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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1205

[Doc. #AMS–CN–11–0026C; CN–11–002]

Cotton Board Rules and Regulations: Adjusting Supplemental Assessment on Imports; Corrections

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Correcting amendment.

SUMMARY: This document contains corrections to the final rule published on August 31, 2011, regarding the Cotton Board Rules and Regulations and the adjustment to the supplemental assessment collected for use by the Cotton Research and Promotion Program. Corrections are made to section 1205.510 of the final rule to remove expired Harmonized Tariff Schedule (HTS) codes and HTS codes representing ensembles, which are strictly used for statistical reporting. Furthermore, conversion factors and assessment rates for two HTS codes, which were inadvertently excluded from the final rule, are added, and clerical errors associated with three different HTS codes are corrected.

DATES: *Effective Date:* November 8, 2011.

FOR FURTHER INFORMATION CONTACT: Shethir M. Riva, Chief, Research and Promotion Staff, Cotton and Tobacco Programs, AMS, USDA, Stop 0224, 1400 Independence Ave. SW., Room 2635–S, Washington, DC 20250–0224, telephone (540) 361–2726, facsimile (202) 690–1718, or email at *Shethir.Riva@ams.usda.gov.*

SUPPLEMENTARY INFORMATION: The final rule (76 FR 54078) amended the Cotton Board Rules and Regulations in 7 CFR 1205.510 by updating the value assigned to imported cotton for the purpose of calculating supplemental assessments collected for use by the Cotton Research and Promotion Program. The final rule was required to adjust the supplemental assessment and to ensure that assessments collected on imported raw cotton and the cotton content of imported cotton-containing products are the same as assessments collected on domestically produced cotton. In addition, textile trade conversion factors used to determine the raw fiber equivalents of imported cotton-containing products were updated and the number of HTS codes used to assess all imported cotton and cotton-containing products were expanded.

Following the publication of the final rule and during implementation with the U.S. Customs and Border Protection (CBP), eleven HTS codes were determined to have expired and, therefore, are no longer relevant to the assessment of imports which contain cotton. The eleven expired HTS codes are removed from the ''Import Assessment Table.'' In addition, CBP notified the Agricultural Marketing Service (AMS) that the ''Import Assessment Table'' contained 129 HTS codes which represent ensembles. Ensemble HTS codes are used identify and report statistics on articles that are marketed as a bundle and are composed of identical fabric. CBP does not use ensemble HTS codes for assessment purposes. Rather each article composing an ensemble is assessed using its own HTS code. Therefore, the 129 ensemble HTS codes are removed from the ''Import Assessment Table.'' Two HTS numbers were inadvertently excluded from the final rule. These HTS numbers (5608901000 and 5602906000) along with their conversion factors (1.0852 and 0.5426, respectively) and assessment rates (1.3744 and 0.6872, respectively) are added to the ''Import Assessment Table.'' Finally, clerical errors associated with three HTS numbers published in the final rule are corrected. HTS numbers 5513390011, 5513390015 and 5513390091 should read 5513390111, 5513390115 and 5513390191, respectively.

List of Subjects in 7 CFR Part 1205

Advertising, Agricultural research, Cotton, Marketing agreements, Reporting and recordkeeping requirements.

Accordingly, 7 CFR part 1205 is corrected by making the following correcting amendment:

PART 1205—COTTON RESEARCH AND PROMOTION

In § 1205.510, the table in paragraph (b)(3)(ii) is revised to read as follows:

§ 1205.510 Levy of assessments.

* * * * *

(b) * * *

(3) * * *

(ii) * * *

IMPORT ASSESSMENT TABLE

[Raw cotton fiber]

HTS No.	Conv. fact.	Cents/kg
5007106010	0.2713	0.3436
5007106020	0.2713	0.3436
5007906010	0.2713	0.3436
5007906020	0.2713	0.3436
5112904000	0.1085	0.1374
5112905000	0.1085	0.1374
5112909010	0.1085	0.1374
5112909090	0.1085	0.1374
5201000500	0	1.2665
5201001200	0	1.2665
5201001400	0	1.2665
5201001800	0	1.2665
5201002200	0	1.2665
5201002400	0	1.2665
5201002800	0	1.2665
5201003400	0	1.2665
5201003800	0	1.2665
5204110000	1.0526	1.3332
5204190000	0.6316	0.7999
5204200000	1.0526	1.3332
5205111000	1.0000	1.2665
5205112000	1.0000	1.2665
5205121000	1.0000	1.2665
5205122000	1.0000	1.2665
5205131000	1.0000	1.2665
5205132000	1.0000	1.2665
5205141000	1.0000	1.2665
5205142000	1.0000	1.2665
5205151000	1.0000	1.2665
5205152000	1.0000	1.2665
5205210020	1.0440	1.3222
5205210090	1.0440	1.3222
5205220020	1.0440	1.3222
5205220090	1.0440	1.3222
5205230020	1.0440	1.3222
5205230090	1.0440	1.3222
5205240020	1.0440	1.3222
5205240090	1.0440	1.3222
5205260020	1.0440	1.3222
5205260090	1.0440	1.3222
5205270020	1.0440	1.3222
5205270090	1.0440	1.3222
5205280020	1.0440	1.3222
5205280090	1.0440	1.3222
5205310000	1.0000	1.2665
5205320000	1.0000	1.2665

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

HTS No.	Conv. fact.	Cents/kg
5205330000	1.0000	1.2665
5205340000	1.0000	1.2665
5205350000	1.0000	1.2665
5205410020	1.0440	1.3222
5205410090	1.0440	1.3222
5205420021	1.0440	1.3222
5205420029	1.0440	1.3222
5205420090	1.0440	1.3222
5205430021	1.0440	1.3222
5205430029	1.0440	1.3222
5205430090	1.0440	1.3222
5205440021	1.0440	1.3222
5205440029	1.0440	1.3222
5205440090	1.0440	1.3222
5205460021	1.0440	1.3222
5205460029	1.0440	1.3222
5205460090	1.0440	1.3222
5205470021	1.0440	1.3222
5205470029	1.0440	1.3222
5205470090	1.0440	1.3222
5205480020	1.0440	1.3222
5205480090	1.0440	1.3222
5206110000	0.7368	0.9332
5206120000	0.7368	0.9332
5206130000	0.7368	0.9332
5206140000	0.7368	0.9332
5206150000	0.7368	0.9332
5206210000	0.7692	0.9742
5206220000	0.7692	0.9742
5206230000	0.7692	0.9742
5206240000	0.7692	0.9742
5206250000	0.7692	0.9742
5206310000	0.7368	0.9332
5206320000	0.7368	0.9332
5206330000	0.7368	0.9332
5206340000	0.7368	0.9332
5206350000	0.7368	0.9332
5206410000	0.7692	0.9742
5206420000	0.7692	0.9742
5206430000	0.7692	0.9742
5206440000	0.7692	0.9742
5206450000	0.7692	0.9742
5207100000	0.9474	1.1998
5207900000	0.6316	0.7999
5208112020	1.0852	1.3744
5208112040	1.0852	1.3744
5208112090	1.0852	1.3744
5208114020	1.0852	1.3744
5208114040	1.0852	1.3744
5208114060	1.0852	1.3744
5208114090	1.0852	1.3744
5208116000	1.0852	1.3744
5208118020	1.0852	1.3744
5208118090	1.0852	1.3744
5208124020	1.0852	1.3744
5208124040	1.0852	1.3744
5208124090	1.0852	1.3744
5208126020	1.0852	1.3744
5208126040	1.0852	1.3744
5208126060	1.0852	1.3744
5208126090	1.0852	1.3744
5208128020	1.0852	1.3744
5208128090	1.0852	1.3744
5208130000	1.0852	1.3744
5208192020	1.0852	1.3744
5208192090	1.0852	1.3744
5208194020	1.0852	1.3744
5208194090	1.0852	1.3744
5208196020	1.0852	1.3744

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

HTS No.	Conv. fact.	Cents/kg
5208196090	1.0852	1.3744
5208198020	1.0852	1.3744
5208198090	1.0852	1.3744
5208212020	1.0852	1.3744
5208212040	1.0852	1.3744
5208212090	1.0852	1.3744
5208214020	1.0852	1.3744
5208214040	1.0852	1.3744
5208214060	1.0852	1.3744
5208214090	1.0852	1.3744
5208216020	1.0852	1.3744
5208216090	1.0852	1.3744
5208224020	1.0852	1.3744
5208224040	1.0852	1.3744
5208224090	1.0852	1.3744
5208226020	1.0852	1.3744
5208226040	1.0852	1.3744
5208226060	1.0852	1.3744
5208226090	1.0852	1.3744
5208228020	1.0852	1.3744
5208228090	1.0852	1.3744
5208230000	1.0852	1.3744
5208292020	1.0852	1.3744
5208292090	1.0852	1.3744
5208294020	1.0852	1.3744
5208294090	1.0852	1.3744
5208296020	1.0852	1.3744
5208296090	1.0852	1.3744
5208298020	1.0852	1.3744
5208298090	1.0852	1.3744
5208312000	1.0852	1.3744
5208314020	1.0852	1.3744
5208314040	1.0852	1.3744
5208314090	1.0852	1.3744
5208316020	1.0852	1.3744
5208316040	1.0852	1.3744
5208316060	1.0852	1.3744
5208316090	1.0852	1.3744
5208318020	1.0852	1.3744
5208318090	1.0852	1.3744
5208321000	1.0852	1.3744
5208323020	1.0852	1.3744
5208323040	1.0852	1.3744
5208323090	1.0852	1.3744
5208324020	1.0852	1.3744
5208324040	1.0852	1.3744
5208324060	1.0852	1.3744
5208324090	1.0852	1.3744
5208325020	1.0852	1.3744
5208325090	1.0852	1.3744
5208330000	1.0852	1.3744
5208392020	1.0852	1.3744
5208392090	1.0852	1.3744
5208394020	1.0852	1.3744
5208394090	1.0852	1.3744
5208396020	1.0852	1.3744
5208396090	1.0852	1.3744
5208398020	1.0852	1.3744
5208398090	1.0852	1.3744
5208412000	1.0852	1.3744
5208414000	1.0852	1.3744
5208416000	1.0852	1.3744
5208418000	1.0852	1.3744
5208421000	1.0852	1.3744
5208423000	1.0852	1.3744
5208424000	1.0852	1.3744
5208425000	1.0852	1.3744
5208430000	1.0852	1.3744
5208492000	1.0852	1.3744

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

HTS No.	Conv. fact.	Cents/kg
5208494010	1.0852	1.3744
5208494020	1.0852	1.3744
5208494090	1.0852	1.3744
5208496010	1.0852	1.3744
5208496020	1.0852	1.3744
5208496030	1.0852	1.3744
5208496090	1.0852	1.3744
5208498020	1.0852	1.3744
5208498090	1.0852	1.3744
5208512000	1.0852	1.3744
5208514020	1.0852	1.3744
5208514040	1.0852	1.3744
5208514090	1.0852	1.3744
5208516020	1.0852	1.3744
5208516040	1.0852	1.3744
5208516060	1.0852	1.3744
5208516090	1.0852	1.3744
5208518020	1.0852	1.3744
5208518090	1.0852	1.3744
5208521000	1.0852	1.3744
5208523020	1.0852	1.3744
5208523035	1.0852	1.3744
5208523045	1.0852	1.3744
5208523090	1.0852	1.3744
5208524020	1.0852	1.3744
5208524035	1.0852	1.3744
5208524045	1.0852	1.3744
5208524055	1.0852	1.3744
5208524065	1.0852	1.3744
5208524090	1.0852	1.3744
5208525020	1.0852	1.3744
5208525090	1.0852	1.3744
5208591000	1.0852	1.3744
5208592015	1.0852	1.3744
5208592025	1.0852	1.3744
5208592085	1.0852	1.3744
5208592095	1.0852	1.3744
5208594020	1.0852	1.3744
5208594090	1.0852	1.3744
5208596020	1.0852	1.3744
5208596090	1.0852	1.3744
5208598020	1.0852	1.3744
5208598090	1.0852	1.3744
5209110020	1.0309	1.3057
5209110025	1.0309	1.3057
5209110035	1.0309	1.3057
5209110050	1.0309	1.3057
5209110090	1.0309	1.3057
5209120020	1.0309	1.3057
5209120040	1.0309	1.3057
5209190020	1.0309	1.3057
5209190040	1.0309	1.3057
5209190060	1.0309	1.3057
5209190090	1.0309	1.3057
5209210020	1.0309	1.3057
5209210025	1.0309	1.3057
5209210035	1.0309	1.3057
5209210050	1.0309	1.3057
5209210090	1.0309	1.3057
5209220020	1.0309	1.3057
5209220040	1.0309	1.3057
5209290020	1.0309	1.3057
5209290040	1.0309	1.3057
5209290060	1.0309	1.3057
5209290090	1.0309	1.3057
5209313000	1.0309	1.3057
5209316020	1.0309	1.3057
5209316025	1.0309	1.3057
5209316035	1.0309	1.3057

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

HTS No.	Conv. fact.	Cents/kg
5209316050	1.0309	1.3057
5209316090	1.0309	1.3057
5209320020	1.0309	1.3057
5209320040	1.0309	1.3057
5209390020	1.0309	1.3057
5209390040	1.0309	1.3057
5209390060	1.0309	1.3057
5209390080	1.0309	1.3057
5209390090	1.0309	1.3057
5209413000	1.0309	1.3057
5209416020	1.0309	1.3057
5209416040	1.0309	1.3057
5209420020	0.9767	1.2370
5209420040	0.9767	1.2370
5209420060	0.9767	1.2370
5209420080	0.9767	1.2370
5209430030	1.0309	1.3057
5209430050	1.0309	1.3057
5209490020	1.0309	1.3057
5209490040	1.0309	1.3057
5209490090	1.0309	1.3057
5209513000	1.0309	1.3057
5209516015	1.0852	1.3744
5209516025	1.0852	1.3744
5209516032	1.0852	1.3744
5209516035	1.0852	1.3744
5209516050	1.0852	1.3744
5209516090	1.0852	1.3744
5209520020	1.0852	1.3744
5209520040	1.0852	1.3744
5209590015	1.0852	1.3744
5209590025	1.0852	1.3744
5209590040	1.0852	1.3744
5209590060	1.0852	1.3744
5209590090	1.0852	1.3744
5210114020	0.6511	0.8246
5210114040	0.6511	0.8246
5210114090	0.6511	0.8246
5210116020	0.6511	0.8246
5210116040	0.6511	0.8246
5210116060	0.6511	0.8246
5210116090	0.6511	0.8246
5210118020	0.6511	0.8246
5210118090	0.6511	0.8246
5210191000	0.6511	0.8246
5210192020	0.6511	0.8246
5210192090	0.6511	0.8246
5210194020	0.6511	0.8246
5210194090	0.6511	0.8246
5210196020	0.6511	0.8246
5210196090	0.6511	0.8246
5210198020	0.6511	0.8246
5210198090	0.6511	0.8246
5210214020	0.6511	0.8246
5210214040	0.6511	0.8246
5210214090	0.6511	0.8246
5210216020	0.6511	0.8246
5210216040	0.6511	0.8246
5210216060	0.6511	0.8246
5210216090	0.6511	0.8246
5210218020	0.6511	0.8246
5210218090	0.6511	0.8246
5210291000	0.6511	0.8246
5210292020	0.6511	0.8246
5210292090	0.6511	0.8246
5210294020	0.6511	0.8246
5210294090	0.6511	0.8246
5210296020	0.6511	0.8246
5210296090	0.6511	0.8246

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

HTS No.	Conv. fact.	Cents/kg
5210298020	0.6511	0.8246
5210298090	0.6511	0.8246
5210314020	0.6511	0.8246
5210314040	0.6511	0.8246
5210314090	0.6511	0.8246
5210316020	0.6511	0.8246
5210316040	0.6511	0.8246
5210316060	0.6511	0.8246
5210316090	0.6511	0.8246
5210318020	0.6511	0.8246
5210318090	0.6511	0.8246
5210320000	0.6511	0.8246
5210392020	0.6511	0.8246
5210392090	0.6511	0.8246
5210394020	0.6511	0.8246
5210394090	0.6511	0.8246
5210396020	0.6511	0.8246
5210396090	0.6511	0.8246
5210398020	0.6511	0.8246
5210398090	0.6511	0.8246
5210414000	0.6511	0.8246
5210416000	0.6511	0.8246
5210418000	0.6511	0.8246
5210491000	0.6511	0.8246
5210492000	0.6511	0.8246
5210494010	0.6511	0.8246
5210494020	0.6511	0.8246
5210494090	0.6511	0.8246
5210496010	0.6511	0.8246
5210496020	0.6511	0.8246
5210496090	0.6511	0.8246
5210498020	0.6511	0.8246
5210498090	0.6511	0.8246
5210514020	0.6511	0.8246
5210514040	0.6511	0.8246
5210514090	0.6511	0.8246
5210516020	0.6511	0.8246
5210516040	0.6511	0.8246
5210516060	0.6511	0.8246
5210516090	0.6511	0.8246
5210518020	0.6511	0.8246
5210518090	0.6511	0.8246
5210591000	0.6511	0.8246
5210592020	0.6511	0.8246
5210592090	0.6511	0.8246
5210594020	0.6511	0.8246
5210594090	0.6511	0.8246
5210596020	0.6511	0.8246
5210596090	0.6511	0.8246
5210598020	0.6511	0.8246
5210598090	0.6511	0.8246
5211110020	0.6511	0.8246
5211110025	0.6511	0.8246
5211110035	0.6511	0.8246
5211110050	0.6511	0.8246
5211110090	0.6511	0.8246
5211120020	0.6511	0.8246
5211120040	0.6511	0.8246
5211190020	0.6511	0.8246
5211190040	0.6511	0.8246
5211190060	0.6511	0.8246
5211190090	0.6511	0.8246
5211202120	0.6511	0.8246
5211202125	0.6511	0.8246
5211202135	0.6511	0.8246
5211202150	0.6511	0.8246
5211202190	0.6511	0.8246
5211202220	0.6511	0.8246
5211202240	0.6511	0.8246

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

HTS No.	Conv. fact.	Cents/kg
5211202920	0.6511	0.8246
5211202940	0.6511	0.8246
5211202960	0.6511	0.8246
5211202990	0.6511	0.8246
5211310020	0.6511	0.8246
5211310025	0.6511	0.8246
5211310035	0.6511	0.8246
5211310050	0.6511	0.8246
5211310090	0.6511	0.8246
5211320020	0.6511	0.8246
5211320040	0.6511	0.8246
5211390020	0.6511	0.8246
5211390040	0.6511	0.8246
5211390060	0.6511	0.8246
5211390090	0.6511	0.8246
5211410020	0.6511	0.8246
5211410040	0.6511	0.8246
5211420020	0.7054	0.8934
5211420040	0.7054	0.8934
5211420060	0.6511	0.8246
5211420080	0.6511	0.8246
5211430030	0.6511	0.8246
5211430050	0.6511	0.8246
5211490020	0.6511	0.8246
5211490090	0.6511	0.8246
5211510020	0.6511	0.8246
5211510030	0.6511	0.8246
5211510050	0.6511	0.8246
5211510090	0.6511	0.8246
5211520020	0.6511	0.8246
5211520040	0.6511	0.8246
5211590015	0.6511	0.8246
5211590025	0.6511	0.8246
5211590040	0.6511	0.8246
5211590060	0.6511	0.8246
5211590090	0.6511	0.8246
5212111010	0.5845	0.7403
5212111020	0.6231	0.7891
5212116010	0.8681	1.0995
5212116020	0.8681	1.0995
5212116030	0.8681	1.0995
5212116040	0.8681	1.0995
5212116050	0.8681	1.0995
5212116060	0.8681	1.0995
5212116070	0.8681	1.0995
5212116080	0.8681	1.0995
5212116090	0.8681	1.0995
5212121010	0.5845	0.7403
5212121020	0.6231	0.7891
5212126010	0.8681	1.0995
5212126020	0.8681	1.0995
5212126030	0.8681	1.0995
5212126040	0.8681	1.0995
5212126050	0.8681	1.0995
5212126060	0.8681	1.0995
5212126070	0.8681	1.0995
5212126080	0.8681	1.0995
5212126090	0.8681	1.0995
5212131010	0.5845	0.7403
5212131020	0.6231	0.7891
5212136010	0.8681	1.0995
5212136020	0.8681	1.0995
5212136030	0.8681	1.0995
5212136040	0.8681	1.0995
5212136050	0.8681	1.0995
5212136060	0.8681	1.0995
5212136070	0.8681	1.0995
5212136080	0.8681	1.0995
5212136090	0.8681	1.0995

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

HTS No.	Conv. fact.	Cents/kg
5212141010	0.5845	0.7403
5212141020	0.6231	0.7891
5212146010	0.8681	1.0995
5212146020	0.8681	1.0995
5212146030	0.8681	1.0995
5212146090	0.8681	1.0995
5212151010	0.5845	0.7403
5212151020	0.6231	0.7891
5212156010	0.8681	1.0995
5212156020	0.8681	1.0995
5212156030	0.8681	1.0995
5212156040	0.8681	1.0995
5212156050	0.8681	1.0995
5212156060	0.8681	1.0995
5212156070	0.8681	1.0995
5212156080	0.8681	1.0995
5212156090	0.8681	1.0995
5212211010	0.5845	0.7403
5212211020	0.6231	0.7891
5212216010	0.8681	1.0995
5212216020	0.8681	1.0995
5212216030	0.8681	1.0995
5212216040	0.8681	1.0995
5212216050	0.8681	1.0995
5212216060	0.8681	1.0995
5212216090	0.8681	1.0995
5212221010	0.5845	0.7403
5212221020	0.6231	0.7891
5212226010	0.8681	1.0995
5212226020	0.8681	1.0995
5212226030	0.8681	1.0995
5212226040	0.8681	1.0995
5212226050	0.8681	1.0995
5212226060	0.8681	1.0995
5212226090	0.8681	1.0995
5212231010	0.5845	0.7403
5212231020	0.6231	0.7891
5212236010	0.8681	1.0995
5212236020	0.8681	1.0995
5212236030	0.8681	1.0995
5212236040	0.8681	1.0995
5212236050	0.8681	1.0995
5212236060	0.8681	1.0995
5212236090	0.8681	1.0995
5212241010	0.5845	0.7403
5212241020	0.6231	0.7891
5212246010	0.8681	1.0995
5212246020	0.7054	0.8934
5212246030	0.8681	1.0995
5212246040	0.8681	1.0995
5212246090	0.8681	1.0995
5212251010	0.5845	0.7403
5212251020	0.6231	0.7891
5212256010	0.8681	1.0995
5212256020	0.8681	1.0995
5212256030	0.8681	1.0995
5212256040	0.8681	1.0995
5212256050	0.8681	1.0995
5212256060	0.8681	1.0995
5212256090	0.8681	1.0995
5309213005	0.5426	0.6872
5309213010	0.5426	0.6872
5309213015	0.5426	0.6872
5309213020	0.5426	0.6872
5309214010	0.2713	0.3436
5309214090	0.2713	0.3436
5309293005	0.5426	0.6872
5309293010	0.5426	0.6872
5309293015	0.5426	0.6872

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

HTS No.	Conv. fact.	Cents/kg
5309293020	0.5426	0.6872
5309294010	0.2713	0.3436
5309294090	0.2713	0.3436
5311003005	0.5426	0.6872
5311003010	0.5426	0.6872
5311003015	0.5426	0.6872
5311003020	0.5426	0.6872
5311004010	0.8681	1.0995
5311004020	0.8681	1.0995
5407810010	0.5426	0.6872
5407810020	0.5426	0.6872
5407810030	0.5426	0.6872
5407810040	0.5426	0.6872
5407810090	0.5426	0.6872
5407820010	0.5426	0.6872
5407820020	0.5426	0.6872
5407820030	0.5426	0.6872
5407820040	0.5426	0.6872
5407820090	0.5426	0.6872
5407830010	0.5426	0.6872
5407830020	0.5426	0.6872
5407830030	0.5426	0.6872
5407830040	0.5426	0.6872
5407830090	0.5426	0.6872
5407840010	0.5426	0.6872
5407840020	0.5426	0.6872
5407840030	0.5426	0.6872
5407840040	0.5426	0.6872
5407840090	0.5426	0.6872
5509210000	0.1053	0.1333
5509220010	0.1053	0.1333
5509220090	0.1053	0.1333
5509530030	0.3158	0.3999
5509530060	0.3158	0.3999
5509620000	0.5263	0.6666
5509920000	0.5263	0.6666
5510300000	0.3684	0.4666
5511200000	0.3158	0.3999
5512110010	0.1085	0.1374
5512110022	0.1085	0.1374
5512110027	0.1085	0.1374
5512110030	0.1085	0.1374
5512110040	0.1085	0.1374
5512110050	0.1085	0.1374
5512110060	0.1085	0.1374
5512110070	0.1085	0.1374
5512110090	0.1085	0.1374
5512190005	0.1085	0.1374
5512190010	0.1085	0.1374
5512190015	0.1085	0.1374
5512190022	0.1085	0.1374
5512190027	0.1085	0.1374
5512190030	0.1085	0.1374
5512190035	0.1085	0.1374
5512190040	0.1085	0.1374
5512190045	0.1085	0.1374
5512190050	0.1085	0.1374
5512190090	0.1085	0.1374
5512210010	0.0326	0.0412
5512210020	0.0326	0.0412
5512210030	0.0326	0.0412
5512210040	0.0326	0.0412
5512210060	0.0326	0.0412
5512210070	0.0326	0.0412
5512210090	0.0326	0.0412
5512290010	0.2170	0.2749
5512910010	0.0543	0.0687
5512990005	0.0543	0.0687
5512990010	0.0543	0.0687

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

HTS No.	Conv. fact.	Cents/kg
5512990015	0.0543	0.0687
5512990020	0.0543	0.0687
5512990025	0.0543	0.0687
5512990030	0.0543	0.0687
5512990035	0.0543	0.0687
5512990040	0.0543	0.0687
5512990045	0.0543	0.0687
5512990090	0.0543	0.0687
5513110020	0.3581	0.4535
5513110040	0.3581	0.4535
5513110060	0.3581	0.4535
5513110090	0.3581	0.4535
5513120000	0.3581	0.4535
5513130020	0.3581	0.4535
5513130040	0.3581	0.4535
5513130090	0.3581	0.4535
5513190010	0.3581	0.4535
5513190020	0.3581	0.4535
5513190030	0.3581	0.4535
5513190040	0.3581	0.4535
5513190050	0.3581	0.4535
5513190060	0.3581	0.4535
5513190090	0.3581	0.4535
5513210020	0.3581	0.4535
5513210040	0.3581	0.4535
5513210060	0.3581	0.4535
5513210090	0.3581	0.4535
5513230121	0.3581	0.4535
5513230141	0.3581	0.4535
5513230191	0.3581	0.4535
5513290010	0.3581	0.4535
5513290020	0.3581	0.4535
5513290030	0.3581	0.4535
5513290040	0.3581	0.4535
5513290050	0.3581	0.4535
5513290060	0.3581	0.4535
5513290090	0.3581	0.4535
5513310000	0.3581	0.4535
5513390011	0.3581	0.4535
5513390015	0.3581	0.4535
5513390091	0.3581	0.4535
5513410020	0.3581	0.4535
5513410040	0.3581	0.4535
5513410060	0.3581	0.4535
5513410090	0.3581	0.4535
5513491000	0.3581	0.4535
5513492020	0.3581	0.4535
5513492040	0.3581	0.4535
5513492090	0.3581	0.4535
5513499010	0.3581	0.4535
5513499020	0.3581	0.4535
5513499030	0.3581	0.4535
5513499040	0.3581	0.4535
5513499050	0.3581	0.4535
5513499060	0.3581	0.4535
5513499090	0.3581	0.4535
5514110020	0.4341	0.5498
5514110030	0.4341	0.5498
5514110050	0.4341	0.5498
5514110090	0.4341	0.5498
5514120020	0.4341	0.5498
5514120040	0.4341	0.5498
5514191020	0.4341	0.5498
5514191040	0.4341	0.5498
5514191090	0.4341	0.5498
5514199010	0.4341	0.5498
5514199020	0.4341	0.5498
5514199030	0.4341	0.5498
5514199040	0.4341	0.5498

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

HTS No.	Conv. fact.	Cents/kg
5514199090	0.4341	0.5498
5514210020	0.4341	0.5498
5514210030	0.4341	0.5498
5514210050	0.4341	0.5498
5514210090	0.4341	0.5498
5514220020	0.4341	0.5498
5514220040	0.4341	0.5498
5514230020	0.4341	0.5498
5514230040	0.4341	0.5498
5514230090	0.4341	0.5498
5514290010	0.4341	0.5498
5514290020	0.4341	0.5498
5514290030	0.4341	0.5498
5514290040	0.4341	0.5498
5514290090	0.4341	0.5498
5514303100	0.4341	0.5498
5514303210	0.4341	0.5498
5514303215	0.4341	0.5498
5514303280	0.4341	0.5498
5514303310	0.4341	0.5498
5514303390	0.4341	0.5498
5514303910	0.4341	0.5498
5514303920	0.4341	0.5498
5514303990	0.4341	0.5498
5514410020	0.4341	0.5498
5514410030	0.4341	0.5498
5514410050	0.4341	0.5498
5514410090	0.4341	0.5498
5514420020	0.4341	0.5498
5514420040	0.4341	0.5498
5514430020	0.4341	0.5498
5514430040	0.4341	0.5498
5514430090	0.4341	0.5498
5514490010	0.4341	0.5498
5514490020	0.4341	0.5498
5514490030	0.4341	0.5498
5514490040	0.4341	0.5498
5514490090	0.4341	0.5498
5515110005	0.1085	0.1374
5515110010	0.1085	0.1374
5515110015	0.1085	0.1374
5515110020	0.1085	0.1374
5515110025	0.1085	0.1374
5515110030	0.1085	0.1374
5515110035	0.1085	0.1374
5515110040	0.1085	0.1374
5515110045	0.1085	0.1374
5515110090	0.1085	0.1374
5515120010	0.1085	0.1374
5515120022	0.1085	0.1374
5515120027	0.1085	0.1374
5515120030	0.1085	0.1374
5515120040	0.1085	0.1374
5515120090	0.1085	0.1374
5515190005	0.1085	0.1374
5515190010	0.1085	0.1374
5515190015	0.1085	0.1374
5515190020	0.1085	0.1374
5515190025	0.1085	0.1374
5515190030	0.1085	0.1374
5515190035	0.1085	0.1374
5515190040	0.1085	0.1374
5515190045	0.1085	0.1374
5515190090	0.1085	0.1374
5515290005	0.1085	0.1374
5515290010	0.1085	0.1374
5515290015	0.1085	0.1374
5515290020	0.1085	0.1374
5515290025	0.1085	0.1374

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

HTS No.	Conv. fact.	Cents/kg
5515290030	0.1085	0.1374
5515290035	0.1085	0.1374
5515290040	0.1085	0.1374
5515290045	0.1085	0.1374
5515290090	0.1085	0.1374
5515999005	0.1085	0.1374
5515999010	0.1085	0.1374
5515999015	0.1085	0.1374
5515999020	0.1085	0.1374
5515999025	0.1085	0.1374
5515999030	0.1085	0.1374
5515999035	0.1085	0.1374
5515999040	0.1085	0.1374
5515999045	0.1085	0.1374
5515999090	0.1085	0.1374
5516210010	0.1085	0.1374
5516210020	0.1085	0.1374
5516210030	0.1085	0.1374
5516210040	0.1085	0.1374
5516210090	0.1085	0.1374
5516220010	0.1085	0.1374
5516220020	0.1085	0.1374
5516220030	0.1085	0.1374
5516220040	0.1085	0.1374
5516220090	0.1085	0.1374
5516230010	0.1085	0.1374
5516230020	0.1085	0.1374
5516230030	0.1085	0.1374
5516230040	0.1085	0.1374
5516230090	0.1085	0.1374
5516240010	0.1085	0.1374
5516240020	0.1085	0.1374
5516240030	0.1085	0.1374
5516240040	0.1085	0.1374
5516240085	0.1085	0.1374
5516240095	0.1085	0.1374
5516410010	0.3798	0.4810
5516410022	0.3798	0.4810
5516410027	0.3798	0.4810
5516410030	0.3798	0.4810
5516410040	0.3798	0.4810
5516410050	0.3798	0.4810
5516410060	0.3798	0.4810
5516410070	0.3798	0.4810
5516410090	0.3798	0.4810
5516420010	0.3798	0.4810
5516420022	0.3798	0.4810
5516420027	0.3798	0.4810
5516420030	0.3798	0.4810
5516420040	0.3798	0.4810
5516420050	0.3798	0.4810
5516420060	0.3798	0.4810
5516420070	0.3798	0.4810
5516420090	0.3798	0.4810
5516430010	0.2170	0.2749
5516430015	0.3798	0.4810
5516430020	0.3798	0.4810
5516430035	0.3798	0.4810
5516430080	0.3798	0.4810
5516440010	0.3798	0.4810
5516440022	0.3798	0.4810
5516440027	0.3798	0.4810
5516440030	0.3798	0.4810
5516440040	0.3798	0.4810
5516440050	0.3798	0.4810
5516440060	0.3798	0.4810
5516440070	0.3798	0.4810
5516440090	0.3798	0.4810
5516910010	0.0543	0.0687

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

HTS No.	Conv. fact.	Cents/kg
5516910020	0.0543	0.0687
5516910030	0.0543	0.0687
5516910040	0.0543	0.0687
5516910050	0.0543	0.0687
5516910060	0.0543	0.0687
5516910070	0.0543	0.0687
5516910090	0.0543	0.0687
5516920010	0.0543	0.0687
5516920020	0.0543	0.0687
5516920030	0.0543	0.0687
5516920040	0.0543	0.0687
5516920050	0.0543	0.0687
5516920060	0.0543	0.0687
5516920070	0.0543	0.0687
5516920090	0.0543	0.0687
5516930010	0.0543	0.0687
5516930020	0.0543	0.0687
5516930090	0.0543	0.0687
5516940010	0.0543	0.0687
5516940020	0.0543	0.0687
5516940030	0.0543	0.0687
5516940040	0.0543	0.0687
5516940050	0.0543	0.0687
5516940060	0.0543	0.0687
5516940070	0.0543	0.0687
5516940090	0.0543	0.0687
5601101000	0.8681	1.0995
5601102000	0.9767	1.2370
5601210010	0.9767	1.2370
5601210090	0.9767	1.2370
5601220010	0.9767	1.2370
5601220090	0.9767	1.2370
5601300000	0.3256	0.4123
5602101000	0.0543	0.0687
5602109090	0.4341	0.5498
5602290000	0.4341	0.5498
5602906000	0.5426	0.6872
5602909000	0.3256	0.4123
5603143000	0.2713	0.3436
5603910010	0.0217	0.0275
5603910090	0.0651	0.0825
5603920010	0.0217	0.0275
5603920090	0.0651	0.0825
5603930010	0.0217	0.0275
5603930090	0.0651	0.0825
5603941090	0.3256	0.4123
5603943000	0.1628	0.2062
5603949010	0.0326	0.0412
5604100000	0.2632	0.3333
5604909000	0.2105	0.2666
5605009000	0.1579	0.2000
5606000010	0.1263	0.1600
5606000090	0.1263	0.1600
5607502500	0.1684	0.2133
5607909000	0.8421	1.0665
5608901000	1.0852	1.3744
5608902300	0.6316	0.7999
5608902700	0.6316	0.7999
5608903000	0.3158	0.3999
5609001000	0.8421	1.0665
5609004000	0.2105	0.2666
5701101300	0.0526	0.0667
5701101600	0.0526	0.0667
5701104000	0.0526	0.0667
5701109000	0.0526	0.0667
5701901010	1.0000	1.2665
5701901020	1.0000	1.2665
5701901030	0.0526	0.0667
5701901090	0.0526	0.0667

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

HTS No.	Conv. fact.	Cents/kg
5701902010	0.9474	1.1998
5701902020	0.9474	1.1998
5701902030	0.0526	0.0667
5701902090	0.0526	0.0667
5702101000	0.0447	0.0567
5702109010	0.0447	0.0567
5702109020	0.8500	1.0765
5702109030	0.0447	0.0567
5702109090	0.0447	0.0567
5702201000	0.0447	0.0567
5702311000	0.0447	0.0567
5702312000	0.0895	0.1133
5702322000	0.0895	0.1133
5702391000	0.0895	0.1133
5702392010	0.8053	1.0199
5702392090	0.0447	0.0567
5702411000	0.0447	0.0567
5702412000	0.0447	0.0567
5702421000	0.0895	0.1133
5702422020	0.0895	0.1133
5702422080	0.0895	0.1133
5702491020	0.8947	1.1332
5702491080	0.8947	1.1332
5702492000	0.0895	0.1133
5702502000	0.0895	0.1133
5702504000	0.0447	0.0567
5702505200	0.0895	0.1133
5702505600	0.8500	1.0765
5702912000	0.0447	0.0567
5702913000	0.0447	0.0567
5702914000	0.0447	0.0567
5702921000	0.0447	0.0567
5702929000	0.0447	0.0567
5702990500	0.8947	1.1332
5702991500	0.8947	1.1332
5703201000	0.0452	0.0572
5703202010	0.0452	0.0572
5703302000	0.0452	0.0572
5703900000	0.3615	0.4579
5705001000	0.0452	0.0572
5705002005	0.0452	0.0572
5705002015	0.0452	0.0572
5705002020	0.7682	0.9729
5705002030	0.0452	0.0572
5705002090	0.1808	0.2289
5801210000	0.9767	1.2370
5801221000	0.9767	1.2370
5801229000	0.9767	1.2370
5801230000	0.9767	1.2370
5801240000	0.9767	1.2370
5801250010	1.0852	1.3744
5801250020	0.9767	1.2370
5801260010	0.7596	0.9621
5801260020	0.7596	0.9621
5801310000	0.2170	0.2749
5801320000	0.2170	0.2749
5801330000	0.2170	0.2749
5801360010	0.2170	0.2749
5801360020	0.2170	0.2749
5802110000	1.0309	1.3057
5802190000	1.0309	1.3057
5802200020	0.1085	0.1374
5802200090	0.3256	0.4123
5802300030	0.4341	0.5498
5802300090	0.1085	0.1374
5803001000	1.0852	1.3744
5803002000	0.8681	1.0995
5803003000	0.8681	1.0995
5803005000	0.3256	0.4123

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

HTS No.	Conv. fact.	Cents/kg
5804101000	0.4341	0.5498
5804109090	0.2193	0.2777
5804291000	0.8772	1.1110
5804300020	0.3256	0.4123
5805001000	0.1085	0.1374
5805003000	1.0852	1.3744
5806101000	0.8681	1.0995
5806103090	0.2170	0.2749
5806200010	0.2577	0.3264
5806200090	0.2577	0.3264
5806310000	0.8681	1.0995
5806393080	0.2170	0.2749
5806400000	0.0814	0.1031
5807100510	0.8681	1.0995
5807102010	0.8681	1.0995
5807900510	0.8681	1.0995
5807902010	0.8681	1.0995
5808104000	0.2170	0.2749
5808107000	0.2170	0.2749
5808900010	0.4341	0.5498
5810100000	0.3256	0.4123
5810910010	0.7596	0.9621
5810910020	0.7596	0.9621
5810921000	0.2170	0.2749
5810929030	0.2170	0.2749
5810929050	0.2170	0.2749
5810929080	0.2170	0.2749
5811002000	0.8681	1.0995
5901102000	0.5643	0.7147
5901904000	0.8139	1.0308
5903101000	0.4341	0.5498
5903103000	0.1085	0.1374
5903201000	0.4341	0.5498
5903203090	0.1085	0.1374
5903901000	0.4341	0.5498
5903903090	0.1085	0.1374
5904901000	0.0326	0.0412
5905001000	0.1085	0.1374
5905009000	0.1085	0.1374
5906100000	0.4341	0.5498
5906911000	0.4341	0.5498
5906913000	0.1085	0.1374
5906991000	0.4341	0.5498
5906993000	0.1085	0.1374
5907002500	0.3798	0.4810
5907003500	0.3798	0.4810
5907008090	0.3798	0.4810
5908000000	0.7813	0.9896
5909001000	0.6837	0.8659
5909002000	0.4883	0.6185
5910001010	0.3798	0.4810
5910001020	0.3798	0.4810
5910001030	0.3798	0.4810
5910001060	0.3798	0.4810
5910001070	0.3798	0.4810
5910001090	0.6837	0.8659
5910009000	0.5697	0.7216
5911101000	0.1736	0.2199
5911102000	0.0434	0.0550
5911201000	0.4341	0.5498
5911310010	0.4341	0.5498
5911310020	0.4341	0.5498
5911310030	0.4341	0.5498
5911310080	0.4341	0.5498
5911320010	0.4341	0.5498
5911320020	0.4341	0.5498
5911320030	0.4341	0.5498
5911320080	0.4341	0.5498
5911400000	0.5426	0.6872

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

HTS No.	Conv. fact.	Cents/kg
5911900040	0.3158	0.3999
5911900080	0.2105	0.2666
6001106000	0.1096	0.1389
6001210000	0.9868	1.2498
6001220000	0.1096	0.1389
6001290000	0.1096	0.1389
6001910010	0.8772	1.1110
6001910020	0.8772	1.1110
6001920010	0.0548	0.0694
6001920020	0.0548	0.0694
6001920030	0.0548	0.0694
6001920040	0.0548	0.0694
6001999000	0.1096	0.1389
6002404000	0.7401	0.9374
6002408020	0.1974	0.2500
6002408080	0.1974	0.2500
6002904000	0.7895	0.9999
6002908020	0.1974	0.2500
6002908080	0.1974	0.2500
6003201000	0.8772	1.1110
6003203000	0.8772	1.1110
6003301000	0.1096	0.1389
6003306000	0.1096	0.1389
6003401000	0.1096	0.1389
6003406000	0.1096	0.1389
6003901000	0.1096	0.1389
6003909000	0.1096	0.1389
6004100010	0.2961	0.3750
6004100025	0.2961	0.3750
6004100085	0.2961	0.3750
6004902010	0.2961	0.3750
6004902025	0.2961	0.3750
6004902085	0.2961	0.3750
6004909000	0.2961	0.3750
6005210000	0.7127	0.9027
6005220000	0.7127	0.9027
6005230000	0.7127	0.9027
6005240000	0.7127	0.9027
6005310010	0.1096	0.1389
6005310080	0.1096	0.1389
6005320010	0.1096	0.1389
6005320080	0.1096	0.1389
6005330010	0.1096	0.1389
6005330080	0.1096	0.1389
6005340010	0.1096	0.1389
6005340080	0.1096	0.1389
6005410010	0.1096	0.1389
6005410080	0.1096	0.1389
6005420010	0.1096	0.1389
6005420080	0.1096	0.1389
6005430010	0.1096	0.1389
6005430080	0.1096	0.1389
6005440010	0.1096	0.1389
6005440080	0.1096	0.1389
6005909000	0.1096	0.1389
6006211000	1.0965	1.3887
6006219020	0.7675	0.9721
6006219080	0.7675	0.9721
6006221000	1.0965	1.3887
6006229020	0.7675	0.9721
6006229080	0.7675	0.9721
6006231000	1.0965	1.3887
6006239020	0.7675	0.9721
6006239080	0.7675	0.9721
6006241000	1.0965	1.3887
6006249020	0.7675	0.9721
6006249080	0.7675	0.9721
6006310020	0.3289	0.4166
6006310040	0.3289	0.4166

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

HTS No.	Conv. fact.	Cents/kg
6006310060	0.3289	0.4166
6006310080	0.3289	0.4166
6006320020	0.3289	0.4166
6006320040	0.3289	0.4166
6006320060	0.3289	0.4166
6006320080	0.3289	0.4166
6006330020	0.3289	0.4166
6006330040	0.3289	0.4166
6006330060	0.3289	0.4166
6006330080	0.3289	0.4166
6006340020	0.3289	0.4166
6006340040	0.3289	0.4166
6006340060	0.3289	0.4166
6006340080	0.3289	0.4166
6006410025	0.3289	0.4166
6006410085	0.3289	0.4166
6006420025	0.3289	0.4166
6006420085	0.3289	0.4166
6006430025	0.3289	0.4166
6006430085	0.3289	0.4166
6006440025	0.3289	0.4166
6006440085	0.3289	0.4166
6006909000	0.1096	0.1389
6101200010	1.0200	1.2918
6101200020	1.0200	1.2918
6101301000	0.2072	0.2624
6101900500	0.1912	0.2422
6101909010	0.5737	0.7266
6101909030	0.5100	0.6459
6101909060	0.2550	0.3230
6102100000	0.2550	0.3230
6102200010	0.9562	1.2111
6102200020	0.9562	1.2111
6102300500	0.1785	0.2261
6102909005	0.5737	0.7266
6102909015	0.4462	0.5652
6102909030	0.2550	0.3230
6103101000	0.0637	0.0807
6103104000	0.1218	0.1543
6103105000	0.1218	0.1543
6103106010	0.8528	1.0801
6103106015	0.8528	1.0801
6103106030	0.8528	1.0801
6103109010	0.5482	0.6944
6103109020	0.5482	0.6944
6103109030	0.5482	0.6944
6103109040	0.1218	0.1543
6103109050	0.1218	0.1543
6103109080	0.1827	0.2315
6103320000	0.8722	1.1047
6103398010	0.7476	0.9468
6103398030	0.3738	0.4734
6103398060	0.2492	0.3156
6103411010	0.3576	0.4528
6103411020	0.3576	0.4528
6103412000	0.3576	0.4528
6103421020	0.8343	1.0566
6103421035	0.8343	1.0566
6103421040	0.8343	1.0566
6103421050	0.8343	1.0566
6103421065	0.8343	1.0566
6103421070	0.8343	1.0566
6103422010	0.8343	1.0566
6103422015	0.8343	1.0566
6103422025	0.8343	1.0566
6103431520	0.2384	0.3019
6103431535	0.2384	0.3019
6103431540	0.2384	0.3019
6103431550	0.2384	0.3019

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

HTS No.	Conv. fact.	Cents/kg
6103431565	0.2384	0.3019
6103431570	0.2384	0.3019
6103432020	0.2384	0.3019
6103432025	0.2384	0.3019
6103491020	0.2437	0.3086
6103491060	0.2437	0.3086
6103492000	0.2437	0.3086
6103498010	0.5482	0.6944
6103498014	0.3655	0.4629
6103498024	0.2437	0.3086
6103498026	0.2437	0.3086
6103498034	0.5482	0.6944
6103498038	0.3655	0.4629
6103498060	0.2437	0.3086
6104196010	0.8722	1.1047
6104196020	0.8722	1.1047
6104196030	0.8722	1.1047
6104196040	0.8722	1.1047
6104198010	0.5607	0.7101
6104198020	0.5607	0.7101
6104198030	0.5607	0.7101
6104198040	0.5607	0.7101
6104198060	0.3738	0.4734
6104198090	0.2492	0.3156
6104320000	0.8722	1.1047
6104392010	0.5607	0.7101
6104392030	0.3738	0.4734
6104392090	0.2492	0.3156
6104420010	0.8528	1.0801
6104420020	0.8528	1.0801
6104499010	0.5482	0.6944
6104499030	0.3655	0.4629
6104499060	0.2437	0.3086
6104520010	0.8822	1.1173
6104520020	0.8822	1.1173
6104598010	0.5672	0.7183
6104598030	0.3781	0.4789
6104598090	0.2521	0.3192
6104610010	0.2384	0.3019
6104610020	0.2384	0.3019
6104610030	0.2384	0.3019
6104621010	0.7509	0.9510
6104621020	0.8343	1.0566
6104621030	0.8343	1.0566
6104622006	0.7151	0.9057
6104622011	0.8343	1.0566
6104622016	0.7151	0.9057
6104622021	0.8343	1.0566
6104622026	0.7151	0.9057
6104622028	0.8343	1.0566
6104622030	0.8343	1.0566
6104622050	0.8343	1.0566
6104622060	0.8343	1.0566
6104631020	0.2384	0.3019
6104631030	0.2384	0.3019
6104632006	0.8343	1.0566
6104632011	0.8343	1.0566
6104632016	0.7151	0.9057
6104632021	0.8343	1.0566
6104632026	0.3576	0.4528
6104632028	0.3576	0.4528
6104632030	0.3576	0.4528
6104632050	0.7151	0.9057
6104632060	0.3576	0.4528
6104691000	0.3655	0.4629
6104692030	0.3655	0.4629
6104692060	0.3655	0.4629
6104698010	0.5482	0.6944
6104698014	0.3655	0.4629

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

HTS No.	Conv. fact.	Cents/kg
6104698020	0.2437	0.3086
6104698022	0.5482	0.6944
6104698026	0.3655	0.4629
6104698038	0.2437	0.3086
6104698040	0.2437	0.3086
6105100010	0.9332	1.1819
6105100020	0.9332	1.1819
6105100030	0.9332	1.1819
6105202010	0.2916	0.3693
6105202020	0.2916	0.3693
6105202030	0.2916	0.3693
6105908010	0.5249	0.6648
6105908030	0.3499	0.4432
6105908060	0.2333	0.2955
6106100010	0.9332	1.1819
6106100020	0.9332	1.1819
6106100030	0.9332	1.1819
6106202010	0.2916	0.3693
6106202020	0.4666	0.5909
6106202030	0.2916	0.3693
6106901500	0.0583	0.0739
6106902510	0.5249	0.6648
6106902530	0.3499	0.4432
6106902550	0.2916	0.3693
6106903010	0.5249	0.6648
6106903030	0.3499	0.4432
6106903040	0.2916	0.3693
6107110010	1.0727	1.3585
6107110020	1.0727	1.3585
6107120010	0.4767	0.6038
6107120020	0.4767	0.6038
6107191000	0.1192	0.1509
6107210010	0.8343	1.0566
6107210020	0.7151	0.9057
6107220010	0.3576	0.4528
6107220015	0.1192	0.1509
6107220025	0.2384	0.3019
6107299000	0.1788	0.2264
6107910030	1.1918	1.5095
6107910040	1.1918	1.5095
6107910090	0.9535	1.2076
6107991030	0.3576	0.4528
6107991040	0.3576	0.4528
6107991090	0.3576	0.4528
6107999000	0.1192	0.1509
6108199010	1.0611	1.3439
6108199030	0.2358	0.2986
6108210010	1.1790	1.4932
6108210020	1.1790	1.4932
6108299000	0.3537	0.4480
6108310010	1.0611	1.3439
6108310020	1.0611	1.3439
6108320010	0.2358	0.2986
6108320015	0.2358	0.2986
6108320025	0.2358	0.2986
6108398000	0.3537	0.4480
6108910005	1.1790	1.4932
6108910015	1.1790	1.4932
6108910025	1.1790	1.4932
6108910030	1.1790	1.4932
6108910040	1.1790	1.4932
6108920005	0.2358	0.2986
6108920015	0.2358	0.2986
6108920025	0.2358	0.2986
6108920030	0.2358	0.2986
6108920040	0.2358	0.2986
6108999000	0.3537	0.4480
6109100004	1.0022	1.2692
6109100007	1.0022	1.2692

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

HTS No.	Conv. fact.	Cents/kg
6109100011	1.0022	1.2692
6109100012	1.0022	1.2692
6109100014	1.0022	1.2692
6109100018	1.0022	1.2692
6109100023	1.0022	1.2692
6109100027	1.0022	1.2692
6109100037	1.0022	1.2692
6109100040	1.0022	1.2692
6109100045	1.0022	1.2692
6109100060	1.0022	1.2692
6109100065	1.0022	1.2692
6109100070	1.0022	1.2692
6109901007	0.2948	0.3733
6109901009	0.2948	0.3733
6109901013	0.2948	0.3733
6109901025	0.2948	0.3733
6109901047	0.2948	0.3733
6109901049	0.2948	0.3733
6109901050	0.2948	0.3733
6109901060	0.2948	0.3733
6109901065	0.2948	0.3733
6109901070	0.2948	0.3733
6109901075	0.2948	0.3733
6109901090	0.2948	0.3733
6109908010	0.3499	0.4432
6109908030	0.2333	0.2955
6110201010	0.7476	0.9468
6110201020	0.7476	0.9468
6110201022	0.7476	0.9468
6110201024	0.7476	0.9468
6110201026	0.7476	0.9468
6110201029	0.7476	0.9468
6110201031	0.7476	0.9468
6110201033	0.7476	0.9468
6110202005	1.1214	1.4203
6110202010	1.1214	1.4203
6110202015	1.1214	1.4203
6110202020	1.1214	1.4203
6110202025	1.1214	1.4203
6110202030	1.1214	1.4203
6110202035	1.1214	1.4203
6110202040	1.0965	1.3887
6110202045	1.0965	1.3887
6110202067	1.0965	1.3887
6110202069	1.0965	1.3887
6110202077	1.0965	1.3887
6110202079	1.0965	1.3887
6110909010	0.5607	0.7101
6110909012	0.1246	0.1578
6110909014	0.3738	0.4734
6110909020	0.2492	0.3156
6110909022	0.2492	0.3156
6110909024	0.2492	0.3156
6110909026	0.5607	0.7101
6110909028	0.1869	0.2367
6110909030	0.3738	0.4734
6110909038	0.2492	0.3156
6110909040	0.2492	0.3156
6110909042	0.2492	0.3156
6110909044	0.5607	0.7101
6110909046	0.5607	0.7101
6110909052	0.3738	0.4734
6110909054	0.3738	0.4734
6110909064	0.2492	0.3156
6110909066	0.2492	0.3156
6110909067	0.5607	0.7101
6110909069	0.5607	0.7101
6110909071	0.5607	0.7101
6110909073	0.5607	0.7101

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

HTS No.	Conv. fact.	Cents/kg
6110909079	0.3738	0.4734
6110909080	0.3738	0.4734
6110909081	0.3738	0.4734
6110909082	0.3738	0.4734
6110909088	0.2492	0.3156
6110909090	0.2492	0.3156
6111201000	1.1918	1.5095
6111202000	1.1918	1.5095
6111203000	0.9535	1.2076
6111204000	0.9535	1.2076
6111205000	0.9535	1.2076
6111206010	0.9535	1.2076
6111206020	0.9535	1.2076
6111206030	0.9535	1.2076
6111206050	0.9535	1.2076
6111206070	0.9535	1.2076
6111301000	0.2384	0.3019
6111302000	0.2384	0.3019
6111303000	0.2384	0.3019
6111304000	0.2384	0.3019
6111305010	0.2384	0.3019
6111305015	0.2384	0.3019
6111305020	0.2384	0.3019
6111305030	0.2384	0.3019
6111305050	0.2384	0.3019
6111305070	0.2384	0.3019
6111901000	0.2384	0.3019
6111902000	0.2384	0.3019
6111903000	0.2384	0.3019
6111904000	0.2384	0.3019
6111905010	0.2384	0.3019
6111905020	0.2384	0.3019
6111905030	0.2384	0.3019
6111905050	0.2384	0.3019
6111905070	0.2384	0.3019
6112110010	0.9535	1.2076
6112110020	0.9535	1.2076
6112110030	0.9535	1.2076
6112110040	0.9535	1.2076
6112110050	0.9535	1.2076
6112110060	0.9535	1.2076
6112120010	0.2384	0.3019
6112120020	0.2384	0.3019
6112120030	0.2384	0.3019
6112120040	0.2384	0.3019
6112120050	0.2384	0.3019
6112120060	0.2384	0.3019
6112191010	0.2492	0.3156
6112191020	0.2492	0.3156
6112191030	0.2492	0.3156
6112191040	0.2492	0.3156
6112191050	0.2492	0.3156
6112191060	0.2492	0.3156
6112201060	0.2492	0.3156
6112201070	0.2492	0.3156
6112201080	0.2492	0.3156
6112201090	0.2492	0.3156
6112202010	0.8722	1.1047
6112202020	0.3738	0.4734
6112202030	0.2492	0.3156
6112310010	0.1192	0.1509
6112310020	0.1192	0.1509
6112390010	1.0727	1.3585
6112410010	0.1192	0.1509
6112410020	0.1192	0.1509
6112410030	0.1192	0.1509
6112410040	0.1192	0.1509
6112490010	0.8939	1.1321
6113001005	0.1246	0.1578

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

HTS No.	Conv. fact.	Cents/kg
6113001010	0.1246	0.1578
6113001012	0.1246	0.1578
6113009015	0.3489	0.4419
6113009020	0.3489	0.4419
6113009038	0.3489	0.4419
6113009042	0.3489	0.4419
6113009055	0.3489	0.4419
6113009060	0.3489	0.4419
6113009074	0.3489	0.4419
6113009082	0.3489	0.4419
6114200005	0.9747	1.2344
6114200010	0.9747	1.2344
6114200015	0.8528	1.0801
6114200020	0.8528	1.0801
6114200035	0.8528	1.0801
6114200040	0.8528	1.0801
6114200042	0.3655	0.4629
6114200044	0.8528	1.0801
6114200046	0.8528	1.0801
6114200048	0.8528	1.0801
6114200052	0.8528	1.0801
6114200055	0.8528	1.0801
6114200060	0.8528	1.0801
6114301010	0.2437	0.3086
6114301020	0.2437	0.3086
6114302060	0.1218	0.1543
6114303014	0.2437	0.3086
6114303020	0.2437	0.3086
6114303030	0.2437	0.3086
6114303042	0.2437	0.3086
6114303044	0.2437	0.3086
6114303052	0.2437	0.3086
6114303054	0.2437	0.3086
6114303060	0.2437	0.3086
6114303070	0.2437	0.3086
6114909045	0.5482	0.6944
6114909055	0.3655	0.4629
6114909070	0.3655	0.4629
6115100500	0.4386	0.5555
6115101510	1.0965	1.3887
6115103000	0.9868	1.2498
6115106000	0.1096	0.1389
6115298010	1.0965	1.3887
6115309030	0.7675	0.9721
6115956000	0.9868	1.2498
6115959000	0.9868	1.2498
6115966020	0.2193	0.2777
6115991420	0.2193	0.2777
6115991920	0.2193	0.2777
6115999000	0.1096	0.1389
6116101300	0.3463	0.4385
6116101720	0.8079	1.0233
6116104810	0.4444	0.5628
6116105510	0.6464	0.8186
6116107510	0.6464	0.8186
6116109500	0.1616	0.2047
6116920500	0.8079	1.0233
6116920800	0.8079	1.0233
6116926410	1.0388	1.3156
6116926420	1.0388	1.3156
6116926430	1.1542	1.4618
6116926440	1.0388	1.3156
6116927450	1.0388	1.3156
6116927460	1.1542	1.4618
6116927470	1.0388	1.3156
6116928800	1.0388	1.3156
6116929400	1.0388	1.3156
6116938800	0.1154	0.1462
6116939400	0.1154	0.1462

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

HTS No.	Conv. fact.	Cents/kg
6116994800	0.1154	0.1462
6116995400	0.1154	0.1462
6116999510	0.4617	0.5847
6116999530	0.3463	0.4385
6117106010	0.9234	1.1694
6117106020	0.2308	0.2924
6117808500	0.9234	1.1694
6117808710	1.1542	1.4618
6117808770	0.1731	0.2193
6117809510	0.9234	1.1694
6117809540	0.3463	0.4385
6117809570	0.1731	0.2193
6117909003	1.1542	1.4618
6117909015	0.2308	0.2924
6117909020	1.1542	1.4618
6117909040	1.1542	1.4618
6117909060	1.1542	1.4618
6117909080	1.1542	1.4618
6201121000	0.8981	1.1374
6201122010	0.8482	1.0742
6201122020	0.8482	1.0742
6201122025	0.9979	1.2638
6201122035	0.9979	1.2638
6201122050	0.6486	0.8215
6201122060	0.6486	0.8215
6201134015	0.1996	0.2528
6201134020	0.1996	0.2528
6201134030	0.2495	0.3160
6201134040	0.2495	0.3160
6201199010	0.5613	0.7109
6201199030	0.3742	0.4739
6201199060	0.3742	0.4739
6201921000	0.8779	1.1119
6201921500	1.0974	1.3898
6201922005	0.9754	1.2354
6201922010	0.9754	1.2354
6201922021	1.2193	1.5443
6201922031	1.2193	1.5443
6201922041	1.2193	1.5443
6201922051	0.9754	1.2354
6201922061	0.9754	1.2354
6201931000	0.2926	0.3706
6201932010	0.2439	0.3089
6201932020	0.2439	0.3089
6201933511	0.2439	0.3089
6201933521	0.2439	0.3089
6201999010	0.5487	0.6949
6201999030	0.3658	0.4633
6201999060	0.2439	0.3089
6202121000	0.8879	1.1245
6202122010	1.0482	1.3275
6202122020	1.0482	1.3275
6202122025	1.2332	1.5618
6202122035	1.2332	1.5618
6202122050	0.8016	1.0152
6202122060	0.8016	1.0152
6202134005	0.2524	0.3196
6202134010	0.2524	0.3196
6202134020	0.3155	0.3995
6202134030	0.3155	0.3995
6202199010	0.5678	0.7192
6202199030	0.3786	0.4794
6202199060	0.2524	0.3196
6202921000	0.9865	1.2494
6202921500	0.9865	1.2494
6202922010	0.9865	1.2494
6202922020	0.9865	1.2494
6202922026	1.2332	1.5618
6202922031	1.2332	1.5618

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

HTS No.	Conv. fact.	Cents/kg
6202922061	0.9865	1.2494
6202922071	0.9865	1.2494
6202931000	0.2960	0.3748
6202932010	0.2466	0.3124
6202932020	0.2466	0.3124
6202935011	0.2466	0.3124
6202935021	0.2466	0.3124
6202999011	0.5549	0.7028
6202999031	0.3700	0.4685
6202999061	0.2466	0.3124
6203122010	0.1233	0.1562
6203122020	0.1233	0.1562
6203191010	0.9865	1.2494
6203191020	0.9865	1.2494
6203191030	0.9865	1.2494
6203199010	0.5549	0.7028
6203199020	0.5549	0.7028
6203199030	0.5549	0.7028
6203199050	0.3700	0.4685
6203199080	0.2466	0.3124
6203221000	1.2332	1.5618
6203321000	0.6782	0.8590
6203322010	1.1715	1.4837
6203322020	1.1715	1.4837
6203322030	1.1715	1.4837
6203322040	1.1715	1.4837
6203322050	1.1715	1.4837
6203332010	0.1233	0.1562
6203332020	0.1233	0.1562
6203392010	0.1233	0.1562
6203392020	0.1233	0.1562
6203399010	0.5549	0.7028
6203399030	0.3700	0.4685
6203399060	0.2466	0.3124
6203421000	1.0616	1.3445
6203422005	0.7077	0.8963
6203422010	0.9436	1.1951
6203422025	0.9436	1.1951
6203422050	0.9436	1.1951
6203422090	0.9436	1.1951
6203424003	1.0616	1.3445
6203424006	1.1796	1.4939
6203424011	1.1796	1.4939
6203424016	0.9436	1.1951
6203424021	1.1796	1.4939
6203424026	1.1796	1.4939
6203424031	1.1796	1.4939
6203424036	1.1796	1.4939
6203424041	0.9436	1.1951
6203424046	0.9436	1.1951
6203424051	0.8752	1.1084
6203424056	0.8752	1.1084
6203424061	0.8752	1.1084
6203431000	0.1887	0.2390
6203431500	0.1180	0.1494
6203432005	0.1180	0.1494
6203432010	0.2359	0.2988
6203432025	0.2359	0.2988
6203432050	0.2359	0.2988
6203432090	0.2359	0.2988
6203432500	0.4128	0.5229
6203433510	0.0590	0.0747
6203433590	0.0590	0.0747
6203434010	0.1167	0.1478
6203434015	0.1167	0.1478
6203434020	0.1167	0.1478
6203434030	0.1167	0.1478
6203434035	0.1167	0.1478
6203434040	0.1167	0.1478

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

HTS No.	Conv. fact.	Cents/kg
6203491005	0.1180	0.1494
6203491010	0.2359	0.2988
6203491025	0.2359	0.2988
6203491050	0.2359	0.2988
6203491090	0.2359	0.2988
6203491500	0.4128	0.5229
6203492015	0.2359	0.2988
6203492020	0.2359	0.2988
6203492030	0.1180	0.1494
6203492045	0.1180	0.1494
6203492050	0.1180	0.1494
6203492060	0.1180	0.1494
6203498020	0.5308	0.6723
6203498030	0.3539	0.4482
6203498045	0.2359	0.2988
6204110000	0.0617	0.0781
6204120010	0.9865	1.2494
6204120020	0.9865	1.2494
6204120030	0.9865	1.2494
6204120040	0.9865	1.2494
6204132010	0.1233	0.1562
6204132020	0.1233	0.1562
6204192000	0.1233	0.1562
6204198010	0.5549	0.7028
6204198020	0.5549	0.7028
6204198030	0.5549	0.7028
6204198040	0.5549	0.7028
6204198060	0.3083	0.3905
6204198090	0.2466	0.3124
6204221000	1.2332	1.5618
6204321000	0.6782	0.8590
6204322010	1.1715	1.4837
6204322020	1.1715	1.4837
6204322030	0.9865	1.2494
6204322040	0.9865	1.2494
6204398010	0.5549	0.7028
6204398030	0.3083	0.3905
6204412010	0.0603	0.0764
6204412020	0.0603	0.0764
6204421000	1.2058	1.5271
6204422000	0.6632	0.8399
6204423010	1.2058	1.5271
6204423020	1.2058	1.5271
6204423030	0.9043	1.1453
6204423040	0.9043	1.1453
6204423050	0.9043	1.1453
6204423060	0.9043	1.1453
6204431000	0.4823	0.6108
6204432000	0.0603	0.0764
6204442000	0.4316	0.5466
6204495010	0.5549	0.7028
6204495030	0.2466	0.3124
6204510010	0.0631	0.0799
6204510020	0.0631	0.0799
6204521000	1.2618	1.5981
6204522010	1.1988	1.5182
6204522020	1.1988	1.5182
6204522030	1.1988	1.5182
6204522040	1.1988	1.5182
6204522070	1.0095	1.2785
6204522080	1.0095	1.2785
6204531000	0.4416	0.5593
6204532010	0.0631	0.0799
6204532020	0.0631	0.0799
6204533010	0.2524	0.3196
6204533020	0.2524	0.3196
6204591000	0.4416	0.5593
6204594010	0.5678	0.7192
6204594030	0.2524	0.3196

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

HTS No.	Conv. fact.	Cents/kg
6204594060	0.2524	0.3196
6204611010	0.0590	0.0747
6204611020	0.0590	0.0747
6204619010	0.0590	0.0747
6204619020	0.0590	0.0747
6204619030	0.0590	0.0747
6204619040	0.1180	0.1494
6204621000	0.8681	1.0995
6204622005	0.7077	0.8963
6204622010	0.9436	1.1951
6204622025	0.9436	1.1951
6204622050	0.9436	1.1951
6204623000	1.1796	1.4939
6204624003	1.0616	1.3445
6204624006	1.1796	1.4939
6204624011	1.1796	1.4939
6204624021	0.9436	1.1951
6204624026	1.1796	1.4939
6204624031	1.1796	1.4939
6204624036	1.1796	1.4939
6204624041	1.1796	1.4939
6204624046	0.9436	1.1951
6204624051	0.9436	1.1951
6204624056	0.9335	1.1823
6204624061	0.9335	1.1823
6204624066	0.9335	1.1823
6204631000	0.2019	0.2557
6204631200	0.1180	0.1494
6204631505	0.1180	0.1494
6204631510	0.2359	0.2988
6204631525	0.2359	0.2988
6204631550	0.2359	0.2988
6204632000	0.4718	0.5976
6204632510	0.0590	0.0747
6204632520	0.0590	0.0747
6204633010	0.0603	0.0764
6204633090	0.0603	0.0764
6204633510	0.2412	0.3054
6204633525	0.2412	0.3054
6204633530	0.2412	0.3054
6204633532	0.2309	0.2924
6204633535	0.2309	0.2924
6204633540	0.2309	0.2924
6204691005	0.1180	0.1494
6204691010	0.2359	0.2988
6204691025	0.2359	0.2988
6204691050	0.2359	0.2988
6204692010	0.0590	0.0747
6204692020	0.0590	0.0747
6204692030	0.0590	0.0747
6204692510	0.2359	0.2988
6204692520	0.2359	0.2988
6204692530	0.2359	0.2988
6204692540	0.2309	0.2924
6204692550	0.2309	0.2924
6204692560	0.2309	0.2924
6204696010	0.5308	0.6723
6204696030	0.2359	0.2988
6204696070	0.3539	0.4482
6204699010	0.5308	0.6723
6204699030	0.2359	0.2988
6204699044	0.2359	0.2988
6204699046	0.2359	0.2988
6204699050	0.3539	0.4482
6205201000	1.1796	1.4939
6205202003	0.9436	1.1951
6205202016	0.9436	1.1951
6205202021	0.9436	1.1951
6205202026	0.9436	1.1951

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

HTS No.	Conv. fact.	Cents/kg
6205202031	0.9436	1.1951
6205202036	1.0616	1.3445
6205202041	1.0616	1.3445
6205202044	1.0616	1.3445
6205202047	0.9436	1.1951
6205202051	0.9436	1.1951
6205202056	0.9436	1.1951
6205202061	0.9436	1.1951
6205202066	0.9436	1.1951
6205202071	0.9436	1.1951
6205202076	0.9436	1.1951
6205301000	0.4128	0.5229
6205302010	0.2949	0.3735
6205302020	0.2949	0.3735
6205302030	0.2949	0.3735
6205302040	0.2949	0.3735
6205302050	0.2949	0.3735
6205302055	0.2949	0.3735
6205302060	0.2949	0.3735
6205302070	0.2949	0.3735
6205302075	0.2949	0.3735
6205302080	0.2949	0.3735
6205900710	0.1180	0.1494
6205900720	0.1180	0.1494
6205901000	0.2359	0.2988
6205903010	0.5308	0.6723
6205903030	0.2359	0.2988
6205903050	0.1769	0.2241
6205904010	0.5308	0.6723
6205904030	0.2359	0.2988
6205904040	0.2359	0.2988
6206100010	0.5308	0.6723
6206100030	0.2359	0.2988
6206100040	0.1180	0.1494
6206100050	0.2359	0.2988
6206203010	0.0590	0.0747
6206203020	0.0590	0.0747
6206301000	1.1796	1.4939
6206302000	0.6488	0.8216
6206303003	0.9436	1.1951
6206303011	0.9436	1.1951
6206303021	0.9436	1.1951
6206303031	0.9436	1.1951
6206303041	0.9436	1.1951
6206303051	0.9436	1.1951
6206303061	0.9436	1.1951
6206401000	0.4128	0.5229
6206403010	0.2949	0.3735
6206403020	0.2949	0.3735
6206403025	0.2949	0.3735
6206403030	0.2949	0.3735
6206403040	0.2949	0.3735
6206403050	0.2949	0.3735
6206900010	0.5308	0.6723
6206900030	0.2359	0.2988
6206900040	0.1769	0.2241
6207110000	1.0281	1.3021
6207199010	0.3427	0.4340
6207199030	0.4569	0.5787
6207210010	1.0502	1.3301
6207210020	1.0502	1.3301
6207210030	1.0502	1.3301
6207210040	1.0502	1.3301
6207220000	0.3501	0.4434
6207291000	0.1167	0.1478
6207299030	0.1167	0.1478
6207911000	1.0852	1.3744
6207913010	1.0852	1.3744
6207913020	1.0852	1.3744

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

HTS No.	Conv. fact.	Cents/kg
6207997520	0.2412	0.3054
6207998510	0.2412	0.3054
6207998520	0.2412	0.3054
6208110000	0.2412	0.3054
6208192000	1.0852	1.3744
6208195000	0.1206	0.1527
6208199000	0.2412	0.3054
6208210010	1.0026	1.2698
6208210020	1.0026	1.2698
6208210030	1.0026	1.2698
6208220000	0.1180	0.1494
6208299030	0.2359	0.2988
6208911010	1.0852	1.3744
6208911020	1.0852	1.3744
6208913010	1.0852	1.3744
6208913020	1.0852	1.3744
6208920010	0.1206	0.1527
6208920020	0.1206	0.1527
6208920030	0.1206	0.1527
6208920040	0.1206	0.1527
6208992010	0.0603	0.0764
6208992020	0.0603	0.0764
6208995010	0.2412	0.3054
6208995020	0.2412	0.3054
6208998010	0.2412	0.3054
6208998020	0.2412	0.3054
6209201000	1.0967	1.3890
6209202000	1.0390	1.3159
6209203000	0.9236	1.1697
6209205030	0.9236	1.1697
6209205035	0.9236	1.1697
6209205040	1.1545	1.4621
6209205045	0.9236	1.1697
6209205050	0.9236	1.1697
6209301000	0.2917	0.3695
6209302000	0.2917	0.3695
6209303010	0.2334	0.2956
6209303020	0.2334	0.2956
6209303030	0.2334	0.2956
6209303040	0.2334	0.2956
6209900500	0.1154	0.1462
6209901000	0.2917	0.3695
6209902000	0.2917	0.3695
6209903010	0.2917	0.3695
6209903015	0.2917	0.3695
6209903020	0.2917	0.3695
6209903030	0.2917	0.3695
6209903040	0.2917	0.3695
6210109010	0.2170	0.2749
6210109040	0.2170	0.2749
6210203000	0.0362	0.0458
6210205000	0.0844	0.1069
6210207000	0.1809	0.2291
6210303000	0.0362	0.0458
6210305000	0.0844	0.1069
6210307000	0.0362	0.0458
6210309020	0.4220	0.5345
6210403000	0.0370	0.0469
6210405020	0.4316	0.5466
6210405031	0.0863	0.1093
6210405039	0.0863	0.1093
6210405040	0.4316	0.5466
6210405050	0.4316	0.5466
6210407000	0.1110	0.1406
6210409025	0.1110	0.1406
6210409033	0.1110	0.1406
6210409045	0.1110	0.1406
6210409060	0.1110	0.1406
6210503000	0.0370	0.0469

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

HTS No.	Conv. fact.	Cents/kg
6210505020	0.0863	0.1093
6210505031	0.0863	0.1093
6210505039	0.0863	0.1093
6210505040	0.0863	0.1093
6210505055	0.0863	0.1093
6210507000	0.4316	0.5466
6210509050	0.1480	0.1874
6210509060	0.1480	0.1874
6210509070	0.1480	0.1874
6210509090	0.1480	0.1874
6211111010	0.1206	0.1527
6211111020	0.1206	0.1527
6211118010	1.0852	1.3744
6211118020	1.0852	1.3744
6211118040	0.2412	0.3054
6211121010	0.0603	0.0764
6211121020	0.0603	0.0764
6211128010	1.0852	1.3744
6211128020	1.0852	1.3744
6211128030	0.6029	0.7635
6211200410	0.7717	0.9773
6211200420	0.0965	0.1222
6211200430	0.7717	0.9773
6211200440	0.0965	0.1222
6211200810	0.3858	0.4887
6211200820	0.3858	0.4887
6211201510	0.7615	0.9644
6211201515	0.2343	0.2967
6211201520	0.6443	0.8160
6211201525	0.2929	0.3709
6211201530	0.7615	0.9644
6211201535	0.3515	0.4451
6211201540	0.7615	0.9644
6211201545	0.2929	0.3709
6211201550	0.7615	0.9644
6211201555	0.4100	0.5193
6211201560	0.7615	0.9644
6211201565	0.2343	0.2967
6211202400	0.1233	0.1562
6211202810	0.8016	1.0152
6211202820	0.2466	0.3124
6211202830	0.3083	0.3905
6211203400	0.1233	0.1562
6211203810	0.8016	1.0152
6211203820	0.2466	0.3124
6211203830	0.3083	0.3905
6211204400	0.1233	0.1562
6211204815	0.8016	1.0152
6211204835	0.2466	0.3124
6211204860	0.3083	0.3905
6211205400	0.1233	0.1562
6211205810	0.8016	1.0152
6211205820	0.2466	0.3124
6211205830	0.3083	0.3905
6211206400	0.1233	0.1562
6211206810	0.8016	1.0152
6211206820	0.2466	0.3124
6211206830	0.3083	0.3905
6211207400	0.1233	0.1562
6211207810	0.9249	1.1714
6211207820	0.2466	0.3124
6211207830	0.3083	0.3905
6211320003	0.6412	0.8121
6211320007	0.8016	1.0152
6211320010	0.9865	1.2494
6211320015	0.9865	1.2494
6211320025	0.9865	1.2494
6211320030	0.9249	1.1714
6211320040	0.9249	1.1714

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

HTS No.	Conv. fact.	Cents/kg
6211320050	0.9249	1.1714
6211320060	0.9249	1.1714
6211320070	0.9249	1.1714
6211320075	0.9249	1.1714
6211320081	0.9249	1.1714
6211330003	0.0987	0.1249
6211330007	0.1233	0.1562
6211330010	0.3083	0.3905
6211330015	0.3083	0.3905
6211330017	0.3083	0.3905
6211330025	0.3700	0.4685
6211330030	0.3700	0.4685
6211330035	0.3700	0.4685
6211330040	0.3700	0.4685
6211330054	0.3700	0.4685
6211330058	0.3700	0.4685
6211330061	0.3700	0.4685
6211390510	0.1233	0.1562
6211390520	0.1233	0.1562
6211390530	0.1233	0.1562
6211390540	0.1233	0.1562
6211390545	0.1233	0.1562
6211390551	0.1233	0.1562
6211399010	0.2466	0.3124
6211399020	0.2466	0.3124
6211399030	0.2466	0.3124
6211399040	0.2466	0.3124
6211399050	0.2466	0.3124
6211399060	0.2466	0.3124
6211399070	0.2466	0.3124
6211399090	0.2466	0.3124
6211410020	0.0617	0.0781
6211410030	0.1233	0.1562
6211410040	0.0617	0.0781
6211410050	0.0617	0.0781
6211410055	0.0617	0.0781
6211410061	0.0617	0.0781
6211420003	0.6412	0.8121
6211420007	0.8016	1.0152
6211420010	0.9865	1.2494
6211420020	0.9865	1.2494
6211420025	1.1099	1.4056
6211420030	0.8632	1.0933
6211420040	0.9865	1.2494
6211420054	1.1099	1.4056
6211420056	1.1099	1.4056
6211420060	0.9865	1.2494
6211420070	1.1099	1.4056
6211420075	1.1099	1.4056
6211420081	1.1099	1.4056
6211430003	0.0987	0.1249
6211430007	0.1233	0.1562
6211430010	0.2466	0.3124
6211430020	0.2466	0.3124
6211430030	0.2466	0.3124
6211430040	0.2466	0.3124
6211430050	0.2466	0.3124
6211430060	0.2466	0.3124
6211430064	0.3083	0.3905
6211430066	0.2466	0.3124
6211430074	0.3083	0.3905
6211430076	0.3700	0.4685
6211430078	0.3700	0.4685
6211430091	0.2466	0.3124
6211499010	0.2466	0.3124
6211499020	0.2466	0.3124
6211499030	0.2466	0.3124
6211499040	0.2466	0.3124
6211499050	0.2466	0.3124

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

HTS No.	Conv. fact.	Cents/kg
6211499060	0.2466	0.3124
6211499070	0.2466	0.3124
6211499080	0.2466	0.3124
6211499090	0.2466	0.3124
6212105010	0.9138	1.1574
6212105020	0.2285	0.2893
6212105030	0.2285	0.2893
6212109010	0.9138	1.1574
6212109020	0.2285	0.2893
6212109040	0.2285	0.2893
6212200010	0.6854	0.8680
6212200020	0.2856	0.3617
6212200030	0.1142	0.1447
6212300010	0.6854	0.8680
6212300020	0.2856	0.3617
6212300030	0.1142	0.1447
6212900010	0.1828	0.2315
6212900020	0.1828	0.2315
6212900030	0.1828	0.2315
6212900050	0.0914	0.1157
6212900090	0.4112	0.5208
6213201000	1.1187	1.4169
6213202000	1.0069	1.2752
6213900700	0.4475	0.5668
6213901000	0.4475	0.5668
6213902000	0.3356	0.4251
6214300000	0.1142	0.1447
6214400000	0.1142	0.1447
6214900010	0.8567	1.0850
6214900090	0.2285	0.2893
6215100025	0.1142	0.1447
6215200000	0.1142	0.1447
6215900015	1.0281	1.3021
6216000800	0.0685	0.0868
6216001300	0.3427	0.4340
6216001720	0.6397	0.8102
6216001730	0.1599	0.2025
6216001900	0.3427	0.4340
6216002110	0.5780	0.7320
6216002120	0.2477	0.3137
6216002410	0.6605	0.8366
6216002425	0.1651	0.2091
6216002600	0.1651	0.2091
6216002910	0.6605	0.8366
6216002925	0.1651	0.2091
6216003100	0.1651	0.2091
6216003300	0.5898	0.7470
6216003500	0.5898	0.7470
6216003800	1.1796	1.4939
6216004100	1.1796	1.4939
6217109510	0.9646	1.2217
6217109520	0.1809	0.2291
6217109530	0.2412	0.3054
6217909003	0.9646	1.2217
6217909005	0.1809	0.2291
6217909010	0.2412	0.3054
6217909025	0.9646	1.2217
6217909030	0.1809	0.2291
6217909035	0.2412	0.3054
6217909050	0.9646	1.2217
6217909055	0.1809	0.2291
6217909060	0.2412	0.3054
6217909075	0.9646	1.2217
6217909080	0.1809	0.2291
6217909085	0.2412	0.3054
6301300010	0.8305	1.0518
6301300020	0.8305	1.0518
6301900030	0.2215	0.2805
6302100005	1.1073	1.4024

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

HTS No.	Conv. fact.	Cents/kg
6302100008	1.1073	1.4024
6302100015	1.1073	1.4024
6302213010	1.1073	1.4024
6302213020	1.1073	1.4024
6302213030	1.1073	1.4024
6302213040	1.1073	1.4024
6302213050	1.1073	1.4024
6302215010	0.7751	0.9817
6302215020	0.7751	0.9817
6302215030	0.7751	0.9817
6302215040	0.7751	0.9817
6302215050	0.7751	0.9817
6302217010	1.1073	1.4024
6302217020	1.1073	1.4024
6302217030	1.1073	1.4024
6302217040	1.1073	1.4024
6302217050	1.1073	1.4024
6302219010	0.7751	0.9817
6302219020	0.7751	0.9817
6302219030	0.7751	0.9817
6302219040	0.7751	0.9817
6302219050	0.7751	0.9817
6302221010	0.5537	0.7012
6302221020	0.3876	0.4909
6302221030	0.5537	0.7012
6302221040	0.3876	0.4909
6302221050	0.3876	0.4909
6302221060	0.3876	0.4909
6302222010	0.3876	0.4909
6302222020	0.3876	0.4909
6302222030	0.3876	0.4909
6302290020	0.2215	0.2805
6302313010	1.1073	1.4024
6302313020	1.1073	1.4024
6302313030	1.1073	1.4024
6302313040	1.1073	1.4024
6302313050	1.1073	1.4024
6302315010	0.7751	0.9817
6302315020	0.7751	0.9817
6302315030	0.7751	0.9817
6302315040	0.7751	0.9817
6302315050	0.7751	0.9817
6302317010	1.1073	1.4024
6302317020	1.1073	1.4024
6302317030	1.1073	1.4024
6302317040	1.1073	1.4024
6302317050	1.1073	1.4024
6302319010	0.7751	0.9817
6302319020	0.7751	0.9817
6302319030	0.7751	0.9817
6302319040	0.7751	0.9817
6302319050	0.7751	0.9817
6302321010	0.5537	0.7012
6302321020	0.3876	0.4909
6302321030	0.5537	0.7012
6302321040	0.3876	0.4909
6302321050	0.3876	0.4909
6302321060	0.3876	0.4909
6302322010	0.5537	0.7012
6302322020	0.3876	0.4909
6302322030	0.5537	0.7012
6302322040	0.3876	0.4909
6302322050	0.3876	0.4909
6302322060	0.3876	0.4909
6302390030	0.2215	0.2805
6302402010	0.9412	1.1921
6302511000	0.5537	0.7012
6302512000	0.8305	1.0518
6302513000	0.5537	0.7012

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

HTS No.	Conv. fact.	Cents/kg
6302514000	0.7751	0.9817
6302593020	0.5537	0.7012
6302600010	1.1073	1.4024
6302600020	0.9966	1.2622
6302600030	0.9966	1.2622
6302910005	0.9966	1.2622
6302910015	1.1073	1.4024
6302910025	0.9966	1.2622
6302910035	0.9966	1.2622
6302910045	0.9966	1.2622
6302910050	0.9966	1.2622
6302910060	0.9966	1.2622
6302931000	0.4429	0.5610
6302932000	0.4429	0.5610
6302992000	0.2215	0.2805
6303191100	0.8859	1.1220
6303910010	0.6090	0.7713
6303910020	0.6090	0.7713
6303921000	0.2768	0.3506
6303922010	0.2768	0.3506
6303922030	0.2768	0.3506
6303922050	0.2768	0.3506
6303990010	0.2768	0.3506
6304111000	0.9966	1.2622
6304113000	0.1107	0.1402
6304190500	0.9966	1.2622
6304191000	1.1073	1.4024
6304191500	0.3876	0.4909
6304192000	0.3876	0.4909
6304193060	0.2215	0.2805
6304910020	0.8859	1.1220
6304910070	0.2215	0.2805
6304920000	0.8859	1.1220
6304996040	0.2215	0.2805
6505901515	1.1189	1.4170
6505901525	0.5594	0.7085
6505901540	1.1189	1.4170
6505902030	0.9412	1.1921
6505902060	0.9412	1.1921
6505902545	0.5537	0.7012
6507000000	0.3986	0.5049
9404901000	0.2104	0.2665
9404908020	0.9966	1.2622
9404908040	0.9966	1.2622
9404908505	0.6644	0.8415
9404908536	0.0997	0.1262
9404909505	0.6644	0.8415
9404909570	0.2658	0.3366

* * * * *

Authority: 7 U.S.C. 2101–2118.

Dated: November 1, 2011.

David R. Shipman,

Acting Administrator.

[FR Doc. 2011–28795 Filed 11–7–11; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1214

[Doc. No. AMS–FV–10–0008–FR–1A]

RIN 0581–AD00

Christmas Tree Promotion, Research, and Information Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This rule establishes an industry-funded promotion, research, and information program for fresh cut Christmas trees. The Christmas Tree Promotion, Research, and Information Order (Order) is authorized under the Commodity Promotion, Research, and Information Act of 1996 (1996 Act). The Order will establish a national Christmas Tree Promotion Board (Board) comprised of 11 producers and one importer. Under the Order, producers and importers of fresh cut Christmas trees will pay an initial assessment of fifteen cents per Christmas tree. Producers and importers that produce or import less than 500 Christmas trees annually will be exempt from the assessment. A referendum will be conducted, among producers and importers, three years after the collection of assessments begin to determine if Christmas tree producers and importers favor the continuation of this program.

DATES: Effective November 9, 2011.

FOR FURTHER INFORMATION CONTACT: Patricia A. Petrella, Marketing Specialist, Research and Promotion Division, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue SW., Room 1406, Stop 0244, Washington, DC 20250–0244; *telephone:* (301) 334–2891; or *facsimile:* (301) 334–2896; or *email: Patricia.Petrella@ams.usda.gov*.

SUPPLEMENTARY INFORMATION: This Order is issued pursuant to the Commodity Promotion, Research, and Information Act of 1996 (1996 Act) (7 U.S.C. 7411–7425).

As part of this rulemaking process, a proposed rule was published in the **Federal Register** on November 8, 2010 (75 FR 68512). That rule provided for a 60-day comment period which ended on February 7, 2011. Five hundred comments were received. As requested by a member of Congress and several North Carolina producers, the comment period was reopened for 15 days (76 FR 9695, February 22, 2011). That comment

period ended on March 9, 2011. An additional 65 comments were received. All comments are addressed later in this rule.

Executive Order 12866

This final rule has been determined not significant for purposes of Executive Order 12866 and therefore has not been reviewed by the Office of Management and Budget (OMB).

Executive Order 12988

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. It is not intended to have retroactive effect. Section 524 of the 1996 Act provides that it shall not affect or preempt any other Federal or State law authorizing promotion or research relating to an agricultural commodity.

Under section 519 of the 1996 Act, a person subject to an order may file a written petition with the Department stating that an order, any provision of an order, or any obligation imposed in connection with an order, is not established in accordance with the law, and requesting a modification of an order or an exemption from an order. Any petition filed challenging an order, any provision of an order, or any obligation imposed in connection with an order, shall be filed within two years after the effective date of an order, provision, or obligation subject to challenge in the petition. The petitioner will have the opportunity for a hearing on the petition. Thereafter, the Department will issue a ruling on the petition. The 1996 Act provides that the district court of the United States for any district in which the petitioner resides or conducts business shall have the jurisdiction to review a final ruling on the petition, if the petitioner files a complaint for that purpose not later than 20 days after the date of the entry of the Department's final ruling.

Executive Order 13132

This final rule has been reviewed under Executive Order 13132, Federalism. Section 524 of the 1996 Act provides that the Act shall not affect or preempt any other Federal or State law authorizing promotion or research relating to an agricultural commodity.

The proponent, the Christmas Tree Checkoff Task Force is an industry wide group of producers and importers that support this proposed program. They have conducted meetings throughout the United States with several State and multi-State Christmas tree organizations. The proposed program is not intended to duplicate any State program. The proponents have determined that they need a mechanism that would be sustainable over time. A national Christmas tree research and promotion program would accomplish this goal.

Summary

This rule establishes an industry-funded promotion, research, and information program for fresh cut Christmas trees. The Christmas Tree Promotion, Research, and Information Order (Order), was submitted to the Department of Agriculture (Department) by the Christmas Tree Checkoff Task Force (Task Force), an industry wide group of producers and importers that support this program. Under the Order, producers and importers of fresh cut Christmas trees will pay an initial assessment of $0.15 cents per tree, which would be paid to the Christmas Tree Promotion Board (Board). This Board will be responsible for administration and operation of the Order. Producers and importers that produce or import less than 500 Christmas trees annually will be exempt from the assessment. The program is authorized under the Commodity Promotion, Research, and Information Act of 1996 (1996 Act).

A referendum will be conducted, among producers and importers, three years after the collection of assessments begin to determine if Christmas tree producers and importers favor the continuation of this program. A final rule on the referendum procedures will be published in the **Federal Register** at a later time. The rule also announces the Agricultural Marketing Service's (AMS) approval of new Christmas tree information collection requirements by the OMB for the operation of the Order.

Authority in 1996 Act

The Order is authorized under the 1996 Act which authorizes USDA to establish agricultural commodity research and promotion orders which may include a combination of promotion, research, industry information, and consumer information activities funded by mandatory assessments. These programs are designed to maintain and expand markets and uses for agricultural commodities. As defined under section 513(1)(D) of the 1996 Act, agricultural commodities include fresh cut Christmas trees. The Order will provide for the development and financing of a coordinated program of research, promotion, and information for Christmas trees.

The 1996 Act provides for a number of optional provisions that allow the tailoring of orders for different commodities. Section 516 of the 1996 Act provides permissive terms for orders, and other sections provide for alternatives. For example, section 514 of the 1996 Act provides for orders applicable to (1) Producers, (2) first handlers and others in the marketing chain as appropriate, and (3) importers (if imports are subject to assessments). Section 516 states that an order may include an exemption of *de minimis* quantities of an agricultural commodity; different payment and reporting schedules; coverage of research, promotion, and information activities to expand, improve, or make more efficient the marketing or use of an agricultural commodity in both domestic and foreign markets; provision for reserve funds; provision for credits for generic and branded activities; and assessment of imports.

In addition, section 518 of the 1996 Act provides for referenda to ascertain approval of an order to be conducted either prior to its going into effect or within three years after assessments first begin under the order. An order also may provide for its approval in a referendum based upon different voting patterns. Section 515 provides for establishment of a board or council from among producers, first handlers and others in the marketing chain as appropriate, and importers, if imports are subject to assessment.

Industry Background

Christmas trees have been commercially sold in the United States since about 1850, when most were cut from wild stands. In the last 55 to 60 years, Christmas trees have been farmed and harvested as an agricultural row crop. Most Christmas trees are now grown on or selected and cut by consumers on tree farms. The U.S. Christmas tree industry consists of over 12,000 farms producing over 17 million Christmas trees per year. The best selling Christmas trees are Scotch pine, Douglas fir, noble fir, Fraser fir, Virginia pine, balsam fir and white pine.

Christmas trees are grown for retail sale in almost all U.S. states. Oregon, Michigan, Wisconsin, North Carolina and Pennsylvania together produce more than 75 percent of the trees produced each year. During 2007, 47 out of the 50 States contributed to the production of Christmas trees.

Competition

The fresh cut Christmas tree industry competes directly with the artificial Christmas tree industry. Artificial Christmas tree companies advertise heavily throughout the fall and Christmas seasons. According to data

supplied by the proponents artificial tree purchases have increased from 9.8 million in 2003 to 17.4 million in 2007.

Imports

According to U.S. Department of Commerce, U.S. Census Bureau, Foreign Trade Statistics, imports of Christmas trees from 2006 through 2008 averaged about 1.9 million trees. During those years, imports from Canada accounted for 99.72 percent of the total imports. Italy, Columbia and Mali comprised about .28 million trees or less than one percent. For the same period, these imports were valued at $27.427 million dollars.

Prices

According to the Task Force, in 2007 the average price per tree for a Noble was approximately $18.00 and the average price per tree for a Douglas was $11.00. By averaging these two types of Christmas trees, prices would be approximately $15 per tree. With 31 million trees cut in 2007, the value would be approximately $465 million (value at point of first sale).

Need for a Program

A national research and promotion program for Christmas trees would help the industry to address the many market problems it currently faces. According to the Task Force, two main factors currently affecting Christmas tree sales, both in the domestic market and abroad, are increased competition and changing consumer habits.

According to additional data supplied by the Task Force, the market share of fresh Christmas trees in the U.S. from 1965 to 2008 has declined by 6 percent. In comparison, the market share of artificial trees has increased 655 percent from 1965 to 2008.

According to the proponent data, sales of fresh cut Christmas trees decreased by 15 million trees from 37 million trees sold in 1991 down to 22 million trees sold in 2002. The industry saw an increase in sales in 2003 through 2007 when the industry conducted a voluntary marketing campaign which was lead by a small group of producers and retailers. This voluntary marketing campaign saw sales rebound by 9 million trees—from 22 million trees sold in 2002 to 31 million trees sold in 2007. Even with the strong sales response to the marketing efforts, the voluntary marketing program suffered from a lack of funding.

The Christmas tree industry has tried three different times to conduct promotional programs based on voluntary contributions. Each time, after about three years, the revenue declined to a point where the programs were ineffective. The decline in revenue is attributable to the voluntary nature of these programs. Therefore, the proponents have determined that they need a mechanism that would be sustainable over time. They believe that a national Christmas tree research and promotion program would accomplish this goal.

Specific Provisions of a Program

Pursuant to section 513 of the 1996 Act, sections 1214.1 through 1214.30 of the Order define certain terms that will be used throughout the Order, such as Christmas trees, importer and producer. Several of the terms are common to all research and promotion programs authorized under the 1996 Act while other terms are specific to the Order.

Sections 1214.47 of the Order will detail the establishment and membership of the Christmas Tree Promotion Board, nominations and appointments, the term of office, removal and vacancies, procedure, reimbursement and attendance, powers and duties, and prohibited activities.

Sections 1214.50 through 1214.56 of the Order will detail requirements regarding the Board's budget and expenses, financial statements, assessments, and exemption from assessments.

The Board's programs and expenses will be funded through assessments on producers, importers, donations from any person including those not subject to assessments, other income, and other funds available to the Board. The Order will provide for an initial assessment rate of $0.15 per Christmas tree cut and sold domestically or imported into the United States.

This assessment rate will be reviewed by the Board after the initial referendum is conducted (3 years after assessments first begin). The assessment rate cannot be changed during the first three years of operation of the Order. The assessment rate may be increased or decreased no more than 2 cents per Christmas tree during the fiscal period. Any change in the assessment rate within this range will be subject to rulemaking by the Secretary. The assessment rate shall not exceed 20 cents per Christmas tree, nor shall it be less than 10 cents per Christmas tree, unless a majority of producers and importers approve such other levels of assessments through a referendum conducted pursuant to this subpart. Importers who import 500 Christmas trees or more would be required to pay assessments to the Board, if not collected by Customs.

Importer assessments will be collected through Customs. The Order will specify a list of numbers of the Harmonized Tariff Schedule of the United States that will identify Christmas trees subject to assessments.

The Order will provide authority for the Board to impose a late payment charge and interest for assessments overdue to the Board. The late payment charge and rate of interest will be prescribed in the Order's regulations issued by the Secretary.

Sections 1214.60 through 1214.62 of the Order will detail requirements regarding promotion, research and information projects authorized under the Order.

Sections 1214.70 through 1214.72 specify the reporting and recordkeeping requirements under the Order as well as requirements regarding confidentiality of information.

Section 1214.81(a)(1) of the Order specifies that the program will be implemented and a referendum conducted three years after assessments first begin under the Order. The Order will not continue unless it is approved by a majority of those persons voting in the referendum for approval.

Section 1214.81(b) of the Order specifies criteria for subsequent referenda. Under the Order, a referendum will be held to ascertain whether the program should continue, be amended, or be terminated.

Section 1214.80 and sections 1214.82 through 1214.88 describe the rights of the Secretary; authorize the Secretary to suspend or terminate the Order when deemed appropriate; prescribe proceedings after termination; address personal liability, separability, and amendments; and provide OMB control numbers. These provisions are common to all research and promotion program authorized under the 1996 Act.

Regulatory Flexibility Act Analysis

In accordance with the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612), AMS is required to examine the impact of this rule on small entities. Accordingly, AMS has prepared this final regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions so that small businesses will not be disproportionately burdened. The Small Business Administration defines, in 13 CFR part 121, small agricultural producers as those having annual receipts of no more than $750,000 and small agricultural service firms (producers and importers) as those having annual receipts of no more than $7.0 million.

Under these criteria, the majority of the producers that will be affected by this Order will be considered small entities, while most importers will not. Producers and importers who cut and sell or imported less than 500 Christmas trees annually will be exempt from the assessment. Organic producers and importers would also be exempt from assessments. The number of entities assessed under the program will be approximately 3,263. Estimated revenue is expected to be approximately $2 million of which 10 percent is expected from imported product and 90 percent from domestic product.

According to the Task Force, based on data from the 2007 Census of Agriculture, there were approximately 12,255 Christmas tree farms that harvested Christmas trees in the United States. Approximately 25 percent of the producers or 3,100 Christmas tree producers will be subject to the assessment based on the exemption of those producing less than 500 trees will be exempt from assessments. Approximately 95 percent of the producers subject to the assessment qualified under the definition for small business owners. According to the Task Force the average price for 6 to 7 foot Douglas and Noble fir trees is $11.00 and $18.00, respectively. During 2007, 47 out of 50 States produced Christmas trees in the United States. Oregon, Michigan, Wisconsin, North Carolina, and Pennsylvania together produced more than 75 percent of the trees harvested in 2007. In 2008, there were approximately 200 importers. Based on the 2008 U.S. Customs data, 163 importers that imported more than 500 Christmas trees are subject to the assessment rate under the Order.

This rule establishes an industry-funded research, promotion, and information program for fresh cut Christmas trees. The program will be financed by an assessment on Christmas tree producers and importers and will be administered by a board of industry members selected by the Secretary. The initial assessment rate will be $0.15 per Christmas tree cut and sold or imported to the United States and could be increased to $0.20 per Christmas tree. Entities that cut and sell or import less than 500 Christmas trees will be exempt. The purpose of the program will be to strengthen the position of Christmas trees in the marketplace, and maintain and expand markets for Christmas trees. A referendum will be held among eligible producers and importers to determine whether they favor implementation of the program three years after the first assessments begin. The Order will continue if favored by a majority of producers and importers voting in the referendum. The program is authorized under the 1996 Act.

Regarding the economic impact of the Order on affected entities, Christmas tree producers and importers will be required to pay assessments to the Board. As previously mentioned, the initial assessment rate will be $0.15 per Christmas tree cut and sold or imported to the United States and could be increased to no more than $0.20 per Christmas tree.

Regarding the impact on the industry as a whole, the Order is expected to grow demand for fresh cut Christmas trees. The Christmas tree industry hopes to achieve a stable funding base to promote Christmas now and into the future.

Regarding alternatives, the Christmas tree industry has already considered and implemented voluntary programs, but based on past experiences, these programs only worked in the short term; until monies were depleted.

This action will impose an additional reporting and recordkeeping burden on producers and importers of fresh cut Christmas trees. Producers and importers interested in serving on the Board may be asked to submit a nomination form to the Board indicating their desire to serve or nominating another industry member to serve on the Board. Interested persons will also submit a background statement outlining their qualifications to serve on the Board. Producers and importers will have the opportunity to cast a ballot and vote for candidates to serve on the Board. Producer and importer nominees to the Board will have to submit a background form to the Secretary to ensure they are qualified to serve on the Board.

Additionally, producers and importers who domestically produce or import less than 500 Christmas trees annually could submit a request to the Board for an exemption from paying assessments on this volume. Producers and importers also will report regarding their sales/imports that will accompany their assessments paid to the Board. Producers and importers who will qualify as 100 percent organic under the NOP could submit a request to the Board for an exemption from assessments.

Finally, producers and importer who wanted to participate in a referendum to vote on whether the Order should continue will have to complete a ballot for submission to the Secretary. These forms were approved by OMB under OMB Control No. 0581–0267 and 0581–0268. Specific burdens for the forms are detailed later in this document in the section titled Paperwork Reduction Act. As with all Federal promotion programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. Finally, USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

AMS is committed to complying with the E–Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

Regarding outreach efforts, as previously mentioned, the Task Force conducted sessions throughout the United Sates in different States and regions. These were held in conjunction with regional and state organization meetings. Approximately 50 sessions were held across the United States. Input regarding the proposed program was incorporated into the Task Force's proposal.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the reporting and recordkeeping provisions generated by this rule have been preapproved by the Office of Management and Budget (OMB).

Title: Research and Promotion Background Information.

OMB Number for background form AD–755: (approved under OMB No. 0505–0001).

Expiration Date of Approval: 7/31/2012.

Title: Christmas Tree Promotion, Research, and Information Program (Order).

OMB Numbers: 0581–0268.

Expiration Date of Approval: 12/31/2013.

Type of Request: Approval of a preapproved collection.

Abstract: The information collection requirements in the request are essential to carry out the intent of the 1996 Act. The information collection concerns a proposal received by USDA for a national research and promotion program for the Christmas tree industry. The program will be financed by an assessment on Christmas tree producers and importers and will be administered by a board of industry members selected by the Secretary. The program will provide for an exemption for producers and importers that cut and sell or import less than 500 Christmas trees during the year. A referendum will be

held among eligible producers and importers to determine whether they favor continuation of the program three years after assessments first begin. The purpose of the program will be to help increase demand for fresh cut Christmas trees.

In summary, the information collection requirements under the program concern Board nominations, refunds of assessments, exemption applications, and the collection of assessments. For Board nominations, producers and importers interested in serving on the Board will be asked to submit a ''Nomination Form'' to the Board indicating their desire to serve or to nominate another industry member to serve on the Board. Producers and importers will have the opportunity to submit a ''Nomination Ballot'' to the Board where they will vote for candidates to serve on the Board. Nominees will also have to submit a background information form, ''AD–755,'' to the Secretary to ensure they are qualified to serve on the Board.

Regarding assessments, producers and importers who cut and sell or import less than 500 Christmas trees annually could submit a request, ''Application for Exemption from Assessments,'' to the Board for an exemption from paying assessments. Producers and importers may be asked to submit a ''Sales/Import Report'' that will accompany their assessments paid to the Board and report the quantity of Christmas trees cut and sold or imported during the applicable period, the quantity for which assessments were paid, and the port of entry (for imports). Importer assessments will be collected by Customs. If Customs collects the assessment and the importer does not reach the assessable threshold, the Board will refund such assessments no later than 60 calendar days after receipt from the Board. Customs will remit the funds to the Board along with this information. Finally, producers and importers who will qualify as 100 percent organic under the NOP could submit an ''Organic Exemption Form'' to the Board and request an exemption from assessments.

Producers and importers will also file a form to request a refund of assessments paid if the referendum fails to pass. A referendum is proposed to be conducted three years after the assessments first begin to determine if producers and importers favor the continuance of the Order.

There will also be an additional burden on producers and importers voting in referenda. The referendum ballot, which represents the information collection requirement relating to referenda, is addressed in a final rule on referendum procedures which will be published in the **Federal Register** at a later time.

Information collection requirements that are included in this proposal include:

(1) Background Information Form AD–755 (OMB Form No. 0505–0001)

Estimate of Burden: Public recordkeeping burden for this collection of information is estimated to average 0.5 hour per application.

Respondents: Producers and importers.

Estimated Number of Respondents: 8 (24 for initial nominations to the Board, 8 in subsequent years.

Estimated Number of Responses per Respondent: 1 every 3 years (0.3).

Estimated Total Annual Burden on Respondents: 12 hours for the initial nominations to the Board and 4 hours annually thereafter.

(2) Sales/Import Report by Each Producer or Importer of Christmas Trees

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 0.5 hours per producer reporting on Christmas trees sold.

Respondents: Producers and importers.

Estimated number of Respondents: 3,110

Estimated number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 1,555 hours.

(3) An Exemption Application for Producers and Importers Who Are Exempt From Assessments

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 0.25 hours per producers or importer reporting on Christmas trees domestically sold or imported. Upon approval of an application, producers and importers will receive exemption certification.

Respondents: Exempt producers and importers.

Estimated number of Respondents: 9,192.

Estimated number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 2,298 hours.

(4) Application for Reimbursement of Assessment

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 0.25 hours per request for reimbursement.

Respondents: Importers.

Estimated number of Respondents: 37.

Estimated number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 9.25 hours.

(5) A Requirement to Maintain Records Sufficient To Verify Reports Submitted Under the Order

Estimate of Burden: Public recordkeeping burden for keeping this information is estimated to average 0.5 hours per record keeper maintaining such records.

Recordkeepers: Producers and importers.

Estimated number of recordkeepers: 12,455.

Estimated total recordkeeping hours: 6,227.5 hours.

(6) Nomination Form

Estimate of Burden: Public recordkeeping burden for this collection of information is estimated to average 0.25 hours per application.

Respondents: Producers and importers.

Estimated Number of Respondents: 40

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 10.00 hours.

(7) Background Statement

Estimate of Burden: Public recordkeeping burden for this collection of information is estimated to average 0.25 hour per application.

Respondents: Producers and importers.

Estimated Number of Respondents: 40.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 10.00

(8) Nomination Ballot

Estimate of Burden: Public recordkeeping burden for this collection of information is estimated to average 0.25 hours per application.

Respondents: Producers and importers.

Estimated Number of Respondents: 1,200.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 300 hours.

(9) Organic Exemption Form

Estimate of Burden: Public recordkeeping burden for this collection of information is estimated to average 0.5 hours per exemption form.

Respondents: Producers and importers.

Estimated Number of Respondents: 5.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 2.5 hours.

(10) Application for Refund Form

Estimate of Burden: Public recordkeeping burden for this collection of information is estimated to average 0.5 hours per refund form.

Respondents: Producers and importers.

Estimated Number of Respondents: 325.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 162.5.

As noted above, under the program, producers and importers will be required to pay assessments and file reports with and submit assessments to the Board (importers through Customs). While the Order will impose certain recordkeeping requirements on producers and importers, information required under the Order could be compiled from records currently maintained. Such records shall be retained for at least two years beyond the marketing year of their applicability.

An estimated 12,455 respondents will provide information to the Board (12,255 producers and 200 importers). The estimated cost of providing the information to the Board by respondents will be $348,975. This total has been estimated by multiplying 10,575 total hours required for reporting and recordkeeping by $33, the average mean hourly earnings of various occupations involved in keeping this information. Data for computation of this hourly rate was obtained from the U.S. Department of Labor Statistics.

The Order's provisions have been carefully reviewed, and every effort has been made to minimize any unnecessary recordkeeping costs or requirements, including efforts to utilize information already submitted under other programs administered by USDA and other state programs.

The forms will require the minimum information necessary to effectively carry out the requirements of the program, and their use is necessary to fulfill the intent of the 1996 Act. Such information can be supplied without data processing equipment or outside technical expertise. In addition, there are no additional training requirements for individuals filling out reports and remitting assessments to the Board. The forms will be simple, easy to understand, and place as small a burden as possible on the person required to file the information.

Collecting information quarterly will coincide with normal industry business practices. The timing and frequency of collecting information are intended to meet the needs of the industry while minimizing the amount of work necessary to fill out the required reports. The requirement to keep records for two years is consistent with normal industry practices. In addition, the information to be included on these forms is not available from other sources because such information relates specifically to individual producers and importers who are subject to the provisions of the 1996 Act. Therefore, there is no practical method for collecting the required information without the use of these forms.

Analysis of Comments

The previous proposed rule concerning this action published in the **Federal Register** on November 8, 2010, provided for a 60-day comment period which ended on February 7, 2011. The comment period was reopened for 15 days (76 FR 9695, February 22, 2011), as requested by a member of Congress and several North Carolina producers. That comment period ended on March 9, 2011. A total of 565 comments were received during the two comment periods. Of the 565 comments received, 19 were from U.S. State or regional organizations representing Christmas tree producers. Two of these organizations representing Texas and Vermont were in opposition to the proposal, while the others supported the proposal. Three regional producer organizations from Canada submitted comments in favor of the proposal. In addition, two State Universities and one State Department of Agriculture submitted comments in favor of Christmas tree program.

Of the 565 comments submitted, 398 were in favor of the proposal, 147 were in opposition, nine were duplicates, six were neither for or against, four requested an extension of the comment period, and one had no comment. Comments were received from interested parties in 35 different States in the United States with the majority of those comments from North Carolina, Oregon, Michigan, and Wisconsin. Also, comments were received from interested parties in four Canadian provinces and the United Kingdom.

General Comments in Support

The majority of the comments that supported the Order suggested that the pooling of resources was a significant benefit of a national mandatory Christmas tree promotion program. Several commenters mentioned the need to promote the environmental and green benefits of Christmas trees and how providing education to the public of these aspects will result in the possible increase in sales. Many commented that they have seen the successes of other promotional programs and how beneficial it was to that industry. Commenters suggested promoting Christmas tree traditions of choosing a Christmas tree as a family experience.

Some commenters stated that there should not be a 500 Christmas tree threshold for payment of assessments. These commenters suggested that all Christmas tree producers should pay the assessment and share in the cost of promotion.

Section 516(a)(1) of the 1996 Act provides authority for the Secretary to exempt from an order any *de minimis* quantity of an agricultural commodity otherwise covered by the order. However, the 1996 Act does not define the term *de minimis* and USDA is not limited to using the definition of *de minimis* as specified in another law or agreement. The *de minimis* quantity is defined for a particular program and industry. The Task Force reviewed various options for the exemption and determined that 500 Christmas trees would be appropriate because such a level would still provide the Board with resources to have a program that could be successful. USDA agrees that this exemption level is appropriate and reasonable.

Comments in Support With Modifications

There were 11 comments in support of the Order with modifications.

An association that includes all of the members of the Task Force and a national association promoting Christmas trees supported the proposal in general with some suggested modifications.

The first five modifications suggested changes to the Order language that are not adopted in this final rule. The first modification was to allow 10 percent of the assessments paid under this program by producers that are members of State/multi-State associations to be directed to the State/multi-State associations to carry out local programs without competing to raise additional funds. This was originally proposed to USDA by the proponents as a way to foster better cooperation with associations, however it was not included in the proposed Order by USDA.

USDA believes that with a mandatory requirement to set aside a specific percent of the funds collected under the

program for State/multi-State associations, there may not be adequate funds remaining to achieve the Board's goals of promoting for the entire Christmas tree industry as this program expects to raise only 2 million dollars in assessments. Including this language in the order provisions does not prevent the Board from funding projects with State or multi-State organizations that they determine could benefit the entire Christmas tree industry. Therefore, no changes are being made to the Order language to reflect these comments.

Another suggested modification would change section 1214.46(g) to allow the Board to contract with companies or organizations for their staffing needs. Adding this authority to allow the Board to contract with companies or organizations would provide more flexibility in meeting its needs for staffing. Such authority already exists in the proposed Order and permits such contracting under section 1214.46(o) and therefore, no changes are being made to the Order language to reflect these comments.

The proponents requested elimination of the organic exemption. This change was also requested by other commenters. Under authority provided by 7 U.S.C., the Order exempts producers who operate under an approved National Organic Program (NOP) (7 CFR part 205) system plan, produce only products that are eligible to be labeled as 100 percent organic under the NOP, and are not a split operation, from paying assessments. Thus, 100 percent organic Christmas trees would be exempt from assessment under the Order. Therefore, no changes are being made to the Order language to reflect these comments.

The fourth modification would provide clarifying language in section 1214.50(c) as provided in the preamble of the proposed rule. The commenters wanted this section clarified as stated in the preamble of the proposed Order in regard to shifting of funds from one program, plan, or project to another. The recently modified Guidelines for AMS Oversight of Commodity Research and Promotion Programs require approval by AMS of shifts in program funds from one major area to another. Therefore, no changes are being made to the Order language to reflect these comments.

The fifth and last change to the Order concerns the preamble of the proposed Order which states that if a Board member ceased to work for a producer or importer or ceased to do business in the region he or she represented, such position would become vacant. The comment indicated that in section 1214.41 nominees must domestically produce or import more than 500 Christmas trees during the most recent fiscal year. That is an eligibility requirement for Board members, but does not preclude members from being employees of companies that may be producers or importers assessed under this order. Therefore, the preamble (75 FR 68516) and Order language correctly specify the eligibility requirements for Board members. Therefore, no changes are being made to the Order language to reflect these comments.

The proponents also suggested two modifications that could be adopted by the Board through informal rulemaking, and therefore require no changes to the Order language. The first modification would be to provide for Certificates of Exemptions to be issued every five years instead of annually. The proponents indicated that production of individual farms do not vary greatly from year to year because of the nature of the Christmas trees crop. It normally takes an average of 4 to 10 years to produce a marketable Christmas tree. The proponents indicated that about 9,000 producers could be eligible for an exemption. In addition, the proponents indicated that exemption forms could require a producer to acknowledge that if a producer's situation changes it would their responsibility to inform the Board. Accordingly, no changes are made as a result of this suggestion.

The next modification would increase administrative costs from 10 percent, as proposed, to 15 percent as allowable under the Act. The commenter requested this increase because the start-up costs are likely to be higher than operating costs in later years with the need to educate producers about the program. In addition, the commenter believes a strong compliance element will be important to collecting assessments and assuring sustainability of the program. USDA is of the view if indeed there is concern in the industry that the administrative cost cap be increased to 15 percent, then as authorized by the 1996 Act, upon recommendation of the Board such a change could be accomplished though informal rulemaking. Therefore, no change to Order language is made as a result of this suggestion.

The proponents suggested six other modifications that would require changes to the Order language. The first change will add the refund procedure to the Order language as described in the preamble. The procedure would state that producers and importers that produced or imported 500 Christmas trees or less and did not apply for an exemption shall receive a refund from the Board within 30 calendar days after the end of the fiscal period. This procedure was outlined in the preamble of the proposed Order but not in the Order language. Therefore, section 1214.53(a)(7) was added to the Order language to clarify the procedure described in the preamble.

The second change would provide that for the initial crop year's budget which could be largely administrative that repayment of such expenses would not be considered an administrative expense in subsequent years. The Act provides that for fiscal years beginning 3 or more years after the date of the establishment of the Board, the Board may not expend for administration, maintenance, and functioning of the Board in a fiscal year an amount that exceeds 15 percent of the assessment and other income received by the Board. The proposed Order contains 10 percent as the limit. This language, therefore, permits the Board to expend more funds in the first three years of startup of the Order for administration, maintenance and functioning of the Board. This recommendation is reasonable and the appropriate Order language will be added to the section reflect this change.

Another change would delete erroneous section numbers from the table of contents of the Order. The table of contents for the Order included sections 1214.55 Refunds and 1214.56 Procedures for obtaining a refund. Provision for these sections is in section 1214.53; therefore, the reference to these section numbers is removed from the table of contents.

The fourth change would provide clarification in section 1214.52(e) regarding the assessments due date. The commenters indicated that the wording in section 1214.52(e) could be construed as saying that assessments would not be due until the crop year following the sale of Christmas trees, or more than 14 months later. This is not the intent of the language. For the purpose of this program, crop year is defined as August 1 through July 31, accordingly, producers or importers that domestically produced or imported over 500 Christmas trees are to pay their assessments no later than February 15 of the crop year in which they are produced or imported. Therefore, section 1214.52(e) has been revised to clarify this change.

Another change would correct an erroneous section number in section 1214.62. In section 1214.62, section 1214.73 is erroneously referenced. The reference section number should be section 1214.83.

The last change would correct an erroneous sentence in the Order language regarding the time producers

and importers could receive refunds if the delayed referendum fails. The preamble of the proposed rule specified a procedure that producers and importers shall notify the Board within 30 days after the announcement of the referendum (that it has failed) of their demand to receive a refund. The Order language in section 1214.54(d) specifies that any producer or importer requesting refund shall submit an application on the prescribed form to the Board within 60 days from the date the assessments were paid by such producer or importer but no later than the date the results of the required referendum are announced by the Secretary. The preamble language is correct. Therefore, the Order language in section 1214.54(d) has been corrected to be consistent with this language.

Finally, one modification was suggested that would clarify language in the preamble. There is a phrase in the preamble of the proposed Order (75 FR 68516) that indicates the Board is to report its activities to manufacturers for the U.S. market. This language was not correct and should not have appeared in the preamble of the proposed Order.

Comments in Opposition

There were 21 comments in opposition to the proposal that suggested key points in the areas of assessments, exemptions, promotion, referenda, reporting, and other issues. Based on our evaluation of these comments, no changes will be made the Order. These comments are discussed below.

Assessments

A commenter expressed concern that the government should assess or tax imports of artificial trees instead of taxing or assessing domestically produced Christmas trees. Research and promotion programs are self help programs that promote an agricultural commodity. The Christmas tree industry decided to propose under the authority under the 1996 Act, a program to promote domestic and imported fresh cut Christmas trees.

The commenter was also concerned about assessing Christmas trees that are given to charity or trees lost to disease. If Christmas trees are donated to charity or lost to disease and therefore not sold into the marketplace, they will not be assessed under the Order.

Exemptions

A commenter also stated that not assessing producers or importers that produce or import less than 500 Christmas trees is the way for the proponents to get the program passed in a referendum. The commenter also stated that the initial exemption for Christmas tree producers was 2500 Christmas trees and the amount in the proposed Order is 500 Christmas trees. The Task Force reviewed various options for the exemption and determined that 500 Christmas trees would be appropriate because such a level would still provide the Board with resources to have a program that could be successful. USDA concurs with this exemption level because this level would exempt small operations that would otherwise be burdened by the assessment. Therefore, an exemption for producers and importers of less than 500 trees is authorized under the program and consistent with the Act's provisions.

The commenter questioned how the 500 Christmas tree exemptions would be applied. Under the Order, producers and importers of fewer than 500 Christmas trees would not be assessed under this Order. Producers and importers of 500 or more Christmas trees will be assessed on the total production number of Christmas trees produced or imported.

Promotion

A commenter also stated that the Task Force cited an increase in sales when a similar marketing program was in existence. The commenter stated that this is merely a correlation, and no further evidence is provided establishing that the marketing program caused the increase in sales. Other commenters also stated that the benefits would not outweigh the cost of the program.

The Task Force provided that the main reason for the marketing program's demise was that it was voluntary in nature. Under the proposed Order, the assessments to fund the program would be mandatory, therefore, providing consistent funding by stakeholders. In addition, several comments in favor of the proposed Order supported the consistent funding which would provide the industry with a workable program to increase sales. Furthermore, a third party five-year evaluation is required of all research and promotion programs to determine the benefits to their industries under section 515(h) of the 1996 Act. These evaluations are available from the Boards and are posted on the AMS Web site. The industry may terminate the program if the first evaluation does not show a benefit to the Christmas tree industry.

A commenter also stated that if USDA promulgates this rule they should solicit data from other sources, develop a definitive plan for how to boost Christmas tree sales, and make a projection for the increase in fresh-cut Christmas tree sales and a cost benefit analysis. The Act provides authority for the Secretary to appoint a Board consisting of industry members. The Act states that such a Board must develop a plan under USDA oversight to promote Christmas trees. USDA approves the Board's annual budget and marketing plan. In addition, the Board must conduct a third party program evaluation every five years to evaluate the effectiveness of the program's activities. All these documents are discussed at Board meetings, are public information and available on the Board's Web site. The program evaluation is also available on AMS's Web site. These documents provide the road map for the Boards operations and assist the industry in determining if the program is effective.

Another issue some commenters raised was how much of the funds will be spent on administrative costs, USDA management, research and other projects. The Act authorizes that up to 15 percent of the assessments collected could be used for administrative expenses. However, the proponent group decided to limit the administrative expenses to 10 percent of the funds collected. USDA costs are based on the time spent by the USDA on oversight of the program. The majority of the funds are used for research and promotion of the commodity.

Several of the comments addressed the issue of promotion proposed under the Order. Some Christmas tree producers stated their opposition to perceived government intervention in their Christmas tree operations. They also stated that they preferred to do their own promotion and did not have any problems selling all of their trees, thus they did not see any benefit in the proposed program. Additionally, one commenter stated their belief that the program was illegal stating that the government can't promote private individuals' Christmas trees.

The 1996 Act provides the authority for agricultural industries to develop programs for research and promotion. These programs are initiated by members of the industry. USDA provides oversight of these programs and their activities. However, industry Boards that manage these programs develop their own budgets and marketing plans and conduct strategic planning for the programs. Although these programs are mandatory in nature, they do not preclude individuals from promoting their own commodity.

Another opposition comment stated the belief that Christmas trees were a

differentiated product and not an agricultural commodity and therefore, could not be promoted generically under this program. The 1996 Act states that the term agricultural commodity means, among other things, the products of forestry and other commodities raised or produced in farms. USDA does not agree with this comment and believes Christmas trees are an agricultural commodity and can be promoted under the Act authority.

The commenter also stated their belief that ''choose and cut'' producers who provide trees to a distinct market may not realize the benefits of such a program because generic promotions would not attract customers to their operations. Various other commenters also stated that the government should not compel an industry with a variety of interests to speak with one voice when many are not in agreement.

This Board will consider the views and concerns of every segment of the industry and provide a marketing plan that benefits the whole Christmas tree industry. Producers in all sectors have diversified to provide different types of activities to increase sales and promote their product. A Christmas tree generic promotion program will not hinder any producer from continuing this type of activity. A generic promotion program can work in conjunction with other marketing activities that individual producers and importers already have developed or want to develop.

The commenter also suggested that the type of promotion the Board pursues may not be agreed upon by such commenter and that a one size fits all advertising campaign blurs distinctions among products in their industry. Additional commenters stated that the program should cover research but not promotion efforts. Research and promotion boards represent all sectors of the industry and the members will bring different backgrounds and expertise to the Board when developing marketing strategies. In addition, all meetings are open to the public. The Board would determine the kinds of activities conducted under the program based on those authorized under the Act. No changes have been made to reflect these comments.

The same commenter questioned whether the program will insure that large stores will water and properly care for Christmas trees to maintain quality. Many research and promotion programs include an educational component to those that handle the product. The Board may decide that one of the needs of the industry is to provide information, education and training on the handling of Christmas trees to assure quality of the product to the consumer.

Referenda

A commenter questioned the criteria to determine the referendum vote. Other commenters did not agree with having a delayed referendum or having one vote per entity without regard to the volume produced or imported. Section 518 of the Act provides for a referendum to be conducted either before the program is in place or three years after assessments first begin under the order. The proponent group chose the delayed referendum option. The Act also provides for three options to the vote: By a majority of those persons voting, by persons voting for approval who represent a majority of the volume of the agricultural commodity, or by a majority of those persons voting for approval who also represent a majority of the volume of the agricultural commodity. The proponent group recommended counting by vote in order to attempt to ensure that small businesses have the same vote as large firms. Accordingly, the Order will be approved in a referendum if a majority of producers and importers voting in the referendum vote for approval.

Another commenter expressed the opinion that such voting was unfair. The commenter stated that one farm one vote does not adequately represent the producers that would be funding the program. The commenter also stated that the assessment should be on seedling nurseries since there is no true first handler. In addition, the commenter stated that there is no control on increasing the assessment.

The Act provides three methods for determining the vote in referendum. The proponents chose a majority of those persons voting as the voting method. The proponents also chose to assess producers and importers since these will directly benefit from the program. Further, the Order provides that the assessment can only be increased or decreased by 2 cents during the fiscal period and subject to rulemaking by the USDA; and it cannot exceed 20 cents or drop below 10 cents per fiscal period. In order to make any changes in the assessment rate, the Board would have to make that recommendation to USDA and the USDA will request comments for the industry before implementing any change in the assessment rate. No changes have been to the Order to reflect these concerns.

Reporting

Another issue raised by commenters concerns the reporting burden under the Order. A commenter stated that the proposed program involves too much paperwork and that forms should be web-based to allow easy access. The commenter stated concern that Christmas tree producers were already reporting information to the other Federal agencies. The commenter was also concerned that the Board would be counting stumps. Goals under this program are to minimize reporting burden and eliminate duplication as much as possible. The Board could coordinate with other agencies to help insure there are no duplicative efforts. The Board also may opt to provide the required forms electronically in order to further reduce the reporting burden to producers and importers.

Another commenter was concerned that the reporting requirements would require producers to furnish customer information to the Board. The information required under the program does not contain producer or importer customer information. Furthermore, pursuant to section 515 of the 1996 Act, any information collected under the program is kept confidential.

Another commenter stated concern about how difficult it may be to terminate such a program once implemented. This program requires that a referendum be conducted 3 years after implementation and every 7 years thereafter to determine if producers and importers support continuation of the program. The industry may also request a referendum if 10 percent of those covered under the program request it. The Secretary can also suspend or terminate an order or a provision of an order if the Secretary finds that an order or a provision obstructs or does not tend to effectuate the purposes of the Act.

Other Issues

Some commenters raised constitutionality concerns. One commenter raised concerns about a perceived unequal burden of taxation. The commenter suggested that the exemption provision could affect producers that produce 500 trees or less because this creates unequal taxation treatment of Christmas tree producers. However, the assessment provided for in this type of program is not a tax nor does it yield revenue for the Federal government. These producer and importers funds raised by producers and importers are for the benefit of producers and importers.

The commenter also stated that some Texas producers were not in favor of the proposed Order, that Texas is a sovereign State, and therefore Texas Christmas tree producers should not be included in the Order. The 1996 Act

provides that programs under the Act would be applicable to agricultural commodities produced in the United States, which is defined as collectively the 50 States, the District of Columbia, the Commonwealth of Puerto Rico and the territories and possessions of the United States.

Another commenter in opposition raised concerns that the proposed Order may violate the Establishment Clause. The commenter stated that government speech cannot advocate religion or religious symbols.

USDA considers Christmas trees to be an agricultural commodity which is reported as such in various USDA crop reports and statistical data reports (*e.g.* 2007 Census of Agriculture, National Agricultural Statistics Service). The Act in section 512 provides for the establishment of generic promotion, research and information activities for agricultural commodities, including Christmas trees.

Another commenter in opposition concluded that the rule would fall outside the purpose of the 1996 Act by favoring one domestic industry-Christmas tree farming-to the detriment of another domestic industry-artificial tree manufacturing. The 1996 Act was developed to provide agricultural industries with a way to develop and expand markets of agricultural commodities. Promoting fresh cut Christmas trees is within the scope of the 1996 Act.

Another commenter stated that the proposed rule should be withdrawn as it was an inappropriate use of government power citing free markets, limited government, and individual freedom. The Proposed program was presented to the Department by an industry wide group of producers and importers who requested that such an industry-funded program be implemented. USDA has concluded that a research and promotion program for fresh cut Christmas trees is within the scope of its authority under the 1996 Act, and therefore is establishing this industry supported program.

Another comment in opposition stated concern that the Board makeup unfairly represents big business by its geographic areas and trees produced. USDA believes that the geographical representation proposed by the proponent group fairly divides the U.S. production and imports of Christmas trees. It is USDA policy that the Board consider for nomination, the diversity of the population served and the knowledge, skills, and abilities of the members to serve a diverse population, size of the operations, methods of production and distribution, and other distinguishing factors to ensure that the Board represents the diverse interest of persons responsible for paying assessments, and others in the marketing chain. USDA also makes sure that the geographical distribution of members closely reflects the distribution of the production.

After consideration of all relevant materials presented, including the proposal and comments received, the USDA has determined that this Order is consistent with and will effectuate the purposes of the 1996 Act.

It is found that good cause exist for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** (5 U.S.C. 553) because given that the collection and remittance of assessments begin as soon as possible, the initial Board should be appointed expeditiously in order to carry out the purposes of the Order.

List of Subjects in 7 CFR Part 1214

Administrative practice and procedure, Advertising, Consumer information, Marketing agreements, Christmas trees promotion, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, Title 7, Chapter XI of the Code of Federal Regulations is amended by adding part 1214 to read as follows:

PART 1214—CHRISTMAS TREE PROMOTION, RESEARCH, AND INFORMATION ORDER

Subpart A—Christmas Tree Promotion, Research, and Information Order

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Christmas Tree Promotion Board

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Subpart B—[Reserved]

Authority: 7 U.S.C. 7411–7425; 7 U.S.C. 7401.

Subpart A—Christmas Tree Promotion, Research, and Information Order

Definitions

§ 1214.1 Act.

Act means the Commodity Promotion, Research, and Information Act of 1996 (7 U.S.C. 7411–7425), and any amendments thereto.

§ 1214.2 Board.

Board or the Christmas Tree Promotion Board means the administrative body established pursuant to § 1214.40.

§ 1214.3 Christmas tree.

Christmas tree means any tree of the coniferous species, that is severed or cut from its roots and marketed as a Christmas tree for holiday use.

§ 1214.4 Conflict of interest.

Conflict of interest means a situation in which a member or employee of the Board has a direct or indirect financial interest in a person who performs a service for, or enters into a contract with, the Board for anything of economic value.

§ 1214.5 Crop year.

Crop year means the period August 1 through July 31.

§ 1214.6 Customs or CBP.

Customs or CBP means the United States Customs and Border Protection or U.S. Customs Service, an agency of the United States Department of Homeland Security.

§ 1214.7 Department.

Department means the United States Department of Agriculture or any officer or employee of the Department to whom authority has heretofore been delegated, or to whom authority may hereafter be delegated, to act in the Secretary's stead.

§ 1214.8 Fiscal period.

Fiscal period means the period August 1 through July 31.

§ 1214.9 Importer.

Importer means any person importing Christmas trees into the United States in a fiscal period as a principal or as an agent, broker, or consignee of any person who domestically produces Christmas trees outside of the United States for sale in the United States, and who is listed in the import records as the importer of record for such Christmas trees.

§ 1214.10 Information.

Information means information, program, and activities that are designed to increase efficiency in processing, enhance the development of new markets and marketing strategies, increase market efficiency, and enhance the image of Christmas trees and the Christmas tree industry in the United States.

§ 1214.11 Marketing.

Marketing means to sell or otherwise dispose of Christmas trees in interstate, foreign or intrastate commerce.

§ 1214.12 Order.

Order means an order issued by the Secretary under section 514 of the Act that provides for a program of generic promotion, research, and information regarding agricultural commodities authorized under the Act.

§ 1214.13 Part and subpart.

Part means the Christmas Tree Promotion, Research, and Information Order and all rules, regulations, and supplemental orders issued pursuant to the Act and the Order. The Order shall be a subpart of such part.

§ 1214.14 Person.

Person means any individual, group of individuals, partnership, corporation, association, cooperative, or any other legal entity.

§ 1214.15 Programs, plans and projects.

Programs, plans and projects mean those research, promotion and information programs, plans, or projects established pursuant to this Order.

§ 1214.16 Produce.

Produce means to engage in the cutting and selling of Christmas trees for the holiday market.

§ 1214.17 Producer.

Producer means any person who is engaged in the production of Christmas trees in the United States, and who owns, or shares the ownership and risk of loss of the production of Christmas trees or a person who is engaged in the business of producing, or causing to be domestically produced, Christmas trees beyond personal use and having value at first point of sale.

§ 1214.18 Promotion.

Promotion means any action, including paid advertising and public relations that presents a favorable image of Christmas trees to the general public with the intent of improving the perception and competitive position of Christmas trees and stimulating sales of Christmas trees.

§ 1214.19 Research.

Research means any type of test, systematic study, study, investigation, analysis and/or evaluation designed to advance the image, desirability, use, marketability, quality, product development, or production of Christmas trees, including but not limited to research related to cost of production, market development, testing the effectiveness of market development and promotional efforts, new species of Christmas trees and environmental issues relating to the Christmas tree industry.

§ 1214.20 Secretary.

Secretary means the Secretary of Agriculture of the United States, or any officer or employee of the Department to whom authority has been delegated, or to whom authority may be delegated, to act in the Secretary's stead.

§ 1214.21 State.

State means any of the several 50 States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possessions of the United States.

§ 1214.22 Suspend.

Suspend means to issue a rule under section 553 of title 5 U.S.C. to temporarily prevent the operation of an order or part thereof during a particular period of time specified in the rule.

§ 1214.23 Terminate.

Terminate means to issue a rule under section 553 of title 5 U.S.C. to cancel permanently the operation of an order or part thereof beginning on a certain date specified in the rule.

§ 1214.24 United States.

United States means collectively the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possessions of the United States.

Christmas Tree Promotion Board

§ 1214.40 Establishment and membership.

(a) *Establishment of the Christmas Tree Promotion Board.* There is hereby established a Christmas Tree Promotion Board, composed of no more than twelve (12) members as follows:

(1) Producer members from each of the following regions:

(i) Five producer members from Region #1—Western Region (states from the Pacific Ocean east to the Rocky Mountains): Alaska, Arizona, California, Colorado, Hawaii, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, Wyoming and all U.S. Territories located in the Pacific Ocean.

(ii) Two producer members from Region #2—Central Region (states east of the Rocky Mountains to the Great Lakes): Arkansas, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, Oklahoma, South Dakota, Texas, and Wisconsin.

(iii) Four producer members from Region #3—Eastern Region (states east of the Great Lakes): Alabama, Connecticut, Delaware, Florida, Georgia, Kentucky, Louisiana, New York, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, North Carolina, Pennsylvania, Rhode Island, South Carolina, Tennessee, Virginia, Vermont, Washington, DC, West Virginia, and all U.S. Territories located in the Atlantic Ocean and Caribbean Sea, including but not limited to Puerto Rico.

(2) One Importer member.

(b) *Adjustment of membership.* At least once every five years upon implementation of the Order, but not more frequently than once every three years, the Board will review the geographic distribution of United States production of Christmas trees and the quantity and source of Christmas tree imports. The review will be conducted through State crop production figures and Board assessment records,

including the amount of assessments collected from importers, or other government data. If warranted, the Board will recommend to the Secretary that membership on the Board be altered to reflect any changes in geographic distribution of domestic Christmas tree production and the quantity of imports. *Provided,* that there shall be at least one importer member on the Board. Such adjustments shall not increase the total number of Board members. The adjustments to the Board membership would be submitted to the Secretary by Board recommendation and be implemented by the Secretary through rulemaking.

§ 1214.41 Nominations and appointments.

(a) Voting for producer members will be made by mail ballot, electronic mail, in person, or by facsimile.

(b) Nominations for the initial Board will be conducted by the Department. Subsequent nominations will be conducted by the Board.

(c) The Board shall outreach to all segments of the Christmas tree industry and solicit nominations as described in paragraphs (d) and (e) of this section. Nominees must domestically produce or import more than 500 Christmas trees during the most recent fiscal period.

(d) Nomination of producer members will be conducted by the Board. The Board staff will seek nominations for each vacant producer seat from each region from producers who have paid their assessments to the Board in the most recent fiscal period. Producers who produce Christmas trees in more than one region may seek nomination only in the region in which they produce the majority of their Christmas trees. For selection to the initial Board, the Secretary will notify producers to request nominations to the Board. Subsequent nominations will be submitted to the Board office and placed on a ballot that will be sent to producers in each region for a vote. Producers who produce Christmas trees in more than one region may only vote in the region in which they produce the majority of their Christmas trees. The nominee receiving the highest number of votes and the nominee receiving the second highest number of votes shall be submitted to the Department as the producers' first and second choice nominees. The Board shall submit nominations to the Secretary not less than 90 days prior to the expiration of the term of office.

(e) Nominations for the importer member(s) will be conducted by the Board. The Board will solicit importer nominations from those importers who have paid their assessments to the Board in the most recent fiscal period. For selection to the initial Board, the Secretary will notify importers to request nominations to the Board. Subsequent nominations will be submitted to the Board office and placed on a ballot that will be sent to importers for a vote. The Board shall submit those nominations to the Secretary not less than 90 days prior to the expiration of the term of office. Two nominees for each importer position will be submitted to the Secretary for consideration.

(f) From the nominations, the Secretary shall select the members of the Board for each position on the Board. Members will serve until their successors have been appointed by the Secretary.

§ 1214.42 Term of office.

Board members will serve for a term of three years and be able to serve a maximum of two consecutive three-year terms. When the Board is first established, the members will be assigned initial terms of two, three, and four years. Initial terms will be staggered to assure continuity of the Board. The term of office will begin on January 1 and conclude on December 31. Members serving the initial term of two and four years will be eligible to serve a second term of three-years. Thereafter, each of the positions will carry a full three-year term. Board members shall serve during the term of office for which they have been appointed and qualified, and until their successors are appointed and have qualified.

§ 1214.43 Vacancies.

(a) In the event that any member of the Board ceases to be a member of the category of membership from which the member was appointed to the Board, such position shall automatically become vacant.

(b) If a member of the Board consistently refuses to perform the duties of a member of the Board, or if a member of the Board engages in acts of dishonesty or willful misconduct, the Board may recommend to the Secretary that the member be removed from office. If the Secretary finds the recommendation of the Board shows adequate cause, the Secretary may remove such member from office. Further, without recommendation of the Board, a member may be removed by the Secretary upon showing of adequate cause, including the failure by a member to submit reports or remit assessments required under this part, if the Secretary determines that such member's continued service would be detrimental to the achievement of the purposes of the Act.

(c) Should any member position become vacant, successors for the unexpired terms of such member shall be appointed in the manner specified in § 1214.41. A vacancy will not be required to be filled if the unexpired term is less than six months.

§ 1214.44 Procedure.

(a) At a Board meeting, it will be considered a quorum when a majority of the Board members is present.

(b) All Board members will receive a minimum of 14 days advance notice of all Board and committee meetings, except when emergency circumstances exist and meetings need to be held prior to the advance notice.

(c) Each member of the Board will be entitled to one vote on any matter put to the Board. For any action of the Board to pass, at least a majority of the Board members present must vote in support of such action.

(d) The Board may appoint committees as necessary. It will be considered a quorum at a committee meeting when at least a majority of those appointed to the committee are present. Committees may consist of persons other than Board members, and such persons may vote in committee meetings as the Board shall determine. These committee members shall serve without compensation, but shall be reimbursed for reasonable travel expenses, as approved by the Board.

(e) In lieu of voting at a properly convened meeting, and when, in the opinion of the Board's chairperson, such action is considered necessary, the Board may take action by mail, telephone, electronic mail, facsimile, or any other means of communication. Any action taken under this procedure is valid only if:

(1) All members and the Secretary are notified and the members are provided the opportunity to vote;

(2) A majority of the members vote in favor of the action; and

(3) All votes are promptly confirmed in writing and recorded in the Board minutes.

(f) There shall be no voting by proxy.

(g) The chairperson shall be a voting member.

§ 1214.45 Compensation and reimbursement.

The members of the Board shall serve without compensation but shall be reimbursed for reasonable travel expenses, as approved by the Board, incurred by them in the performance of their duties as Board members.

§ 1214.46 Powers and duties.

The Board shall have the following powers and duties:

(a) To administer the Order in accordance with its terms and conditions and to collect assessments;

(b) To develop and recommend to the Secretary for approval such bylaws as may be necessary for the functioning of the Board, and such rules as may be necessary to administer the Order, including activities authorized to be carried out under the Order;

(c) To meet, organize, and select from among the members of the Board a chairperson, other officers, committees, and subcommittees, as the Board determines to be appropriate, provided that the committee and subcommittee members may also include individuals other than Board members;

(d) To notify producers and importers of all Board meetings through press releases or other means;

(e) To give the Secretary the same notice of meetings of the Board and committees as is given to members, including committee members if committee members are not members of the Board, in order that the Secretary's representative(s) may attend such meetings, and to keep and report minutes of each meeting of the Board and all committees to the Secretary;

(f) To appoint and convene, from time to time, committees that may include importers, exporters, producers or other members of the Christmas tree industry and public to assist in the development of research, promotion, advertising, and information programs for Christmas trees;

(g) To employ persons, other than members, as the Board considers necessary to assist the Board in carrying out its duties and to determine the compensation and specify the duties of such persons;

(h) To act as an intermediary between the Secretary and any producer or importer;

(i) To furnish to the Secretary any information or records that the Secretary may request;

(j) To receive, investigate, and report to the Secretary complaints of violations of the Order;

(k) To maintain such records and books and prepare and submit such reports and records from time to time to the Secretary as the Secretary may require and to make the records available to the Secretary for inspection and audit; to make appropriate accounting with respect to the receipt and disbursement of all funds entrusted to it; and to keep records that accurately reflect the actions and transactions of the Board;

(l) To recommend to the Secretary such amendments to the Order as the Board considers appropriate;

(m) To develop and carry out generic promotion, research, and information activities relating to Christmas trees;

(n) To work to achieve an effective, continuous, and coordinated program of promotion, research, evaluation, and information designed to strengthen the Christmas tree industry's position in the marketplace; maintain and expand existing markets for Christmas trees; and to carry out programs, plans, and projects designed to provide maximum benefits to the Christmas tree industry;

(o) To develop programs, plans, and projects, and enter into contracts or agreements, which must be approved by the Secretary before becoming effective, for the development and carrying out of programs or projects of research, information, or promotion, and the payment of costs thereof with funds collected pursuant to this subpart. Each contract or agreement shall provide that any person who enters into a contract or agreement with the Board shall develop and submit to the Board a proposed activity; keep accurate records of all of its transactions relating to the contract or agreement; account for funds received and expended in connection with the contract or agreement; make periodic reports to the Board of activities conducted under the contract or agreement; and make such other reports available as the Board or the Secretary considers necessary. Any contract or agreement shall provide that:

(1) The contractor or agreeing party shall develop and submit to the Board a program, plan, or project together with a budget or budgets that shall show the estimated cost to be incurred for such program, plan, or project;

(2) The contractor or agreeing party shall keep accurate records of all its transactions and make periodic reports to the Board of activities conducted, submit accounting for funds received and expended, and make such other reports as the Secretary or the Board may require;

(3) The Secretary may audit the records of the contracting or agreeing party periodically; and

(4) Any subcontractor who enters into a contract with a Board contractor and who receives or otherwise uses funds allocated by the Board shall be subject to the same provisions as the contractor;

(p) To prepare and submit for approval of the Secretary, within 60 days after assessments are due to the Board, rates of assessment and a fiscal period budget of the anticipated expenses to be incurred in the administration of the Order, in accordance with § 1214.50;

(q) To borrow funds necessary for the startup expenses of the order;

(r) To invest assessments collected under this part in accordance with § 1214.50;

(s) To pay the cost of the activities with assessments collected under § 1214.52;

(t) To recommend adjustments to the assessments as provided in § 1214.52;

(u) To periodically prepare, make public and to make available to producers and importers, reports of its activities and, at least once each fiscal period, to make public an accounting of funds received and expended; and

(v) To cause its books to be audited by an independent certified public accountant at the end of each fiscal period and at such other times as the Secretary may request, and to submit a report of the audit directly to the Secretary.

§ 1214.47 Prohibited activities.

The Board may not engage in, and shall prohibit the employees and agents of the Board from engaging in:

(a) Any action that would be a conflict of interest;

(b) Using funds collected by the Board under the Order to undertake any action for the purpose of influencing legislation or governmental action or policy, by local, state, national, and foreign governments or any subdivision thereof, other than recommending to the Secretary amendments to the Order; and

(c) No program, plan, or project including advertising shall be false or misleading or disparaging to another agricultural commodity. Christmas trees of all origins shall be treated equally.

Expenses and Assessments

§ 1214.50 Budget and expenses.

(a) Within 60 days after assessments are due to the Board, and as may be necessary thereafter, the Board shall prepare and submit to the Secretary a budget for the fiscal period covering its anticipated expenses and disbursements in administering this part. Each budget shall include:

(1) A statement of objectives and strategy for each program, plan, or project;

(2) A summary of anticipated revenue, with comparative data or at least one preceding year, except for the initial budget;

(3) A summary of proposed expenditures for each program, plan, or project; and

(4) Staff and administrative expense breakdowns, with comparative data for

at least one preceding year, except for the initial budget.

(b) Each budget shall provide adequate funds to defray its proposed expenditures and to provide for a reserve as set forth in this part.

(c) Subject to this section, any amendment or addition to an approved budget must be approved by the Secretary, including shifting funds from one program, plan, or project to another.

(d) The Board is authorized to incur such expenses, including provision for a reserve, as the Secretary finds are reasonable and likely to be incurred by the Board for its maintenance and functioning, and to enable it to exercise its powers and perform its duties in accordance with the provisions of this part. Such expenses shall be paid from funds received by the Board.

(e) With approval of the Secretary, the Board may borrow money for the payment of administrative expenses, subject to the same fiscal, budget, and audit controls as other funds of the Board. Any such funds borrowed by the Board shall be expended for startup costs and are limited to the first year of operation of the Board.

(f) The Board may accept voluntary contributions, but these shall only be used to pay expenses incurred in the conduct of programs, plans, and projects approved by the Secretary. Such contributions shall be free from any encumbrance by the donor and the Board shall retain complete control of their use.

(g) In accordance with § 1214.54, the Board shall deposit funds in a refund escrow account and shall not use such funds for expenses, except as provided for in that section.

(h) The Board may also receive funds provided through the Department's Foreign Agricultural Service or from other sources, with the approval of the Secretary, for authorized activities.

(i) The Board shall reimburse the Secretary for all expenses incurred by the Secretary in the implementation, administration, enforcement, and supervision of the Order, including all referendum costs in connection with the Order.

(j) For fiscal years beginning 3 or more years after the date of the establishment of the Board, the Board may not expend for administration, maintenance, and functioning of the Board in a fiscal year an amount that exceeds 10 percent of the assessment and other income received by the Board. Reimbursements to the Secretary required under paragraph (i) of this section are excluded from this limitation on spending.

(k) The Board may establish an operating monetary reserve and may carry over to subsequent fiscal periods excess funds in any reserve so established: *Provided:* That, the funds in the reserve do not exceed one fiscal period's budget of expenses. Subject to approval by the Secretary, such reserve funds may be used to defray any expenses authorized under this part.

(l) Pending disbursement of assessments and all other revenue under a budget approved by the Secretary, the Board may invest assessments and all other revenues collected under this section in:

(1) Obligations of the United States or any agency of the United States;

(2) General obligations of any State or any political subdivision of a State;

(3) Interest bearing accounts or certificates of deposit of financial institutions that are members of the Federal Reserve System; or

(4) Obligations fully guaranteed as to principal interest by the United States.

§ 1214.51 Financial statements.

(a) The Board shall prepare and submit quarterly financial statements to the Secretary, or at any other time requested by the Secretary. Each such financial statement shall include, but not be limited to, a balance sheet, income statement, and expense budget. The expense budget shall show expenditures during the time period covered by the report, year-to-date expenditures, and the unexpended budget.

(b) Each financial statement shall be submitted to the Secretary within 45 days after the end of the time period to which it applies.

(c) The Board shall submit annually to the Secretary an annual financial statement within 90 days after the end of the fiscal period to which it applies.

§ 1214.52 Assessments.

(a) The funds to cover the Board's expenses shall be paid from assessments on producers, importers, and donations from any person including those not subject to assessments under this Order, and other funds available to the Board including those collected pursuant to § 1214.62 and subject to the limitations contained therein.

(b) The payment of assessments on domestic Christmas trees that are cut and sold will be the responsibility of the producer who produces the Christmas trees or causes the trees to be cut.

(c) Each importer of Christmas trees shall pay the assessment to the Board on Christmas trees imported for marketing in the United States, through Customs. If Customs does not collect an assessment from an importer, the importer will be responsible for paying the assessment directly to the Board 30 calendar days after importation.

(1) The assessment rate for imported Christmas trees shall be the same or equivalent to the rate for Christmas trees domestically produced in the United States.

(2) The import assessment shall be uniformly applied to imported Christmas trees that are identified by the numbers 0604.91.00.20, 0604.91.00.40, and 0604.91.00.60 in the Harmonized Tariff Schedule of the United States or any other numbers used to identify Christmas trees in that schedule.

(3) The assessments due on imported Christmas trees shall be paid when they enter into the United States.

(d) Such assessments shall be levied at an initial rate of 15 cents per Christmas tree domestically produced or imported into the United States. The assessment rate will be reviewed by the Board, after the initial referendum is conducted pursuant to this subpart. The assessment rate may be increased or decreased no more than 2 cents per Christmas tree during the fiscal period. Any change in the assessment rate shall be subject to rulemaking by the Department. The assessment rate shall not exceed 20 cents per Christmas tree, nor shall it be less than 10 cents per Christmas tree, unless a majority of producers and importers approve such other levels of assessment through a referendum conducted pursuant to this subpart.

(e) All assessment payments and reports will be submitted to the office of the Board. All assessment payments are to be received no later than February 15 of the crop year in which they are produced or imported. A late payment charge, may be imposed on any producer or importer who fails to remit to the Board, the total amount for which any such producer or importer is liable on or before the due date established by the Board. In addition to the late payment charge, an interest charge may be imposed on the outstanding amount for which the producer or importer is liable. The rate for late payment and interest charges shall be specified by the Secretary through rulemaking.

(f) Persons failing to remit total assessments due in a timely manner may also be subject to actions under federal debt collection procedures.

(g) The Board may authorize other organizations to collect assessments on its behalf with the approval of the Secretary.

§ 1214.53 Exemption from and refunds of assessments.

(a) *Producers that domestically produce and importers that import less than 500 Christmas trees.*

(1) Any producer who domestically produces less than 500 Christmas trees who desires to claim an exemption from assessments as provided in § 1214.52 shall file an application on a form provided by the Board, for a certificate of exemption. Such producer shall certify that he/she will domestically produce less than 500 trees for the fiscal period for which the exemption is claimed. It is the responsibility of the producer to retain a copy of the certificate of exemption.

(2) Any importer who imports less than 500 trees in a fiscal period who desires to claim an exemption from assessments as provided in § 1214.52 shall file an application on a form provided by the Board, for a certificate of exemption. Such importer shall certify that the importer's total imports of Christmas trees are fewer than 500 trees for the fiscal period for which the exemption is claimed. It is the responsibility of the importer to retain a copy of the certificate of exemption.

(3) On receipt of an exemption application, the Board shall determine whether an exemption may be granted. The Board will then issue, if deemed appropriate, a certificate of exemption to the producer or importer which is eligible to receive one.

(4) The Board, with the Secretary's approval, may require persons receiving an exemption from assessments to provide to the Board reports on the disposition of exempt Christmas trees and, in the case of importers, proof of payment of assessments.

(5) The exemption will apply immediately following the issuance of the certificate of exemption.

(6) Producers and importers who received an exemption certificate from the Board but domestically produced or imported more than 500 Christmas trees during the fiscal period shall pay the Board the applicable assessments owed and submit any necessary reports to the Board pursuant to § 1214.70.

(7) Producers and importers who did not apply to the Board for an exemption and domestically produced or imported less than 500 Christmas trees during the fiscal period shall receive a refund from the Board for the applicable assessments within 30 calendar days after the end of the fiscal year. Board staff shall determine the assessments paid and refund the amount due to the producers and importers accordingly.

(8) The Board may develop additional procedures as it deems necessary for accurately accounting for this exemption. Such procedures shall be implemented through rulemaking by the Secretary.

(b) *Assessment refunds to importers.* (1) Importers who are exempt from assessment shall be eligible for a refund of assessments collected by Customs during the applicable fiscal period. No interest will be paid on assessments collected by Customs. The Board shall refund such importers their assessments as collected by Customs no later than 60 calendar days after receipt by the Board.

(c) *Organic.* (1) Organic Act means section 2103 of the Organic Foods Production Act of 1990 (7 U.S.C. 6502).

(2) A producer who domestically produces Christmas trees under an approved National Organic Program (NOP) (7 CFR part 205) system plan, produces only products that are eligible to be labeled as 100 percent organic under the NOP and is not a split operation shall be exempt from payment of assessments. To obtain an organic exemption, an eligible producer shall submit a request for exemption to the Board, on a form provided by the Board, at any time initially and annually thereafter on or before the start of the fiscal period as long as such producer continues to be eligible for the exemption. The request shall include the following: The producer's name and address; a copy of the organic operation certificate provided by a USDA-accredited certifying agent as defined in the Organic Act, a signed certification that the applicant meets all of the requirements specified for an assessment exemption, and such other information as may be required by the Board and with the approval of the Secretary. The Board shall have 30 calendar days to approve the exemption request. If the exemption is not granted, the Board will notify the applicant and provide reasons for the denial within the same time frame.

(3) An importer who imports only Christmas trees that are eligible to be labeled as 100 percent organic under the NOP and is not a split operation shall be exempt from the payment of assessments. To obtain an organic exemption, an eligible importer must submit documentation to the Board and request an exemption from assessment on 100 percent of organic Christmas trees, on a form provided by the Board, at any time initially and annually thereafter on or before the beginning of the fiscal period as long as the importer continues to be eligible for the exemption. This documentation shall include the same information as required by producers in paragraph (c)(2) of this section. If the importer complies with the requirements of this section, the Board will grant the exemption and issue a Certificate of Exemption to the importer. The Board will also issue the importer a 9-digit alphanumeric number of the United States classification valid for 1 year from the date of issue. This alphanumeric number should be entered by the importer on the Customs entry documentation. Any line item entry of 100 percent organic Christmas trees bearing this alphanumeric number assigned by the Board will not be subject to assessments.

(4) Importers who are exempt from assessment in paragraph (c)(3) of this section shall also be eligible for reimbursement of assessments collected by Customs and may apply to the Board for a reimbursement. The importer would be required to submit satisfactory proof to the Board that the importer paid the assessment on exempt organic products.

(5) The exemption will apply immediately following the issuance of the exemption certificate.

§ 1214.54 Refund escrow accounts.

(a) The Board shall establish an interest bearing escrow account with a financial institution that is a member of the Federal Reserve System and will deposit into such account an amount equal to 10 percent of the assessments collected during the period beginning on the effective date of the Order and ending on the date the Secretary announces the results of the required referendum.

(b) If the Order is not approved by the required referendum, the Board shall promptly pay refunds of assessments to all producers and importers that have paid assessments during the period beginning on the effective date of the Order and ending on the date the Secretary announces the results of the required referendum in the manner specified in paragraph (c) of this section.

(c) If the amount deposited in the escrow account is less than the amount of all refunds that producers and importers subject to the Order have a right to receive, the Board shall prorate the amount deposited in such account among all producers and importers who desire a refund of assessments paid no later than 90 days after the required referendum results are announced by the Secretary.

(d) Any producer or importer requesting a refund shall submit an application on the prescribed form to the Board within 30 days after the announcement of the referendum results of their request for a refund of the

assessments that they paid. The producers and importer requesting a refund shall also submit documentation to substantiate that assessments were paid. Any such demand shall be made by such producer or importer in accordance with the provisions of this subpart and in a manner consistent with regulations recommended by the Board and prescribed by the Secretary.

(e) If the Order is approved by the required referendum conducted under § 1214.71 then:

(1) The escrow account shall be closed; and,

(2) The funds shall be available to the Board for disbursement under § 1214.50.

Promotion, Research and Information

§ 1214.60 Programs, plans, and projects.

(a) The Board shall receive and evaluate, or on its own initiative, develop and submit to the Secretary for approval any program, plan, or project authorized under this subpart. Such programs, plans, or projects shall provide for:

(1) The establishment, issuance, effectuation, and administration of appropriate programs for promotion, research, and information, including producer and consumer industry information, with respect to Christmas trees;

(2) The establishment and conduct of research with respect to the image, desirability, use, marketability, quality, product development or production of Christmas trees, to the end that the marketing and use of Christmas trees may be encouraged, expanded, improved, or made more acceptable and to advance the image, desirability, or quality of Christmas trees.

(b) A program, plan, or project may not be implemented prior to approval of the program, plan, or project by the Secretary. Once a program, plan, or project is so approved, the Board shall take appropriate steps to implement it.

(c) Each program, plan, or project implemented under this subpart shall be reviewed or evaluated periodically by the Board to ensure that it contributes to an effective program of promotion, research, or information. If it is found by the Board that any such program, plan, or project does not contribute to an effective program of promotion, research, or information, then the Board shall terminate such program, plan, or project.

§ 1214.61 Independent evaluation.

The Board shall, not less often than once every five years, authorize and fund, from funds otherwise available to the Board, an independent evaluation of the effectiveness of the Order and programs conducted by the Board pursuant to the Act. The Board shall submit to the Secretary, and make available to the public, the results of each periodic independent evaluation conducted under this paragraph.

§ 1214.62 Patents, copyrights, trademarks, information, publications, and product formulations.

Patents, copyrights, trademarks, information, publications, and product formulations developed through the use of funds received by the Board under this subpart shall be the property of the U.S. Government as represented by the Board and shall, along with any rents, royalties, residual payments, or other income from the rental, sales, leasing, franchising, or other uses of such patents, copyrights, trademarks, information, publications, or product formulations, inure to the benefit of the Board, shall be considered income subject to the same fiscal, budget, and audit controls as other funds of the Board, and may be licensed subject to approval by the Secretary. Upon termination of this subpart, § 1214.83 shall apply to determine disposition of all such property.

Reports, Books, and Records

§ 1214.70 Reports.

(a) Each producer and importer subject to this subpart shall be required to provide to the Board periodically such information as required by the Board, with the approval of the Secretary, which may include but not be limited to the following:

(1) Number of trees produced or total imports;

(2) Number of Christmas trees on which an assessment was paid;

(3) Name and address of producer or importer; and

(4) Date assessment was paid on each Christmas tree produced or imported.

(b) All reports required under § 1214.70 are due to the Board by February 15 of the crop year.

(c) This report shall accompany the payment of the collected assessments.

§ 1214.71 Books and records.

Each producer and importer subject to this subpart, including those who are exempt under this subpart, shall maintain any books and records necessary to carry out the provisions of this subpart and the regulations issued thereunder, including such records as are necessary to verify any reports required. Such books and records must be made available during normal business hours for inspection by the Board's or Secretary's employees or agents. Such records shall be retained for at least two years beyond the fiscal period of their applicability.

§ 1214.72 Confidential treatment.

All information obtained from books, records, or reports under the Act, this subpart, and the regulations issued thereunder shall be kept confidential by all persons, including all employees and former employees of the Board, all officers and employees and former officers and employees of contracting and subcontracting agencies or agreeing parties having access to such information. Such information shall not be available to Board members, producers, or importers. Only those persons having a specific need for such information to effectively administer the provisions of this subpart shall have access to such information. Only such information so obtained as the Secretary deems relevant shall be disclosed by them, and then only in a judicial proceeding or administrative hearing brought at the direction, or on the request, of the Secretary, or to which the Secretary or any officer of the United States is a party, and involving this subpart. Nothing in this section shall be deemed to prohibit:

(a) The issuance of general statements based upon the reports of the number of persons subject to this subpart or statistical data collected therefrom, which statements do not identify the information furnished by any person; and

(b) The publication, by direction of the Secretary, of the name of any person who has been adjudged to have violated this subpart, together with a statement of the particular provisions of this subpart violated by such person.

Miscellaneous

§ 1214.80 Right of the Secretary.

All fiscal matters, programs, plans, or projects, rules or regulations, contracts, reports, or other substantive actions proposed or prepared by the Board shall be submitted to the Secretary for approval.

§ 1214.81 Referenda.

(a) *Required referendum.* For the purpose of ascertaining whether the persons subject to this Order favor the amendment, continuation, suspension, amendment, or termination of this Order, the Secretary shall conduct a referendum among persons subject to assessments under § 1214.52 who, during a representative period determined by the Secretary, have engaged in the production or importation of Christmas trees:

(1) The first referendum shall be conducted not later than 3 years after assessments first begin under the Order;

(2) The order will be approved in a referendum if:

(i) A majority of producers and importers vote for approval in the referendum.

(b) *Subsequent referenda.* The Secretary shall conduct subsequent referenda:

(1) For the purpose of ascertaining whether producers and importers favor the continuation, suspension, or termination of the Order;

(2) Every seven years the Secretary shall hold a referendum to determine whether producers and importers of Christmas trees favor the continuation of the Order. The Order shall continue if it is favored by a majority of producers and importers voting for approval in the referendum who have been engaged in the production or importation of Christmas trees;

(3) At the request of the Board established in this Order;

(4) At the request of 10 percent or more of the number of persons eligible to vote in a referendum as set forth under the Order; or

(5) At any time as determined by the Secretary.

§ 1214.82 Suspension or termination.

(a) The Secretary shall suspend or terminate this part or subpart or a provision thereof, if the Secretary finds that the subpart or a provision thereof obstructs or does not tend to effectuate the purpose of the Act, or if the Secretary determines that this subpart or a provision thereof is not favored by persons voting in a referendum conducted pursuant to the Act.

(b) The Secretary shall suspend or terminate this subpart at the end of the fiscal period whenever the Secretary determines that its suspension or termination is favored by a majority of producers and importers voting in a referenda who, during a representative period determined by the Secretary, have been engaged in the production or importation of Christmas trees.

(c) If, as a result of a referendum the Secretary determines that this subpart is not approved, the Secretary shall:

(1) Not later than one hundred and eighty (180) days after making the determination, suspend or terminate, as the case may be, collection of assessments under this subpart; and

(2) As soon as practical, suspend or terminate, as the case may be, activities under this subpart in an orderly manner.

§ 1214.83 Proceedings after termination.

(a) Upon the termination of this subpart, the Board shall recommend not more than three of its members to the Secretary to serve as trustees for the purpose of liquidating the affairs of the Board. Such persons, upon designation by the Secretary, shall become trustees of all of the funds and property then in the possession or under control of the Board, including claims for any funds unpaid or property not delivered, or any other claim existing at the time of such termination.

(b) The said trustees shall:

(1) Continue in such capacity until discharged by the Secretary;

(2) Carry out the obligations of the Board under any contracts or agreements entered into pursuant to the Order;

(3) From time to time account for all receipts and disbursements and deliver all property on hand, together with all books and records of the Board and the trustees, to such person or persons as the Secretary may direct; and

(4) Upon request of the Secretary execute such assignments or other instruments necessary and appropriate to vest in such persons title and right to all funds, property and claims vested in the Board or the trustees pursuant to the Order.

(c) Any person to whom funds, property or claims have been transferred or delivered pursuant to the Order shall be subject to the same obligations imposed upon the Board and upon the trustees.

(d) Any residual funds not required to defray the necessary expenses of liquidation shall be turned over to the Secretary to be disposed of, to the extent practical, to one or more Christmas tree organizations in the United States in the interest of continuing Christmas tree promotion, research, and information programs.

§ 1214.84 Effect of termination or amendment.

Unless otherwise expressly provided by the Secretary, the termination of this subpart or of any regulation issued pursuant thereto, or the issuance of any amendment to either thereof, shall not:

(a) Affect or waive any right, duty, obligation or liability which shall have arisen or which may thereafter arise in connection with any provision of this subpart or any regulation issued thereunder.

(b) Release or extinguish any violation of this subpart or any regulation issued thereunder.

(c) Affect or impair any rights or remedies of the United States, or of the Secretary or of any other persons, with respect to any such violation.

§ 1214.85 Personal liability.

No member or employee of the Board shall be held personally responsible, either individually or jointly with others, in any way whatsoever, to any person for errors in judgment, mistakes, or other acts, either of commission or omission, as such member or employee, except for acts of dishonesty or willful misconduct.

§ 1214.86 Separability.

If any provision of this subpart is declared invalid or the applicability thereof to any person or circumstances is held invalid, the validity of the remainder of this subpart or the applicability thereof to other persons or circumstances shall not be affected thereby.

§ 1214.87 Amendments.

Amendments to this subpart may be proposed from time to time by the Board or by any interested person affected by the provisions of the Act, including the Secretary.

§ 1214.88 OMB control numbers.

The control number assigned to the information collection requirements by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, is OMB control number 0505–0001, and OMB control number 0581–0267 and 0581–0268.

Subpart B—[Reserved]

Dated: November 1, 2011.

David R. Shipman,

Acting Administrator.

[FR Doc. 2011–28798 Filed 11–7–11; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1214

[Document No. AMS–FV–10–0008–FR]

RIN 0581–AD00

Christmas Tree Promotion, Research, and Information Order; Referendum Procedures

AGENCY: Agricultural Marketing Service, Agriculture, USDA.

ACTION: Final rule.

SUMMARY: This final rule establishes procedures for conducting a referendum to determine whether the continuation

of the Christmas Promotion, Research, and Information Order (Order) is favored by domestic producers and importers of Christmas trees. This program will be implemented under the Commodity Promotion, Research, and Information Act of 1996 (1996 Act). The 1996 Act allows for a referendum to be conducted up to three years after the effective date of the Order. The program will be continued if approved by a simple majority of the current eligible domestic producers and importers voting in the referendum. These procedures will also be used for any subsequent referendum under the Order. The Order is being published separately in this issue of the **Federal Register**.

DATES: *Effective Date:* December 8, 2011.

FOR FURTHER INFORMATION CONTACT: Patricia A. Petrella, Marketing Specialist, Research and Promotion Branch, FV, AMS, USDA, Stop 0244, Room 1406–S, 1400 Independence Avenue SW., Washington, DC 20250–0244; telephone (202) 720–9915 or (888) 720–9917 (toll free) or *email: Patricia.Petrella@ams.usda.gov.*

SUPPLEMENTARY INFORMATION: This rule is issued pursuant to the Commodity Promotion, research, and Information Act of 1996 (1996 Act) (7 U.S.C. 7411–7425).

As part of this rulemaking process, two proposed rules were published in the **Federal Register** on November 8, 2010. One rule pertained to the proposed Order (75 FR 68512) and a second rule pertained to proposed referendum procedures (75 FR 68529). Both rules provided for 60-day comment periods ending on February 7, 2011. No comments were received regarding the referendum procedures. However, the comment period for the proposed order was extended until March 9, 2011 (76 FR 9695). Five hundred and sixty five comments were received regarding the proposed Order. Those comments are addressed in another final rule published earlier in the **Federal Register**.

Executive Order 12866

This rule has been determined to be not significant for purposes of Executive Order 12866 and, therefore, has not been reviewed by the Office of Management and Budget (OMB).

Executive Order 12988

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. It is not intended to have retroactive effect. Section 524 of the 1996 Act provides that the Act shall not affect or preempt any other Federal or State law authorizing promotion or research relating to an agricultural commodity.

Under Section 519 of the 1996 Act, a person subject to an order may file a petition with the Department (USDA) stating that an order, any provision of an order, or any obligation imposed in connection with an order, is not established in accordance with the law. In the petition, the person may request a modification of an order or an exemption from an order. Any petition filed challenging an order, any provision of an order, or any obligation imposed in connection with an order, shall be filed within two years after the effective date of an order, provision or obligation subject to challenge in the petition. The petitioner will have the opportunity for a hearing on the petition. Thereafter, the Department will issue a ruling on the petition. The 1996 Act provides that the district court of the United States for any district in which the petitioner resides or conducts business shall have the jurisdiction to review a final ruling on the petition, if the petitioner files a complaint for that purpose not later than 20 days after the date of entry of the Department's final ruling.

This final rule establishes procedures for conducting a referendum to determine whether the continuation of the Christmas Promotion, Research, and Information Order (Order) is favored by domestic producers and importers of Christmas trees. Domestic producers and importers can vote three years after the establishment of the program to determine if they favor the continuation of the program. This referendum will need to be approved by a simple majority of the eligible domestic producers and importers voting in the referendum. The proponents proposed that a referendum be held among domestic producers and importers three years after the first assessments begin to determine whether they favor continuation of the program. USDA will conduct the referendum. These procedures will also be used for any subsequent referendum under the Order.

The 1996 Act authorizes USDA to establish agricultural commodity research and promotion orders which may include a combination of promotion, research, industry information, and consumer information activities funded by mandatory assessments. These programs are designed to maintain and expand markets and uses for agricultural commodities. As defined under section 513(1)(D) of the 1996 Act, agricultural commodities include the products of forestry, which includes Christmas trees.

The 1996 Act provides for alternatives within the terms of a variety of provisions. Paragraph (e) of section 518 of the 1996 Act provides three options for determining industry approval of a new research and promotion program: (1) By a majority of those persons voting; (2) by persons voting for approval who represent a majority of the volume of the agricultural commodity; or (3) by a majority of those persons voting for approval who also represent a majority of the volume of the agricultural commodity. In addition, section 518 of the 1996 Act provides for referenda to ascertain approval of an order to be conducted either prior to its going into effect or within three years after assessments first begin under an order.

USDA received a proposal for a national research and promotion program for Christmas trees from the Christmas Tree Checkoff Task Force (Task Force). The program will be financed by an assessment on Christmas trees domestic producers and importers and would be administered by a board of industry members selected by the Secretary of Agriculture (Secretary). The initial assessment rate will be $0.15 per Christmas tree domestically produced or imported into the United States and could be increased up to $0.20 per Christmas tree. The purpose of the program will be to strengthen the position of fresh cut Christmas trees in the marketplace and maintain and expand markets for Christmas trees within the United States.

The Task Force proposed that a referendum be held among domestic producers and importers three years after the first assessments begin to determine whether they favor continuation of the program. The Task Force recommended that the program be continued if it is favored by a majority of the current domestic producers and importers voting in the referendum. Current domestic producers or importers who domestically produce or import more than 500 Christmas trees annually will be eligible to vote in the referendum.

Accordingly, this rule will add subpart B to part 1214 that will establish procedures for conducting the referendum. The procedures will cover definitions, voting instructions, use of subagents, ballots, the referendum report, and confidentiality of information. The procedures will be applicable for the initial referendum and future referenda.

Final Regulatory Flexibility Act Analysis

In accordance with the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612), AMS is required to examine the impact of the final rule on small entities. Accordingly, AMS has considered the economic impact of this action on small entities.

The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions so that small businesses will not be disproportionately burdened. The Small Business Administration defines, in 13 CFR part 121, small agricultural producers as those having annual receipts of no more than $750,000 and small agricultural service firms (domestic manufacturers and importers) as those having annual receipts of no more than $7.0 million.

Under these criteria, the majority of the domestic producers that would be covered under this Order will be considered small entities, while most importers will not. Domestic producers and importers who produced or imported less than 500 Christmas trees annually will be exempt from the assessment. Organic domestic producers and importers are also expected to be exempt from assessments. The number of entities assessed under the program would be approximately 3,263. Estimated revenue is expected at $2 million of which 10 percent is expected from imported product and 90 percent from domestic product.

According to the Task Force, based on data from the 2007 Census of Agriculture, there were approximately 12,255 Christmas tree farms that produced Christmas trees in the United States. Approximately 25 percent of the domestic producers or 3,100 Christmas tree domestic producers will be subject to the assessment based on the exemption of those producing less than 500 Christmas trees would be exempt from assessments. Approximately 95 percent of the domestic producers subject to the assessment qualified under the definition for small business owners. In 2008, there were approximately 175 importers. Based on the U.S. Customs data, 163 importers are subject to the assessment rate under the proposed Order.

This rule establishes procedures for conducting a referendum to determine whether domestic producers and importers favor continuation of a Christmas tree Order. USDA will conduct the referendum. The 1996 Act allows for a referendum to be conducted determining if domestic producers and importers favor the Order and also providing that a referendum be conducted up to three years after the effective date of the Proposed Order. Domestic producers and importers can vote three years after the establishment of the program to determine if they favor the continuation of the program. The procedures will also be used for any subsequent referendum under the Order. The procedures are authorized under paragraph (e) of section 518 the 1996 Act.

Regarding the economic impact of the Order on affected entities, domestic producers and importers of more than 500 Christmas trees annually will be required to pay assessments to the Board. As previously mentioned, the initial assessment rate will be $0.15 per Christmas tree domestically produced or imported to the United States and could be increased to no more than $0.20 per Christmas tree. Voting in the referendum is optional. If current domestic producers and importers chose to vote, the burden of voting would be offset by the benefits of having the opportunity to vote on whether or not they want the program to become effective.

Regarding alternatives, USDA considered requiring eligible voters to vote in person at various USDA offices across the country. Conducting the referendum from one central location by mail ballot will be more cost effective and reliable. USDA will provide easy access to information for potential voters through a toll free telephone line.

This action imposes an additional reporting burden on eligible domestic producers and importers of Christmas trees. Current eligible domestic producers and importers will have the opportunity to complete and submit a ballot to USDA indicating whether or not they favor continuation of the Order. The specific burden for the ballot is detailed later in this document in the section titled Paperwork Reduction Act. As with all Federal promotion programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. Finally, USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

AMS is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

Regarding outreach efforts, USDA will keep these individuals informed throughout the program implementation and referendum process to ensure that they are aware of and are able to participate in the program implementation process. USDA will also publicize information regarding the referendum process so that trade associations and related industry media can be kept informed.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the referendum ballot, which represents the information collection and recordkeeping requirements that may be imposed by this rule, has been preapproved by OMB.

Title: Referendum for Christmas Tree Promotion, Research, and Information Program.

OMB Number: 0581–0267.

Expiration Date of Approval: 12/31/2013.

Type of Request: Approval of a preapproved collection.

Abstract: The information collection requirements in this request are essential to carry out the intent of the 1996 Act. The information collection concerns a proposal received by USDA for a national research and promotion program for Christmas trees. The program will be financed by an assessment on Christmas tree domestic producers and importers and will be administered by a board of industry members selected by the Secretary. The program will provide an exemption for domestic producers and importers that domestically produce or import less than 500 Christmas trees annually. A referendum will be held among eligible domestic producers and importers to determine whether they favor continuation of the program. The purpose of the program will be to help build the market for fresh cut Christmas trees.

The information collection requirements in this rule concern the referendum that will be held to determine whether the program is favored by the industry. Current domestic producers and importers that domestically produce or import more than 500 Christmas trees annually will be eligible to vote in the referendum. The ballot will be completed by eligible current domestic producers and importers who want to indicate whether or not they support continuation of the program.

Referendum Ballot

Estimate of Burden: Public recordkeeping burden for this collection of information is estimated to average 0.25 hour per application.

Respondents: Domestic producers and importers.

Estimated Number of Respondents: 3,263 (3,100 domestic producers and 163 importers).

Estimated Number of Responses per Respondent: 1 every 7 years (0.14).

Estimated Total Annual Burden on Respondents: 114.21 hours.

The ballot will be added to the other information collections approved under OMB No. 0581–0267.

An estimated 3,263 respondents would provide information to the Board (3,100 domestic producers and 163 importers). The estimated cost of providing the information to the Board by respondents will be $3,768.93. This total has been estimated by multiplying 114.21 total hours required for reporting and recordkeeping by $33, the average mean hourly earnings of various occupations involved in keeping this information. Data for computation of this hourly rate was obtained from the U.S. Department of Labor Statistics.

The Order's provisions have been carefully reviewed, and every effort has been made to minimize any unnecessary recordkeeping costs or requirements, including efforts to utilize information already submitted under other programs administered by USDA and other state programs.

Request for Public Comment Under the Paperwork Reduction Act

A proposed rule regarding the referendum procedures was published in the **Federal Register** on November 8, 2010 (75 FR 68529). Copies of the rule were made available by USDA through the Office of the Federal Register and were also made available via the Internet at *http://www.regulations.gov.* That rule provided for a 60-day comment period. No comments were received.

In the November 8, 2010, proposed rule, comments were also invited on the information collection requirements prescribed in the Paperwork Reduction Act section of this rule. Specifically, comments were solicited on: (a) Whether the proposed collection of information is necessary for the proper performance of functions of the proposed Order and USDA's oversight of the proposed Order, including whether the information would have practical utility; (b) the accuracy of USDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) the accuracy of USDA's estimate of the principal manufacturing areas in the United States for softwood lumber; (d) the accuracy of USDA's estimate of the number of domestic manufacturers and importers of softwood lumber that would be covered under the program; (e) ways to enhance the quality, utility, and clarity of the information to be collected; and (f) 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. No comments were received regarding information collection.

List of Subjects in 7 CFR Part 1214

Administrative practice and procedure, Advertising, Consumer information, Marketing agreements, Christmas trees, Promotion, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, Title 7, Chapter XI of the Code of Federal Regulations, is amended to read as follows:

PART 1214—CHRISTMAS TREES, PROMOTION, RESEARCH AND INFORMATION ORDER

■ 1. The authority citation for part 1214 continues to read as follows:

Authority: 7 U.S.C. 7411–7425; 7 U.S.C. 7401.

■ 2. Add subpart B to part 1214 to read as follows:

Subpart B—Referendum Procedures

Sec.
1214.100 General.
1214.101 Definitions.
1214.102 Voting.
1214.103 Instructions.
1214.104 Subagents.
1214.105 Ballots.
1214.106 Referendum report.
1214.107 Confidential information.
1214.108 OMB control number.

Subpart B—Referendum Procedures

§ 1214.100 General.

Referenda to determine whether eligible domestic producers and importers of Christmas trees favor the continuance, amendment, suspension, or termination of the Christmas Tree Promotion, Research, and Information Order shall be conducted in accordance with this subpart.

§ 1214.101 Definitions.

(a) *Administrator* means the Administrator of the Agricultural Marketing Service, with power to delegate, or any officer or employee of the U.S. Department of Agriculture to whom authority has been delegated or may hereafter be delegated to act in the Administrator's stead.

(b) *Customs* means the United States Customs and Border Protection or U.S. Customs Service, an agency of the United States Department of Homeland Security.

(c) *Department* means the U.S. Department of Agriculture or any officer or employee of the Department to whom authority has heretofore been delegated, or to whom authority may hereafter be delegated, to act in the Secretary's stead.

(d) *Eligible domestic producer* means any person who domestically produces more than 500 Christmas trees annually in the United States, and who:

(1) Owns, or shares the ownership and risk of loss of the production of Christmas trees;

(2) Rents Christmas tree production land, facilities and/or equipment resulting in the ownership of all or a portion of the Christmas trees domestically produced;

(3) Owns Christmas tree production facilities and equipment but does not manage them and, as compensation, obtains the ownership of a portion of the Christmas trees domestically produced; or

(4) Is a party in a landlord-tenant relationship or a divided ownership arrangement involving totally independent entities cooperating only to domestically produce Christmas trees who share the risk of loss and receive a share of the Christmas trees domestically produced. No other acquisition of legal title to Christmas trees shall be deemed to result in persons becoming eligible domestic producers.

(e) *Eligible importer* means any person importing more than 500 Christmas trees annually into the United States as a principal or as an agent, broker, or consignee of any person who domestically produces or handles Christmas trees outside of the United States for sale in the United States, and who is listed as the importer of record for such Christmas trees that are identified in the Harmonized Tariff Schedule of the United States by the numbers 0604.91.00.20, 0604.91.00.40, and 0604.91.00.60 during the representative period. Importation occurs when Christmas trees originating outside of the United States are released from custody by Customs and introduced into the stream of commerce in the United States. Included are persons who hold title to foreign-produced Christmas trees immediately upon release by Customs, as well as any persons who act on behalf of others, as agents or brokers, to secure the release of Christmas trees from Customs when such Christmas trees are entered or

withdrawn for consumption in the United States.

(f) *Christmas tree* means any tree of the coniferous species, that is severed or cut from its roots and marketed as a Christmas tree for holiday use.

(g) *Order* means the Christmas Tree Promotion, Research, and Information Order.

(h) *Person* means any individual, group of individuals, partnership, corporation, association, cooperative, or any other legal entity. For the purpose of this definition, the term ''partnership'' includes, but is not limited to:

(1) A husband and a wife who have title to, or leasehold interest in, a Christmas tree farm as tenants in common, joint tenants, tenants by the entirety, or, under community property laws, as community property; and

(2) So-called ''joint ventures'' wherein one or more parties to an agreement, informal or otherwise, contributed land and others contributed capital, labor, management, or other services, or any variation of such contributions by two or more parties.

(i) *Referendum agent* or *agent* means the individual or individuals designated by the Department to conduct the referendum.

(j) *Representative period* means the period designated by the Department.

(j) *United States* or *U.S.* means collectively the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possessions of the United States.

§ 1214.102 Voting.

(a) Each eligible domestic producer and eligible importer of Christmas trees shall be entitled to cast only one ballot in the referendum. However, each domestic producer in a landlord/tenant relationship or a divided ownership arrangement involving totally independent entities cooperating only to domestically produce Christmas trees, in which more than one of the parties is a domestic producer or importer, shall be entitled to cast one ballot in the referendum covering only such domestic producer or importer's share of the ownership.

(b) Proxy voting is not authorized, but an officer or employee of an eligible corporate domestic producer or importer, or an administrator, executor, or trustee or an eligible entity may cast a ballot on behalf of such entity. Any individual so voting in a referendum shall certify that such individual is an officer or employee of the eligible entity, or an administrator, executive, or trustee of an eligible entity and that such individual has the authority to take such action. Upon request of the referendum agent, the individual shall submit adequate evidence of such authority.

(c) All ballots are to be cast by mail as instructed by the Department.

(d) Eligible domestic producers or eligible importers may be asked to provide proof of sales or acreage as proof of eligibility to vote in any referendum.

§ 1214.103 Instructions.

The referendum agent shall conduct the referendum, in the manner provided in this subpart, under the supervision of the Administrator. The Administrator may prescribe additional instructions, not inconsistent with the provisions of this subpart, to govern the procedure to be followed by the referendum agent. Such agent shall:

(a) Determine the period during which ballots may be cast.

(b) Provide ballots and related material to be used in the referendum. The ballot shall provide for recording essential information, including that needed for ascertaining whether the person voting, or on whose behalf the vote is cast, is an eligible voter.

(c) Give reasonable public notice of the referendum:

(1) By utilizing available media or public information sources, without incurring advertising expense, to publicize the dates, places, method of voting, eligibility requirements, and other pertinent information. Such sources of publicity may include, but are not limited to, print and radio; and

(2) By such other means as the agent may deem advisable.

(d) Mail to eligible domestic producers and importers whose names and addresses are known to the referendum agent, the instructions on voting, a ballot, and a summary of the terms and conditions of the proposed Order. No person who claims to be eligible to vote shall be refused a ballot.

(e) At the end of the voting period, collect, open, number, and review the ballots and tabulate the results in the presence of an agent of a third party authorized to monitor the referendum process.

(f) Prepare a report on the referendum.

(g) Announce the results to the public.

§ 1214.104 Subagents.

The referendum agent may appoint any individual or individuals necessary or desirable to assist the agent in performing such agent's functions of this subpart. Each individual so appointed may be authorized by the agent to perform any or all of the functions which, in the absence of such appointment, shall be performed by the agent.

§ 1214.105 Ballots.

The referendum agent and subagents shall accept all ballots cast. However, if an agent or subagent deems that a ballot should be challenged for any reason, the agent or subagent shall endorse above their signature, on the ballot, a statement to the effect that such ballot was challenged, by whom challenged, the reasons therefore, the results of any investigations made with respect thereto, and the disposition thereof. Ballots invalid under this subpart shall not be counted.

§ 1214.106 Referendum report.

Except as otherwise directed, the referendum agent shall prepare and submit to the Administrator a report on the results of the referendum, the manner in which it was conducted, the extent and kind of public notice given, and other information pertinent to the analysis of the referendum and its results.

§ 1214.107 Confidential information.

The ballots and other information or reports that reveal, or tend to reveal, the vote of any person covered under the Order and the voter list shall be strictly confidential and shall not be disclosed.

§ 1214.108 OMB control number.

The control number assigned to the information collection requirement in this subpart by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35 is OMB control number 0581–0267.

Dated: November 1, 2011.

David R. Shipman,

Acting Administrator.

[FR Doc. 2011–28807 Filed 11–7–11; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Office of Advocacy and Outreach

7 CFR Part 2502

RIN 0503–AA49

Agricultural Career and Employment Grants Program

AGENCY: Office of Advocacy and Outreach, Departmental Management, USDA.

ACTION: Interim rule with request for comments.

SUMMARY: Section 14204 of the Food, Conservation and Energy Act of 2008 (2008 Farm Bill), authorizes the Secretary of Agriculture to make grants to assist agricultural employers and

farmworkers by improving the supply, stability, safety, and training of the agricultural labor force. Such grants may be made to eligible entities for use in providing services to assist farmworkers who are citizens or otherwise legally present in the United States in securing, retaining, upgrading, or returning from agricultural jobs. The Agriculture, Rural Development, Food and Drug Administration and Related Agencies Appropriations Act, 2010 (2010 Appropriations Act), included an appropriation of $4 million to the U.S. Department of Agriculture's (USDA) Rural Housing Service (RHS) for this program. The delegation of authority and funding for the program has since been transferred to the Office of Advocacy and Outreach (OAO), within Departmental Management of USDA. The purpose of this rulemaking is to establish regulations governing the grants program, including eligibility, application for, evaluation, award and post-award administration of grants made pursuant to the authority granted to the Secretary under Section 14204.

DATES: Comments on the interim rule must be received by the agency on or before December 8, 2011 to be assured of consideration.

Comments on the collection of information, Paperwork Reduction Act, must be received by the agency on or before January 9, 2012 to be assured of consideration.

ADDRESSES: You may submit comments on the interim rule, identified by RIN 0503–AA49 by any of the following methods:

Federal e-Rulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

Email: christine.chavez@osec.usda.gov. Include Regulatory Information Number (RIN) number 0503–AA49 in the subject line of the message.

Fax: (202) 720–7136.

Mail: Comments may be mailed to the Office of Advocacy and Outreach, U.S. Department of Agriculture, 1400 Independence Avenue, Room 520–A, Stop 9801, Washington DC 20250–9821.

Hand Delivery/Courier: Office of Advocacy and Outreach, U.S. Department of Agriculture, 1400 Independence Avenue SW., Room 520–A, Washington DC 20250.

Instructions: All submissions received must include the agency name and the RIN for this rulemaking. All comments received will be posted without change to *http://www.regulations.gov*, including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Christine Chavez, Program Leader, Farmworker Coordination, Office of Advocacy and Outreach, U.S. Department of Agriculture, 1400 Independence Avenue SW., Stop 9801, Washington, DC 20250, *Voice:* (202) 205–4215, *Fax:* (202) 720–7136, *Email: christine.chavez@osec.usda.gov.*

SUPPLEMENTARY INFORMATION:

Effective Date: The Administrative Procedure Act (APA, 5 U.S.C. 553) provides generally that before rules are issued by Government agencies, the rule must be published in the **Federal Register**, and the required publication of a substantive rule is to be not less than 30 days before its effective date. One of the exceptions is when the agency finds good cause for not delaying the effective date. OAO finds that there is good cause to issue this policy as an interim rule. The hired agricultural labor force in the United States is characterized by considerable instability. The publication of this interim rule is necessary to assure the nation's ability to sustain the production and harvesting of agricultural products. Second, the Department has received several pieces of correspondence urging the Department to do everything possible to ensure that this important program is established properly and the funding is obligated to worthy recipients prior to a possible rescission. These letters, combined with other less formal interchanges with stakeholders, demonstrate a strong desire from external constituents to codify this grants program. OAO is concerned that any further administrative delays will negatively affect growers' ability to have access to a more skilled pool of farmworkers, and stability to this sector.

I. Background and Applicability of Regulations

Authority

Section 14204 of the 2008 Farm Bill (Section 14204) authorizes the Secretary of Agriculture to make grants to assist agricultural employers and farmworkers by improving the supply, stability, safety, and training of the agricultural labor force. Such grants may be made to eligible entities for use in providing services to assist farmworkers who are citizens or otherwise legally present in the United States in securing, retaining, upgrading, or returning from agricultural jobs. The purpose of this rulemaking is to establish regulations governing the grants program, including eligibility, application for, evaluation, award and post-award administration of grants made pursuant to the authority granted to the Secretary under Section 14204. The 2010 Appropriations Act included an appropriation of $4 million to the U.S. Department of Agriculture's (USDA) Rural Housing Service (RHS) for this program, and the delegation of authority and funding for the program has since been transferred to the Office of Advocacy and Outreach (OAO), within Departmental Management of USDA. OAO has designated the program the Agricultural Career and Employment (ACE) Grants Program and it will be referred to as such hereafter.

Purpose of the ''ACE'' Grants Program

As the title of Section 14204 of the 2008 Farm Bill suggests—''Grants to Improve the Supply, Stability, Safety, and Training of Agricultural Labor Force''—the grants program authorized by this section is designed to address the needs of both agricultural employers and farmworkers with respect to the supply of skilled labor in American agriculture and the stability of employment in that sector. About 800,000 hired farmworkers are employed in U.S. agriculture, with hired workers making up an estimated one-third of the total agricultural labor force. Particularly critical for labor-intensive sectors of agriculture, such as fruits and vegetables, the hired agricultural labor force in the United States is characterized by considerable instability. Among the hired workforce are large numbers of migrant and seasonal farmworkers, many of whom travel long distances to obtain employment, and often move from crop to crop as conditions warrant. See, *A Profile of Hired Farmworkers, A 2008 Update,* by William Kandel, U.S. Department of Agriculture, Economic Research Service available at *http://www.ers.usda.gov/Publications/ERR60/err60_report summary.pdf.*

Despite this regular flow of workers, regional differences in crops, variations in harvest times, and unpredictable weather conditions mean that many growers complain of chronic labor shortages, while farmworkers frequently report it is difficult to locate employment or obtain sufficient hours of work to earn a living. Unemployment rates among farmworkers generally are double those of other wage and salaried workers and those working in field crops have twice the unemployment rate of livestock workers. Historically, the uncertainty farmworkers have faced as to the availability or duration of work, along with the low wages generally earned by hired farm laborers, has led to many employed in the agricultural labor sector to leave agriculture for employment in other industries. Because of high turnover rates in agricultural employment, it is estimated that 2.0 to 2.5 individual

farmworkers fill each job slot in the course of a year. This phenomenon has lead to chronic instability in the labor market and a shortage of skilled and experienced workers.

The ACE grants program is intended to improve the supply of skilled agricultural workers and bring greater stability to the workforce in this sector. This stability will be realized through services specifically designed to assist farmworkers in securing, retaining, upgrading or returning from an agricultural job. Such services include the following:

- Agricultural labor skills development;
- The provision of agricultural labor market information;
- Transportation;
- Short-term housing while in transit to an agricultural worksite;
- Workplace literacy and assistance with English as a second language;
- Health and safety instruction, including ways of safeguarding the food supply of the United States; and
- Other such services the Secretary deems appropriate.

The training and services offered through the ACE grants program will benefit growers by contributing to the establishment of a more skilled pool of workers. Farmworkers who avail themselves of the training and the other services under the program should have enhanced employment opportunities, with the prospect of obtaining additional hours of work and pay or better paying positions on the farm and expanded promotional opportunities as a result of upgraded skills. Moreover, to the extent greater opportunities exist for farmworkers within the agricultural industry, hired farm laborers will have greater incentives to remain in agriculture and will be less likely to leave farm work for other occupations. Finally, training farmworkers in ways to safeguard the food supply of the United States is intended to benefit not only consumers, but to benefit growers and farmworkers alike by minimizing disruptions in the agricultural sector due to product contamination. Taken together, the listed services and program goals are intended to promote stability in the workforce and thereby improve the supply of skilled labor across U.S. agriculture.

II. Administrative Requirements for the Interim Final Rulemaking

A. Executive Orders 12866, 13563, and the Regulatory Flexibility Act

The Office of Management and Budget (OMB) has determined that this rule is non-significant for the purposes of Executive Orders 12866 and 13563 and, therefore, it has not been reviewed by OMB.

We have prepared an economic analysis for this rule which is summarized below. The economic analysis provides a cost-benefit analysis, as required by Executive Orders 12866 and 13563, and an initial regulatory flexibility analysis that examines the potential economic effects of this interim rule on small entities, as required by the Regulatory Flexibility Act. Copies of the full analysis are available by contacting the person listed under **FOR FURTHER INFORMATION CONTACT** or on the Regulations.gov Web site (see **ADDRESSES** above for instructions for accessing Regulations.gov).

The economic analysis outlines several benefits of this program. The program would provide agricultural employers with access to a more stable and skilled pool of farmworkers and would provide farmworkers with enhanced employment opportunities, such as additional hours of work, better terms and conditions of employment, training, an increase in wages, and more opportunity for advancement. Training farmworkers in ways to safeguard the food supply will benefit not only agricultural employers and farmworkers, but also consumers.

The total cost of this program would be $4 million to taxpayers, most of which would be awarded as grants with a 15 percent maximum that could be used to administer the program.

The initial Regulatory Flexibility Analysis addresses the expected impact of this program on small entities. It is expected that the majority of the entities eligible for grants will be small. However, OAO does not expect this rule to have a significant economic impact on a substantial number of small entities.

C. Paperwork Reduction Act (PRA)

In accordance with section 3507(d) of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the information collection or recordkeeping requirements included in this interim rule have been submitted for approval to the Office of Management and Budget (OMB). Please send written comments to the Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for Departmental Management, Washington, DC 20503. Please state that your comments refer to Docket No. (Insert docket No.). Please send a copy of your comments to: (1) Christine Chavez, Program Leader, Farmworker Coordination, Office of Advocacy and Outreach, U.S. Department of Agriculture, 1400 Independence Avenue SW, Stop 9801, Washington, DC 20250, *Fax:* (202) 720–7136 *Email: christine.chavez@osec.usda.gov.* (2) Clearance Officer, OCIO, USDA, room 404–W, 14th Street and Independence Avenue SW., Washington, DC 20250. A comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication of this interim rule.

This interim rule would allow USDA to make grants to assist agricultural employers and farmworkers by improving the supply, stability, safety, and training of the agricultural labor force.

OAO is asking OMB to approve its use of this information collection activity to ensure that it will maximize the utility of information which is created, collected and maintained and minimize both the burden imposed on entities seeking to participate in the program as well as costs to the Federal government.

OAO is soliciting comments from the public concerning OAO's proposed information collection and recordkeeping requirements. These comments will help OAO:

(1) Evaluate whether the proposed information collection is necessary for the proper performance of our agency's functions, including whether the information will have practical utility;

(2) Evaluate the accuracy of OAO's estimate of the burden on the proposed information collection, 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 information collection on those who are to respond (such as 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).

Estimate of burden: Public reporting burden for this collection of information is estimated to average 2.8 hours per response.

(1) *Respondents:* Not-for-profit institutions or a consortium which includes a non-profit organization(s) and one or more of the following: Agribusinesses, State and local governments, agricultural labor organizations, *Estimated annual number of respondents:* 20 *Estimated annual number of responses per respondent:* 3 (average] *Estimated annual number of responses:* [65] *Estimated total annual burden on respondents:* 2 hours (Due to averaging,

the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

Copies of this information collection can be obtained from Christine Chavez, Program Leader, Farmworker Coordination, Office of Advocacy and Outreach, U.S. Department of Agriculture, 1400 Independence Avenue SW, Stop 9801, Washington, DC 20250, *Email: christine.chavez@osec.usda.gov.*

E-Government Act Compliance

The Office of Advocacy and Outreach is committed to compliance with the E-Government Act to promote the use of the Internet and other information technologies, to provide increased opportunities for citizen access to Government information and services, and for other purposes. For information pertinent to E-Government Act compliance related to this interim final rule, please contact Christine Chavez, Program Leader, Farmworker Coordination, Office of Advocacy and Outreach, U.S. Department of Agriculture, 1400 Independence Avenue SW, Stop 9801, Washington, DC 20250, *Email: christine.chavez@osec.usda.gov.*

D. Catalog of Federal Domestic Assistance

This interim rule applies to the following Federal assistance program administered by the Office of Advocacy and Outreach: 10.465, Farmworker Training Grants.

E. The National Environmental Policy Act of 1969

The Department concludes that the requirements of the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq* (NEPA) do not apply to this rulemaking because this rule includes no provisions impacting the maintenance, preservation or enhancement of a healthful environment.

F. Federal Regulations and Policies on Families

Pursuant to the requirements of Section 654 of the Treasury and general Government Appropriations Act of 1999, 5 U.S.C. 601 note, the Department concludes this regulation has no potential negative effect on family well-being as defined thereunder.

G. Executive Order 13045: Protection of Children From Environmental and Safety Risk

The Department concludes that this interim rule has no negative effect on the health and safety of children.

H. Unfunded Mandates Reform Act of 1995 and Executive Order 13132

Pursuant to Executive Order No. 13132, 64 FR 43225 (August 10, 1999) and the Unfunded Mandates Act of 1995, 2 U.S.C. 1501 *et seq.,* the Department concludes there is no potential or substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. As there is no Federal mandate contained herein that could result in increased expenditures by State, Local, and tribal governments or by the private sector, the Department has not prepared a budgetary impact statement.

I. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

In accordance with Executive Order 13175, 65 FR 67249 (Nov. 9, 2000), the Department concludes this rule, as proposed, does not have ''tribal implications'' nor substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and Indian Tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.

J. Executive Order 12988: Civil Justice Reform

This interim rule has been reviewed in accordance with Executive Order 12988, Civil Justice Reform. This rule would not preempt State or local laws, is not intended to have retroactive effect, and would not involve administrative appeals.

K. Executive Order 13132: Federalism

This interim rule would not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. Provisions of this rule would not have a substantial direct effect on States or their political subdivisions or on the distribution of power and responsibilities among the various government levels.

L. Executive Order 12372: Intergovernmental Review of Federal Programs

For the reasons set forth in the Final Rule Related Notice for 7 CFR part 3015, subpart V (48 FR 29115, June 24, 1983), this program is excluded from the scope of the Executive Order 12372, which requires intergovernmental consultation with State and local officials. This program does not directly affect State and local governments.

List of Subjects in 7 CFR Part 2502

Agricultural labor, Agricultural employers, Farmworkers, Grants, Training.

For the reasons discussed in the preamble, the Office of Advocacy and Outreach, Departmental Management, amends chapter XXV of title 7 of the Code of Federal Regulations by adding part 2502 to read as follows:

PART 2502—AGRICULTURAL CAREER AND EMPLOYMENT (ACE) GRANTS PROGRAM

Subpart A—General Information

Sec.
2502.1 Applicability of regulations.
2502.2 Definitions.
2502.3 Deviations.

Subpart B—Program Eligibility, Services and Delivery

2502.4 Program eligibility.
2502.5 Program benefits and services.
2502.6 Recipients of program benefits or services.
2502.7 Responsibilities of grantees.

Subpart C—Grant Applications and Administration

2502.8 Pre-award, award, and post-award procedures and administration of grants.

Authority: 7 U.S.C. 2008q–1.

Subpart A: General Information

§ 2502.1 Applicability of regulations.

(a) This part contains program-specific definitions for the ACE Grants Program.

(b) Subpart B establishes the criteria to be used in determining eligibility for an ACE grant award and the requirements for the delivery of program benefits and services, including who is considered eligible to receive such benefits and services and what the responsibilities are of ACE grantees.

(c) Subpart C establishes that, unless otherwise provided herein, the procedures for applying for ACE grants, the processes to be followed by OAO in evaluating grant proposals and awarding program funds, and the procedures for post-award administration of ACE grants are those set forth in a rule proposed ON DATE to codify provisions at 7 CFR part 2500, subparts A, B, C, D, and E.

§ 2502.2 Definitions.

As used in this part (unless otherwise indicated):

Agency means the Office of Advocacy and Outreach (OAO), an agency of the United States Department of Agriculture (USDA) or a successor agency.

Agricultural Employer means any person or entity which employs, as

defined in the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. 1802, individuals engaged in agricultural employment and may include farmers, ranchers, dairy operators, agricultural cooperatives, and farm labor contractors.

Agricultural Employment means any service or activity as defined in the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. 1802, including any activity defined as ''agriculture'' in Section 3(f) or the Fair Labor Standards Act of 1938, 29 U.S.C. 203(f), any activity defined as ''agricultural labor'' in 26 U.S.C. 3121(g) (the Internal Revenue Code); as well as the handling, planting, drying, packing, packaging, processing, freezing, or grading prior to delivery for storage of any agricultural or horticultural commodity in its unmanufactured state. Authorized Departmental Officer (ADO) means the individual, acting within the scope of delegated authority, who is responsible for executing and administering awards on behalf of the U.S. Department of Agriculture.

Community-based organization means a non-governmental organization with a well-defined constituency that includes all or part of a particular community.

Consortium means a group formed by entities with similar goals and objectives for the purpose of pooling resources to undertake a project that would otherwise be reasonably beyond the capabilities of any one member.

Eligible entity, as described in section 379C(a) of the Consolidated Farm and Rural Development Act (7 U.S.C. 2008q(a)), means a non-profit organization, or a consortium of nonprofit organizations, agribusinesses, State and local governments, agricultural labor organizations, farmer or rancher cooperatives, and community-based organizations with the capacity to train farm workers.

Farmworker means an individual hired to perform agricultural employment, including migrant, seasonal, and hired family farm workers. The term farmworker includes individuals who are not currently employed as a farmworker but who are actively seeking work as such. The term does not include agricultural employers or individuals who are self-employed.

Grantee means the organization designated in the grant award document as the responsible legal entity to which a grant is awarded.

Legally present in the United States shall have the same meaning as the term ''lawfully present'' in the United States as defined at 8 CFR 103.12(a) (addressing eligibility for Title II Social Security benefits under Pub. L. 104–193).

Notice of Funding Availability (NOFA) means a notice published in the **Federal Register** announcing the availability of money for the grants program which lists the application deadlines, eligibility requirements and locations where interested parties can get help in applying.

Office of Advocacy and Outreach (OAO) means the Office of Advocacy and Outreach, an office within the USDA's Departmental Management.

Request for Proposal (RFP) refers to a grant competition and is used interchangeably with the phrase grant application notice and solicitation for grant applications (SFA).

Retaining an agricultural job means continuing agricultural employment, including upgraded employment.

Returning from an agricultural job means returning to a home area from a position in agricultural employment.

Secretary means the Secretary of Agriculture and any other officer or employee of the United States Department of Agriculture to whom the authority involved is delegated.

Securing an agricultural job means obtaining agricultural employment.

State means any of the States of the United States, the District of Columbia, the Virgin Islands, the Commonwealth of Puerto Rico, and Guam.

United States worker (U.S. worker) shall have the same meaning as the term U.S. worker defined by the Department of Labor at 20 CFR 655.4.

Upgrading an agricultural job means advancement to a position in agricultural employment which offers more hours of work and/or better terms and conditions of employment and/or an increase in wages.

§ 2502.3 Deviations.

Any request by the applicant or grantee for a waiver or deviation from any provision of this part shall be submitted to the ADO identified in the agency specific requirements. OAO shall review the request and notify the applicant/grantee whether the request to deviate has been approved within 30 calendar days from the date of receipt of the deviation request. If the deviation request is still under consideration at the end of 30 calendar days, OAO shall inform the applicant/grantee in writing of the date when the applicant/grantee may expect the decision.

Subpart B—Program Eligibility, Services and Delivery

§ 2502.4. Program eligibility.

(a) Entities eligible to apply for and receive a grant under this part include:

(1) A non-profit organization;

(2) A consortium of nonprofit organizations; or

(3) A consortium which includes a non-profit organization(s) and one or more of the following: agribusinesses, State and local governments, agricultural labor organizations, farmer or rancher cooperatives, and community-based organizations with the capacity to train farm workers.

(b) Additional information about eligible entities may be included in the RFP. In addition, the RFP will specify the criteria by which an entity's capacity to train farm workers will be evaluated, but at a minimum, the entity shall be required to demonstrate that it has:

(1) An understanding of the issues facing hired farmworkers and conditions under which they work;

(2) Familiarity with the agricultural industry in the geographic area to be served, including agricultural labor needs and existing services for farmworkers; and

(3) The capacity to effectively administer a program of services and benefits authorized by the ACE program.

(c) An applicant will be required to submit information to OAO, as specified in the RFP and/or FOA as part of the grant application.

§ 2502.5 Program benefits and services.

(a) The ACE grants program will be centrally administered by the USDA in a manner consistent with these regulations, as well as the pertinent requirements of 7 CFR part 3015, 7 CFR part 3016, 7 CFR part 3018, 7 CFR part 3019 and 7 CFR 3052.

(b) The Office of Advocacy and Outreach (OAO) has been designated as the organizational unit responsible for administering the ACE program, including, among other things, determining the number and amount of grants to be awarded, the purposes for the grants to be awarded, as well as the criteria for the evaluation and award of grants.

(c) Services and benefits provided under the ACE grants program are limited to those which will assist eligible farmworkers in securing, retaining, upgrading or returning from agricultural jobs.

(d) Such services will include the following:

(1) Agricultural labor skills development

(2) Provision of agricultural labor market information:

(3) Transportation:

(4) Short-term housing while in transit to an agricultural worksite;

(5) Workplace literacy and assistance with English as a second language;

(6) Health and safety instruction, including ways of safeguarding the food supply of the United States;

(7) Such other services as the Secretary deems appropriate.

(e) Grant funds shall not be used to deliver or replace any services or benefits which an agricultural employer, association, contractor, or any other entity is legally obliged to provide.

§ 2502.6 Recipients of program benefits or services.

(a) Those eligible to receive program services or benefits under the ACE program are farmworkers who meet the definition of ''United States Workers'' as set forth in § 2502.2 of this part.

(b) Grantees shall be responsible for verifying the employment of farmworkers who are actively employed and are seeking to participate in program services or benefits. Unemployed farmworkers seeking to participate shall be required to certify to grantees that they are eligible for program services and benefits as provided herein. Additional eligibility requirements may be included in the RFP.

§ 2502.7 Responsibilities of grantees

Each grantee is responsible for providing services and/or benefits authorized by this program in accord with a service delivery strategy described in its approved grant plan. The services must reflect the needs of the relevant farmworker population in the area to be served and be consistent with the goals of assisting farmworkers in securing, retaining, upgrading, or returning from agricultural jobs. The necessary components of a service delivery strategy and grant plan will be fully set forth in an RFP but the plan shall include, at a minimum, the following:

(a) The employment and education needs of the farmworker population to be served;

(b) The manner in which the proposed services to be delivered will assist agricultural employers and farmworkers in securing, retaining, upgrading or returning from agricultural jobs;

(c) The manner in which the proposed services will be coordinated with other available services;

(d) The number of participants the grantee expects to serve for each service provided, the results expected and the anticipated expenditures for each category of service.

Subpart C—Grant Applications and Administration

§ 2502.8 Pre-award, award, and post-award procedures and administration of grants.

(a) Unless otherwise provided in this rule, the requirements governing pre-award solicitation and submission of proposals and/or applications, the review and evaluation of such, the award of grant funds, and post-award and close-out procedures are those set forth at 7 CFR part 2500, subparts A, B, C, D, and E.

(b) For purposes of the ACE Grants Program, the provisions of Subpart E, at 7 CFR 2500.49, ''Prior Approvals,'' shall not apply. In lieu of that provision, the following requirements shall apply: Awardees may not subcontract more than 20 percent of the award to other parties without prior written approval of the ADO. To request approval, a justification for the proposed subcontract, a performance statement, and a detailed budget for the subcontract must be submitted in writing to the ADO.

Signed in Washington, DC, on November 3, 2011.

Pearlie Reed,

Assistant Secretary for Administration for the Office of the Secretary.

[FR Doc. 2011–29029 Filed 11–7–11; 8:45 am]

BILLING CODE 3412–89–P

DEPARTMENT OF HOMELAND SECURITY

8 CFR Part 103

[CIS No. 2459–08; DHS Docket No. USCIS–2008–0038]

RIN 1615–AB76

Commonwealth of the Northern Mariana Islands Transitional Worker Classification: Correction

AGENCY: U.S. Citizenship and Immigration Services, DHS.

ACTION: Final rule; correction.

SUMMARY: The Department of Homeland Security (DHS) is issuing a final rule to restore text that was inadvertently deleted in a September 7, 2011, final rule entitled *Commonwealth of the Northern Mariana Islands Transitional Worker Classification*. In that rule, we had sought to modify the title of a paragraph, but inadvertently removed the body of the paragraph. This correction restores the text of the paragraph.

DATES: This final rule is effective November 8, 2011.

FOR FURTHER INFORMATION CONTACT: Paola Rodriguez Hale, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue NW., Washington, DC 20529–2060 telephone (202) 272–1470.

SUPPLEMENTARY INFORMATION:

Need for Correcting Amendment

In the final rule *Commonwealth of the Northern Mariana Islands Transitional Worker Classification,* published in the **Federal Register** on September 7, 2011 at 76 FR 55502, DHS intended to revise only the heading of paragraph (b)(1)(i)(J) of § 103.7, which pertains to various U.S. Citizenship and Immigration Services fees. The heading of that paragraph was revised from ''Petition for Nonimmigrant Worker in CNMI (Form I–129CW)'' to ''Petition for a CNMI-Only Nonimmigrant Transitional Worker (Form I–129CW).'' We did not intend to alter the specific amount of the fee, contained in the text of the paragraph. However, in that final rule, paragraph (b)(1)(i)(J) of § 103.7 was inadvertently revised in its entirety, eliminating all text except for the heading. This document corrects the error by restoring the original text of the paragraph.

List of Subjects in 8 CFR Part 103

Administrative practice and procedure, Authority delegations (Government agencies), Freedom of information, Privacy, Reporting and recordkeeping requirements, Surety bonds.

Correcting Amendment

Accordingly, 8 CFR part 103.7 is amended by making the following correcting amendment:

■ 1. The authority citation for part 103 continues to read as follows:

Authority: 5 U.S.C. 301, 552, 552a; 8 U.S.C. 1101, 1103, 1304, 1356; 31 U.S.C. 9701; 48 U.S.C. 1806; Pub. L. 107–296, 116 Stat. 2135 (6 U.S.C. 1 *et seq.*), E.O. 12356, 47 FR 14874, 15557, 3 CFR, 1982 Comp., p. 166; 8 CFR part 2.

■ 2. Correct § 103.7 by revising paragraph (b)(1)(i)(J) to read as follows:

§ 103.7 Fees.

* * * * *

(b) * * *

(1) * * *

(i) * * *

(J) *Petition for a CNMI-Only Nonimmigrant Transitional Worker (Form I–129CW).* For an employer to petition on behalf of one or more beneficiaries: $325 plus a supplemental CNMI education funding fee of $150 per

beneficiary per year. The CNMI education funding fee cannot be waived.

* * * * *

Dated: October 31, 2011.

Christina E. McDonald,

Associate General Counsel for Regulatory Affairs, Department of Homeland Security.

[FR Doc. 2011–28985 Filed 11–7–11; 8:45 am]

BILLING CODE 9111–97–P

NUCLEAR REGULATORY COMMISSION

10 CFR Part 40

RIN 3150–AI95

[NRC–2011–0072]

Regulatory Changes To Implement the United States/Australian Agreement for Peaceful Nuclear Cooperation

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC or the Commission) is amending its regulations to implement the 2010 ''Agreement between the Government of Australia and the Government of the United States of America Concerning Peaceful Uses of Nuclear Energy'' (the Agreement). The Agreement prohibits the United States from using Australian-obligated nuclear material to produce tritium for use in a nuclear explosive device, or for any other ''military purpose'' as defined in the Agreement. The Agreement's definition of military purpose states that it includes ''depleted uranium munitions, and other direct military non-nuclear applications, as mutually determined by the Parties.'' The amendments in this final rule help enable the U.S. Government to meet its Agreement obligations with the Government of Australia.

DATES: This final rule is effective November 8, 2011.

ADDRESSES: You can access publicly available documents related to this document 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, Room 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 email to *pdr.resource@nrc.gov.*
- *Federal Rulemaking Web Site:* Public comments and supporting materials related to this final rule can be found at *http://www.regulations.gov* by searching on Docket ID NRC–2011–0072. Address questions about NRC dockets to Carol Gallagher, telephone: (301) 492–3668; email: *Carol.Gallagher@nrc.gov.*

FOR FURTHER INFORMATION CONTACT: Naiem S. Tanious, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: (301) 415–6103; email: *Naiem.Tanious@nrc.gov.*

SUPPLEMENTARY INFORMATION:

Background

Section 123 of the Atomic Energy Act of 1954, as amended, sets the specific terms and conditions that must be included in the agreements concluded between the United States and a foreign government to establish the framework for peaceful nuclear cooperation and trade between the countries. The United States has entered into over twenty such agreements that are active at this time, including agreements with the European Atomic Energy Community and the International Atomic Energy Agency (IAEA). The United States entered into a Section 123 agreement with Australia in 1979.

In 2010, the United States and Australia negotiated a new agreement. While it is very similar to the agreement signed in 1979, the 2010 Agreement clarifies restrictions on the use of Australian-obligated nuclear material in the United States by adding a definition of ''military purpose.'' The 2010 Agreement retains Article 9(4) of the 1979 agreement, which states in relevant part that the U.S. must ''establish and maintain a system of accounting for and control of all material transferred pursuant to this Agreement and any material used in or produced through the use of any material, equipment or components so transferred.''

Discussion

As discussed in this document, the NRC finds that in order to implement provisions in Article 8 (''No explosive or military application'') of the 2010 Agreement, NRC regulations in Title 10 of the *Code of Federal Regulations* (10 CFR) Part 40 need to be amended.

Article 8(1) states, in relevant part, that Australian-obligated nuclear material ''shall not be used for any nuclear explosive device, for research on or development of any nuclear explosive device, including but not limited to, the production of tritium for use in such a device, or for any military purpose.'' Article 8(2) states that the term ''military purpose'' includes ''military nuclear propulsion; munitions, including depleted uranium munitions; and other direct military non-nuclear applications as mutually determined by the Parties.'' The term ''military purpose'' does not include ''the supply of electricity to a military base from any power network, the production of radioisotopes to be used for medical purposes in military hospitals, and such other similar purposes as may be mutually determined by the Parties.''

The Agreement defines ''material'' as including source material, and broadly defines ''source material'' as including uranium ores ''in such concentration as mutually determined by the Parties from time to time.'' The term ''Australian-obligated source material'' is used in this rulemaking to designate the material covered by the rule, and such material is that which originates in Australia and is imported from there to the United States. The term ''Australian-obligated source material'' should be understood as describing a subset of the material referenced in the existing definition of *Foreign obligations* set forth in § 40.4. The term *Foreign obligations* is used in the existing § 40.64 reporting requirements, under which licensees holding one kilogram or more of source material with foreign obligations must document such holdings on a yearly basis and submit annual inventory reports to the NRC. In accordance with § 40.64(e), licensees subject to 10 CFR part 75 (which implements requirements established by treaties between the United States and the IAEA) instead submit their inventory reports under §§ 75.34 and 75.35. These 10 CFR part 40 and part 75 reporting requirements are not referenced in the 2010 Agreement, and are not affected by this rulemaking. If the Australian Government later has questions concerning inventories of Australian-obligated source material in quantities less than one kilogram, the NRC would request such information from its licensees, who are already required by § 40.61 to keep records

showing the receipt, transfer, and disposal of all source material.

The NRC has determined that in order to fully implement Article 8 of the Agreement, it is necessary to amend the regulations in 10 CFR part 40 to exclude Australian-obligated source material from an existing exemption applicable to mixtures that contain less than one-twentieth of one percent of source material; exclude Australian-obligated source material from an existing exemption applicable to uranium contained in counterweights installed in aircraft and military projectiles; and prohibit the receipt, processing, transfer, or other use of Australian-obligated source material for military purposes.

Section-by-Section Analysis

The NRC is amending § 40.13(a). Section 40.13(a) exempts from the regulations in 10 CFR part 40, and from the requirements for a license, source material in any chemical mixture, compound, solution, or alloy, in which the source material is by weight less than one-twentieth of one percent of the mixture, compound, solution, or alloy. This § 40.13(a) exemption is modified to state that it does not apply to any Australian-obligated source material. This change is being made to be consistent with Article 8(2) of the 2010 Agreement, which states that the term ''military purpose'' includes ''direct military non-nuclear applications.''

The NRC is amending § 40.13(c)(5). This exemption applies to uranium contained in counterweights installed in aircraft, rockets, projectiles, and missiles. This § 40.13(c)(5) exemption is being modified by adding a new paragraph 40.13(c)(5)(v), stating that the exemption does not apply to counterweights manufactured for the military using Australian-obligated source material. The new paragraph 40.13(c)(5)(v) is needed to be consistent with Article 8(2) of the 2010 Agreement, which states that the term ''military purpose'' includes ''direct military non-nuclear applications.''

The NRC is amending 10 CFR part 40 by adding a new § 40.52, titled ''Restrictions on the Use of Australian-Obligated Source Material.'' The new requirement prohibits those possessing Australian-obligated source material from processing or otherwise using that material for military purposes, and prohibits the transfer of such material to others for military purposes. Section 40.52 defines ''military purposes'' in a manner consistent with Article 8 of the Agreement.

Notice and Comment Waiver

Because the substance of the amendments made by this rule involves a foreign affairs function of the United States, the notice and comment provisions of the Administrative Procedure Act do not apply (5 U.S.C. 553(a)(1)). These regulations codify explicit obligations established by an international agreement to which the United States is a party, which the NRC has no discretion or authority to modify. Under these circumstances, the NRC finds good cause for dispensing with the usual 30-day delay in the rule's effective date, in accordance with 5 U.S.C. 553(d)(3). The amendments are effective upon publication in the **Federal Register.**

Criminal Penalties

For the purpose of Section 223 of the Atomic Energy Act of 1954, as amended (AEA), the Commission is issuing the final rule to amend 10 CFR part 40 under one or more of Sections 161b, 161i, or 161o of the AEA. Willful violations of the rule will be subject to criminal enforcement.

Agreement State Compatibility

Under the ''Policy Statement on Adequacy and Compatibility of Agreement State Programs'' approved by the Commission on June 30, 1997, and published in the **Federal Register** on September 3, 1997 (62 FR 46517), this rule is classified as Compatibility Category ''NRC.'' Compatibility is not required for Category ''NRC'' regulations. The NRC program elements in this category are those that relate directly to areas of regulation reserved to the NRC by the Atomic Energy Act of 1954, as amended, or the provisions of 10 CFR. Thus, States should not adopt these program elements.

Voluntary Consensus Standards

The National Technology Transfer and Advancement Act of 1995, Public Law 104–113, requires that Federal agencies use technical standards that are developed or adopted by voluntary consensus standards bodies unless using such a standard is inconsistent with applicable law or is otherwise impractical. In this final rule, the NRC is modifying its regulations to implement the Agreement between the United States of America and the Australian Government for Peaceful Nuclear Cooperation. This action does not constitute the establishment of a standard that establishes generally applicable requirements.

Environmental Assessment: Finding of No Significant Environmental Impact

The NRC has prepared an environmental assessment (ADAMS Accession Number ML112560425), and has determined that there will be no significant impact to the public from this action.

Paperwork Reduction Act Statement

This final rule does not contain new or amended information collection requirements subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). Existing requirements were approved by the Office of Management and Budget (OMB), approval numbers 3150–0020, 3150–0055 and 3150–0003.

Public Protection Notification

The NRC may not conduct or sponsor, and a person is not required to respond to, a request for information for an information collection requirement unless the requesting document displays a currently valid OMB control number.

Regulatory Analysis

A regulatory analysis has not been prepared for this regulation. The information reported is necessary to satisfy United States Government obligations under the Agreement.

Backfitting

The NRC has determined that the backfit rule (§§ 50.109, 70.76, 72.62, or 76.76) does not apply to this final rule because this amendment does not involve any provisions that would impose backfits as defined in the backfit rule. Therefore, a backfit analysis is not required.

Congressional Review Act

In accordance with the Congressional Review Act of 1996, the NRC has determined that this action is not a major rule and has verified this determination with the Office of Information and Regulatory Affairs of OMB.

List of Subjects in 10 CFR Part 40

Criminal penalties, Government contracts, Hazardous materials transportation, Nuclear materials, Reporting and recordkeeping requirements, Source material, Uranium.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended; the Energy Reorganization Act of 1974, as amended; 5 U.S.C. 552 and 553; and the Energy Policy Act of 2005; Public Law 109–58, 119 Stat. 594 (2005), the

NRC is adopting the following amendments to 10 CFR Part 40.

PART 40—DOMESTIC LICENSING OF SOURCE MATERIAL

■ 1. The authority citation for part 40 continues to read as follows:

Authority: Secs. 62, 63, 64, 65, 81, 161, 182, 183, 186, 68 Stat. 932, 933, 935, 948, 953, 954, 955, as amended, secs. 11e(2), 83, 84, Pub. L. 95–604, 92 Stat. 3033, as amended, 3039, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2014(e)(2), 2092, 2093, 2094, 2095, 2111, 2113, 2114, 2201, 2232, 2233, 2236, 2282); sec. 274, Pub. L. 86–373, 73 Stat. 688 (42 U.S.C. 2021); secs. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846); sec. 275, 92 Stat. 3021, as amended by Pub. L. 97–415, 96 Stat. 2067 (42 U.S.C. 2022); sec. 193, 104 Stat. 2835, as amended by Pub. L. 104–134, 110 Stat. 1321, 1321–349 (42 U.S.C. 2243), sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note); Energy Policy Act of 2005, Pub. L. No. 109–59, 119 Stat. 594 (2005).

Section 40.7 also issued under Pub. L. 95–601, sec. 10, 92 Stat. 2951 as amended by Pub. L. 102–486, sec. 2902, 106 Stat. 3123 (42 U.S.C. 5851). Section 40.31(g) also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Section 40.46 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Section 40.71 also issued under sec. 187, 68 Stat. 955 (42 U.S.C. 2237).

■ 2. In § 40.13, paragraph (a), the last sentence is revised, and a new paragraph (c)(5)(v) is added to read as follows:

§ 40.13 Unimportant quantities of source material.

(a) * * * The exemption contained in this paragraph does not apply to Australian-obligated source material, nor does it include byproduct materials as defined in this part.

* * * * *

(c) * * *

(5) * * *

(v) Consistent with § 40.52, the counterweights are not manufactured for a military purpose using Australian-obligated source material.

* * * * *

■ 3. Section 40.52 is added to read as follows:

§ 40.52 Restrictions on the use of Australian-obligated source material.

(a) In accordance with Article 8 of the Agreement between the Government of Australia and the Government of the United States of America Concerning Peaceful Uses of Nuclear Energy, dated 2010, Australian-obligated source material shall not be used for military purposes. As used in this section, ''military purposes'' includes, but is not limited to, the production of tritium for use in nuclear explosive devices; military nuclear propulsion; munitions, including depleted uranium munitions; and other direct military non-nuclear applications. ''Military purposes'' does not include the supply of electricity to a military base from any power network; the production of radioisotopes to be used for medical purposes in military hospitals; and such other similar purposes.

(b) Licensees are prohibited from receiving, processing, transferring, or otherwise using Australian-obligated source material for military purposes.

Dated at Rockville, Maryland, this 13th day of October 2011.

For the Nuclear Regulatory Commission.

Michael F. Weber,

Acting Executive Director for Operations.

[FR Doc. 2011–28894 Filed 11–7–11; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF ENERGY

10 CFR Part 431

[Docket Number EERE–2006–STD–0127]

RIN 1904–AB93

Energy Conservation Program: Energy Conservation Standards for Certain Consumer Products (Dishwashers, Dehumidifiers, Microwave Ovens, and Electric and Gas Kitchen Ranges and Ovens) and for Certain Commercial and Industrial Equipment (Commercial Clothes Washers); Correction

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

ACTION: Final rule; correction.

SUMMARY: This final rule reinstates in Department of Energy (DOE) regulations the energy and water conservation standards required by the Energy Policy Act of 2005 (EPACT 2005) for commercial clothes washers (CCWs) until January 1, 2013. In the final rule establishing amended standards for CCW, published in the **Federal Register** on Friday, January 8, 2010 (75 FR 1122) and applicable as of January 1, 2013, DOE erroneously deleted reference to these EPACT 2005 standards.

DATES: This correction is effective on November 8, 2011. The effective date of the rule published Friday, January 8, 2010, was March 9, 2010. The standards established in that final rule will be applicable starting January 8, 2013.

FOR FURTHER INFORMATION CONTACT: Stephen L. Witkowski, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Program, EE–2J, 1000 Independence Avenue SW., Washington, DC 20585–0121. *Telephone:* (202) 586–7463. *Email: Stephen.Witkowski@ee.doe.gov.*

Elizabeth Kohl, Esq., U.S. Department of Energy, Office of General Counsel, GC–71, 1000 Independence Avenue SW., Washington, DC 20585–0121. *Telephone:* (202) 586–7796. *Email: Elizabeth.Kohl@hq.doe.gov.*

SUPPLEMENTARY INFORMATION: DOE published amended energy and water conservation standards for commercial clothes washers on January 8, 2010 (75 FR 1122). Compliance with these amended standards is required as of January 1, 2103. Prior to January 1, 2013, manufacturers are required to meet the standards established by Title III, Part C [1] of the Energy Policy and Conservation Act of 1975 (EPCA or the Act), Public Law 94–163 (42 U.S.C. 6311–6317, as codified), as amended by the Energy Policy Act of 2005 (EPACT 2005; Pub. L. 109–058). Those standards require that CCWs manufactured on or after January 1, 2007 have a modified energy factor (MEF) of at least 1.26 cubic feet of capacity (ft ^{3}) per kilowatt-hour (kWh) and a water factor (WF) of not more than 9.5 gallons of water (gal) per ft ^{3}. (42 U.S.C. 6313(e)) The EPACT 2005 standards were previously codified in title 10 of the Code of Federal Regulations (CFR) part 431, subpart I, section 431.156 (70 FR 60407, Oct. 5, 2008). In the January 8, 2010 final rule, however, DOE mistakenly deleted the EPACT 2005 standards from the regulatory text. This final rule reinserts the EPACT 2005 standards, which are applicable until January 1, 2013, into the regulatory text.

Procedural Issues and Regulatory Review

The regulatory reviews conducted for this rulemaking are those set forth in the October 8, 2005 final rule that originally codified the EPACT 2005 standards into DOE's regulations.

Pursuant to the Administrative Procedure Act, 5 U.S.C. 553(b), DOE has determined that notice and prior opportunity for comment on this rule are unnecessary and contrary to the public interest. The standards being reinstated into DOE's regulations in today's final rule are currently required by EPACT 2005. DOE previously codified these standards in its regulations in the October 2005 final rule without prior opportunity for comment given the EPACT 2005 directive. DOE has determined that there is good cause to waive the 30-day

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

delay in effective date for these same reasons.

List of Subjects in 10 CFR Part 431

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Imports, Intragovernmental relations, Reporting and recordkeeping requirements, and Small businesses.

Accordingly, part 431 of chapter II, subchapter D, of title 10 of the Code of Federal Regulations, is corrected by making the following correcting amendments:

PART 431—ENERGY EFFICIENCY PROGRAM FOR CERTAIN COMMERCIAL AND INDUSTRIAL EQUIPMENT

■ 1. The authority citation for part 431 continues to read as follows:

Authority: 42 U.S.C. 6291–6317.

■ 2. Section 431.156 of subpart I is revised to read as follows:

§ 431.156 Energy and water conservation standards and effective dates.

(a) Each commercial clothes washer manufactured between January 1, 2007, and January 8, 2013, shall have—

(1) A modified energy factor of at least 1.26; and

(2) A water consumption factor of not more than 9.5.

(b) Each commercial clothes washer manufactured on or after January 8, 2013, shall have a modified energy factor no less than and a water factor no greater than:

Equipment class	Modified energy factor, *cu. ft./kWh/cycle*	Water factor, *gal./cu. ft./cycle*
Top-Loading	1.60	8.5
Front-Loading ...	2.00	5.5

Issued in Washington, DC, on November 1, 2011.

Kathleen B. Hogan,

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

[FR Doc. 2011–28920 Filed 11–7–11; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2007–27747; Directorate Identifier 2007–CE–030–AD; Amendment 39–16782; AD 2009–10–09 R2]

RIN 2120–AA64

Airworthiness Directives; Cessna Aircraft Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; correction.

SUMMARY: The FAA is correcting an airworthiness directive (AD) that published in the **Federal Register**. That AD applies to certain Cessna Aircraft Company (Cessna) Models 150F, 150G, 150H, 150J, 150K, 150L, 150M, A150K, A150L, A150M, F150F, F150G, F150H, F150J, F150K, F150L, F150M, FA150K, FA150L, FRA150L, FA150M, FRA150M, 152, A152, F152, and FA152 airplanes. There is an error in the compliance instructions. This document corrects that error. In all other respects, the original document remains the same.

DATES: This final rule; correction, is effective November 8, 2011. The effective date for AD 2009–10–09 R2 remains September 12, 2011.

ADDRESSES: You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The address for the Docket Office (*phone:* (800) 647–5527) is Document Management Facility, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Ann Johnson, Aerospace Engineer, FAA, Wichita Aircraft Certification Office, 1801 Airport Road, Room 100, Wichita, Kansas 67209; *phone:* (316) 946–4105; *fax:* (316) 946–4107; *email: ann.johnson@faa.gov.*

SUPPLEMENTARY INFORMATION: Airworthiness Directive 2009–10–09 R2, Amendment 39–16782 (76 FR 53308, August 26, 2011), currently requires either installing a placard prohibiting spins and other acrobatic maneuvers in the airplane or replacing the rudder stop, the rudder stop bumper, and the attachment hardware with a new rudder stop modification kit for certain Cessna Models 150F, 150G, 150H, 150J, 150K, 150L, 150M, A150K, A150L, A150M, F150F, F150G, F150H, F150J, F150K, F150L, F150M, FA150K, FA150L, FRA150L, FA150M, FRA150M, 152, A152, F152, and FA152 airplanes.

As published, the text in the Procedures column of Table 2 in paragraph (g)(1) of this AD incorrectly states ''* * * fabricate the placard required in paragraph (g)(1)(i) of this AD * * *'', and the text should refer to paragraph (g)(1)(ii).

No other part of the preamble or regulatory information has been changed; therefore, only the changed portion of the final rule is being published in the **Federal Register.**

The effective date of this AD remains September 12, 2011.

Correction of Regulatory Text

§ 39.13 [Corrected]

In the **Federal Register** of August 26, 2011, on page 53311, in the 3rd column, Procedures, paragraph (g)(1), Table 2—Actions, Compliance and Procedures, of AD 2009–10–09 R2 is corrected to read as follows:

* * * * *

A person authorized to perform maintenance as specified in 14 CFR 43.3 of the Federal Aviation Administration Regulations (14 CFR 43.3) is required to make the AFM and POH changes, fabricate the placard required in paragraph (g)(1)(ii) of this AD, and make an entry into the aircraft logbook showing compliance with the portion of the AD per compliance with 14 CFR 43.9.

* * * * *

Issued in Kansas City, Missouri, on November 2, 2011.

John R. Colomy,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2011–28861 Filed 11–7–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–1301; Directorate Identifier 2010–SW–008–AD; Amendment 39–16851; AD 2011–22–08]

RIN 2120–AA64

Airworthiness Directives; MD Helicopters, Inc. Model MD900 Helicopters

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment supersedes an existing airworthiness directive (AD) that applies to MD Helicopters, Inc. (MDHI) Model MD900 helicopters. That AD currently requires turning ON both Vertical Stabilizer Control System (VSCS) switches and turning OFF the autopilot (AP/SAS) switch; pulling certain AP/SAS circuit breakers; installing a placard near the AP/SAS master switch; installing an airspeed limitation placard on the instrument panel; and making changes to the Rotorcraft Flight Manual (RFM). This amendment retains those requirements and provides an option of replacing each affected tube adapter with a newly-designed tube adapter, which provides terminating action for the unsafe condition. This amendment is prompted by the manufacturer introducing an improved, newly-designed tube adapter. The actions specified by this AD are intended to prevent loss of yaw control and subsequent loss of control of the helicopter.

DATES: Effective December 13, 2011.

ADDRESSES: You may get the service information identified in this AD from MD Helicopters, Inc., *Attn:* Customer Support Division, 4555 E. McDowell Rd., Mail Stop M615, Mesa, AZ 85215–9734, telephone 1–(800) 388–3378, fax (480) 346–6813, or at *http://www.mdhelicopters.com.*

Examining the Docket: You may examine the docket that contains this AD, any comments, and other information on the Internet at *http://www.regulations.gov,* or at the Docket Operations office, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Eric D. Schrieber, FAA, Los Angeles Aircraft Certification Office, Aviation Safety Engineer, Airframe Branch, 3960 Paramount Blvd., Lakewood, California 90712, telephone (562) 627–5348, fax (562) 627–5210.

SUPPLEMENTARY INFORMATION:

Discussion

On December 28, 2010, we issued a proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an AD that would apply to all MDHI Model MD900 helicopters with a VSCS tube adapter, part number 500N7218–1, installed. This proposal was published in the **Federal Register** as a notice of proposed rulemaking (NPRM) on January 14, 2011 (76 FR 2607). The NPRM proposed to supersede AD 2008–22–53 (73 FR 73165, December 2, 2008), retain the current requirements, and require continuing operations at a reduced speed until each tube adapter is replaced with an improved tube adapter.

We provided the public the opportunity to participate in developing this AD. We received no comments on the proposal or on the determination of the cost to the public. We have determined that air safety and the public interest require adopting the AD as proposed.

We estimate that this AD will affect 39 helicopters of U.S. registry. It will take about 5.5 hours to install the newly designed tube adapters and 0.5 hours for all other required modifications at an average labor rate of $85 per work hour. Required parts will cost about $244 for 2 tube adapters. Based on these figures, we estimate the total cost impact of this AD on U.S. operators is $29,406, assuming both tube adapters are replaced on the entire fleet of helicopters.

Regulatory Findings

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

For the reasons discussed above, I certify that the regulation:

1. Is not a ''significant regulatory action'' under Executive Order 12866;

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

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

We prepared an economic evaluation of the estimated costs to comply with this AD. See the AD docket to examine the economic evaluation.

Authority for This Rulemaking

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

Accordingly, under the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing Amendment 39–15756 (73 FR 73165, December 2, 2008), and adding the following new AD:

2011–22–08 MD Helicopters, Inc. Model MD900 Helicopters: Amendment 39–16851; Docket No. FAA–2010–1301; Directorate Identifier 2010–SW–008–AD. Supersedes AD 2008–22–53, Amendment 39–15756 (73 FR 73165, December 2, 2008), Directorate ID 2008–SW–61–AD.

Applicability

Model MD900 helicopters with a Vertical Stabilizer Control System (VSCS) tube adapter, part number (P/N) 500N7218–1, installed, certificated in any category.

Compliance

Required before further flight, unless accomplished previously.

To prevent loss of yaw control and subsequent loss of control of the helicopter, do the following:

(a) Turn ON both VSCS switches.

(b) If installed, de-energize the autopilot (AP/SAS) as follows:

(1) Determine if the AP/SAS trim actuators are centered. If the AP/SAS trim actuators are not centered, center them.

(2) After the AP/SAS trim actuators are centered:

(i) Turn the AP/SAS MSTR switch to the OFF position.

(ii) Pull the following AP circuit breakers located on the A601 Essential Bus Circuit Breaker Panel, mounted in the cockpit console, and install a plastic cable tie on each circuit breaker to prevent accidental energizing of the circuit:

(A) AP/SAS CMPTR (CB28),

(B) AP/SAS DISC (CB29), and

(C) AP/SAS ACCEL (CB30).

(3) Install a placard next to the AP Mode Select panel that contains the AP/SAS MSTR switch stating ''AP/SAS DEACTIVATED.''

(c) Install a placard on the instrument panel as close as practicable to the airspeed indicator that states:

''AIRSPEED LIMIT 100 KIAS or V_{NE}, WHICHEVER IS LESS. VFR FLIGHT ONLY, AUTOPILOT OFF.''

(d) Make pen and ink changes or insert a copy of this AD into the Limitations section of the rotorcraft flight manual (RFM) to revise the limitations as follows: ''V_{NE} is limited to 100 KIAS or less as determined by referring to the airspeed V_{NE} placard already installed on the helicopter. VFR Flight Only, Autopilot OFF.''

(e) Make pen and ink changes or insert a copy of this AD into the Limitations section of the RFM to revise the emergency procedures as follows: ''If you experience an anti-torque system malfunction, turn both VSCS switches to OFF during final approach for a run-on landing.''

(f) Instead of complying with paragraphs (a) through (e) of this AD, you may replace both VSCS tube adapters, P/N 500N7218–1, with airworthy VSCS tube adapters, P/N 900C2010303–101. If you install VSCS tube adapters, P/N 900C2010303–101, and previously have complied with AD 2008–22–53 (73 FR 73165, December 2, 2008), return the helicopter to its normal configuration by returning the switches and circuit breakers to their normal operating position, operationally testing the auto-pilot system, removing the two placards, and removing the revisions to the RFM pertaining to the airspeed limitation. Replacing both VSCS tube adapters, P/N 500N7218–1, with airworthy VSCS tube adapters, P/N 900C2010303–101, and returning the helicopter to its normal operating configuration constitutes terminating action for the requirements of this AD.

Note: MD Helicopters Service Bulletin SB900–110R1, dated December 3, 2008, which is not incorporated by reference, contains additional information about the subject of this AD. Copies of this service information may be obtained from MD Helicopters, Inc., *Attn:* Customer Support Division, 4555 E. McDowell Rd., Mail Stop M615, Mesa, Arizona 85215–9734, telephone 1–(800) 388–3378, fax (480) 346–6813, or on the Web at *http://www.mdhelicopters.com.* This service information may be inspected at the FAA, Office of the Regional Counsel, Southwest Region, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137.

(g) To request a different method of compliance or a different compliance time for this AD, follow the procedures in 14 CFR 39.19. Contact the Manager, Los Angeles Aircraft Certification Office, FAA, *Attn:* Eric D. Schrieber, Aviation Safety Engineer, Airframe Branch, 3960 Paramount Blvd., Lakewood, California 90712, telephone (562) 627–5348, fax (562) 627–5210, for information about previously approved alternative methods of compliance.

(h) The Joint Aircraft System/Component (JASC) Code is 6720: Tail Rotor Control System.

(i) This amendment becomes effective on December 13, 2011.

Issued in Fort Worth, Texas, on October 18, 2011.

Lance T. Gant,

Acting Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 2011–28897 Filed 11–7–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 73

[Docket No. FAA–2010–0693; Airspace Docket No. 11–ASO–29]

RIN 2120–AA66

Amendment of Restricted Areas R–2104A, B, C, D and E; Huntsville, AL

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action changes the using agency name for Restricted Area R–2104 A through E, Huntsville, AL to read ''Commander, U.S. Army Garrison, Redstone, Redstone Arsenal, AL.'' There are no changes to the boundaries; designated altitudes; time of designation; or activities conducted within the affected restricted areas.

DATES: Effective date 0901 UTC, February 9, 2012.

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

SUPPLEMENTARY INFORMATION:

Background

The Base Realignment and Closure Commission directed the merger of the ''Army Missile Command'' and the ''Aviation and Troop Command'' to form the ''Aviation and Missile Command.'' As a result, the current using agency organizational name is no longer accurate. Therefore, the U.S. Army requested that the FAA change the name of the using agency for Restricted Areas R–2104A through E to ''Commander, U.S. Army Garrison, Redstone Arsenal, AL.''

The Rule

This action amends Title 14 Code of Federal Regulations (14 CFR) part 73 by amending the using agency name for Restricted Areas R–2104A, B, C, D and E, in Huntsville, AL, from ''Commanding General, U.S. Army Missile Command, Redstone Arsenal, AL'' to ''Commander, U.S. Army Garrison Redstone, Redstone Arsenal, AL.'' This is an administrative change to update the title of the using agency. It does not affect the boundaries, designated altitudes, or activities conducted within the restricted area; therefore, notice and public procedures under 5 U.S.C. 553(b) are unnecessary.

Section 73.21 of Title 14, CFR part 73 was republished in FAA Order 7400.8T, effective February 16, 2011.

The FAA has determined that this action only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this regulation: (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as amends the description of Restricted Areas R–2104A, B, C, D and E, Huntsville, AL.

Environmental Review

The FAA has determined that this action qualifies for categorical exclusion under the National Environmental Policy Act in accordance with FAA Order 1050.1E, Environmental Impacts: Policies and Procedures, paragraph 311d. This airspace action is an administrative change to the descriptions of the affected restricted area to update the using agency name. It does not alter the dimensions, altitudes, or times of designation of the airspace; therefore, it is not expected to cause any potentially significant

environmental impacts, and no extraordinary circumstances exists that warrant preparation of an environmental assessment.

List of Subjects in 14 CFR Part 73

Airspace, Prohibited areas, Restricted areas.

Adoption of the Amendment

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

PART 73—SPECIAL USE AIRSPACE

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

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

§ 73.21 [Amended]

■ 2. § 73.21 is amended as follows:

* * * * *

1. R–2104A Huntsville, AL [Amended]

By removing the words ''Using Agency. Commanding General, U.S. Army Missile Command, Redstone Arsenal, AL'' and inserting the words ''Using Agency. Commander, U.S. Army Garrison Redstone, Redstone Arsenal, AL''

2. R–2104B Huntsville, AL [Amended]

By removing the words ''Using Agency. Commanding General, U.S. Army Missile Command, Redstone Arsenal, AL'' and inserting the words ''Using Agency. Commander, U.S. Army Garrison Redstone, Redstone Arsenal, AL''

3. R–2104C Huntsville, AL [Amended]

By removing the words ''Using Agency. Commanding General, U.S. Army Missile Command, Redstone Arsenal, AL'' and inserting the words ''Using Agency. Commander, U.S. Army Garrison Redstone, Redstone Arsenal, AL''

4. R–2104D Huntsville, AL [Amended]

By removing the words ''Using Agency. Commanding General, U.S. Army Missile Command, Redstone Arsenal, AL'' and inserting the words ''Using Agency. Commander, U.S. Army Garrison Redstone, Redstone Arsenal, AL''

5. R–2104E Huntsville, AL [Amended]

By removing the words ''Using Agency. Commanding General, U.S. Army Missile Command, Redstone Arsenal, AL'' and inserting the words ''Using Agency. Commander, U.S. Army Garrison Redstone, Redstone Arsenal, AL''

Issued in Washington, DC, on October 24, 2011.

Gary A. Norek,

Acting Manager, Airspace, Regulations and ATC Procedures Group.

[FR Doc. 2011–28613 Filed 11–7–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 20

[TD 9555]

RIN 1545–BH94

Graduated Retained Interests

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations that provide guidance on the portion of property (held in trust or otherwise) includible in the grantor's gross estate if the grantor has retained the use of the property, the right to an annuity, unitrust, graduated retained interest, or other payment from the property for life, for any period not ascertainable without reference to the grantor's death, or for a period that does not in fact end before the grantor's death. The final regulations will affect estates that file Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return.

DATES: *Effective Date:* These regulations are effective on November 8, 2011.

Applicability Date: For dates of applicability, see § 20.2036–1(c)(3).

FOR FURTHER INFORMATION CONTACT: Theresa M. Melchiorre at (202) 622–3090 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background and Explanation of Provisions

On April 30, 2009, proposed regulations (REG–119532–08) were published in the **Federal Register** (74 FR 19913). The proposed regulations provide the method required to determine the portion of trust corpus of a grantor retained annuity or unitrust trust (GRT) that is includible in the grantor's gross estate under section 2036 if the deceased grantor retains an interest described in § 25.2702–3(b)(1)(ii)(A) or (b)(1)(ii)(B) or § 25.2702–3(c)(1)(ii); that is, the interest retained by the grantor increases annually during the term of the trust (a graduated retained interest). This method would apply to graduated retained interests in transferred property whether or not held in trust.

In addition, the proposed regulations would add § 20.2036–1(c)(1)(ii), *Example 1,* illustrating the amount includible under section 2036 if the decedent transfers property in trust pursuant to the terms of which trust income is payable to the decedent and decedent's child, C, in equal shares during their joint lives and, on the death of the first to die of decedent and C, all trust income is to be paid to the survivor. The proposed regulations also would amend § 20.2036–1(b)(1)(ii) to address the method required to determine the amount includible under section 2036 if the decedent and C were entitled to receive annuity interests rather than trust income.

Written comments were received on the proposed regulations. No public hearing was scheduled because no individual or organization requested the opportunity to provide oral comments at a hearing. All comments are available at *www.regulations.gov* or upon request. The proposed regulations, with certain changes made in response to the written comments received, are adopted as final regulations.

Summary of Comments and Explanation of Provisions

Section 20.2036–1(b)(1)(ii)—Determining the Portion Includible if the Decedent's Retained Annuity Follows a Preceding Annuity Interest

Section 20.2036–1(b)(1)(ii) of the proposed regulations provides the method required to compute the amount includible in the decedent's gross estate under section 2036 in a situation where the decedent is to receive a payment (or an increased payment) after the death of another beneficiary who is receiving an annuity or other payment at the time of the decedent's death. If the decedent predeceases the other beneficiary, under the proposed regulations, the amount includible is the greater of: (1) The amount of corpus required to generate sufficient income to pay the annuity payable to the decedent as of the date of death; or (2) the amount of corpus required to produce sufficient income to satisfy the annuity or other payment the decedent would have been entitled to receive if the decedent had survived the other beneficiary, reduced by the present value of the other beneficiary's interest. The amount includible, however, cannot exceed the fair market value of the trust corpus on the date of death.

One commentator opined that this method attributes to the decedent a greater portion of a trust's value than is

appropriate, because the method does not take into account any depletion of trust principal that is assumed if the annuity payable to the current recipient is a greater percentage of the trust corpus than the assumed rate of return based on the applicable section 7520 rate. Alternatively, the commentator proposed that the amount includible under section 2036 should be the sum of: (1) The amount of trust corpus required to produce sufficient income to satisfy the annuity or other payment the decedent was receiving at death; plus the lesser of: (A) The amount of trust corpus required to produce sufficient income to satisfy the additional annuity payable to the decedent if the decedent had survived the current recipient; or (B) the fair market value of the corpus on the date of the decedent's death less the present value of the current recipient's annuity.

The requested approach in the comment was not adopted because it is inconsistent with the existing regulations. The regulations have provided, historically, that if the decedent retained or reserved an interest or right with respect to all or a portion of the property transferred, then the amount includible under section 2036 is the value of the property with respect to which the decedent retained the interest less the value of any outstanding income interest that is not subject to the decedent's retained interest and that is being enjoyed by another person at the time of decedent's death. Nevertheless, once this computation has been completed, a ceiling on the amount includible in the gross estate under section 2036 (specifically, the fair market value of the trust at death) is imposed. The method in the proposed regulations implements this principle. This method has been clarified in the final regulations by providing that, solely for the purpose of calculating the present value of the current recipient's interest in this computation, the exhaustion of trust corpus test described in § 20.7520–3(b)(2) is not to be applied in cases where § 20.7520–3(b)(2) would otherwise require it to be applied.

Clarification of § 20.2036–1(c)(1)(ii), Paragraph (i) of Example 1

In response to a comment, paragraph (i) of *Example 1* in § 20.2036–1(c)(1)(ii) has been revised to clarify that the present value of C's outstanding life estate reduces only the 50 percent of trust corpus from which it is payable.

Section 20.2036–1(c)(2)(ii)—Amount Includible in the Case of a Graduated Retained Interest

In response to a commentator's request for a detailed example, a step-by-step illustration of the method described in § 20.2036–1(c)(2)(ii) (renumbered as § 20.2036–1(c)(2)(iii) in the final regulations) has been added in *Example 7* of § 20.2036–1(c)(2)(iv).

Section 20.2036–1(c)(2)—Inclusion Under Sections 2036 and 2033

One commentator requested that the regulations clarify the interaction of sections 2033 and 2036 in a situation where the decedent establishes a GRT under the terms of which the retained interest is paid to the decedent for a specified term of years and, if the decedent dies prior to the expiration of that term, the retained annuity or other payment is to be paid to the decedent's estate for the balance of the term. See for example § 25.2702–3(e), *Example 5.*

The commentator noted that, because all or a portion of the trust corpus is includible in the decedent's gross estate under section 2036, the annuity or other payments that become payable after the decedent's death and are required to be paid to the estate for the remainder of the trust term are reflected in the amount includible under section 2036, and therefore should not also be includible under section 2033.

The IRS and the Treasury Department agree. To the extent that all or a portion of the trust corpus is includible in the gross estate under section 2036 as a result of the decedent's retained annuity or other interest, double inclusion of the same asset would result if any payment that becomes payable after the decedent's date of death to the estate also is included in the decedent's gross estate under section 2033 as a separate item. Accordingly, § 20.2036–1(c)(1)(i) of the regulations has been revised to provide specifically that payments that become payable to the decedent's estate after the decedent's death (as opposed to payments that are payable to the decedent prior to the decedent's death but are not paid until after the decedent's death) are not subject to inclusion under section 2033, if section 2036 is applied to include all or a portion of the trust corpus in the gross estate. This rule is also reflected in § 20.2036–1(c)(2)(iv), *Example 2* paragraph (ii) and *Example 7.*

The payments described in the preceding paragraph are to be distinguished, however, from annuity or other payments payable to the decedent prior to the decedent's date of death, but that are not paid until after death. Such payments are includible in the decedent's gross estate under section 2033 as a separate receivable. Thus, such an amount payable by the trust reduces the fair market value of the trust as of the date of death, but is included in the decedent's gross estate under section 2033 as a receivable amount.

Organizational Changes to and Clarification of § 20.2036–1(b) and (c)

In response to comments, the method set forth in § 20.2036–1(b)(1)(ii) of the proposed regulations for calculating the amount includible if part or all of the decedent's retained annuity follows an annuity interest payable to another at the time of the decedent's death has been moved to a separate section, § 20.2036–1(c)(2)(ii). As a conforming change, paragraph (ii) of *Example 1* of § 20.2036–1(c)(1)(ii) has been moved and renumbered as *Example 8* of § 20.2036–1(c)(2)(iv) in the final regulations.

Also in response to a comment, the manner of computing the amount to be included in the decedent's gross estate has been clarified at the end of § 20.2036–1(c)(2)(i).

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866, as supplemented by Executive Order 13563. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations and, because these regulations do not impose on small entities a collection of information requirement, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding this regulation was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal author of these regulations is Theresa M. Melchiorre, Office of Associate Chief Counsel (Passthroughs and Special Industries), IRS.

List of Subjects in 26 CFR Part 20

Estate taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 20 is amended as follows:

PART 20—ESTATE TAX; ESTATES OF DECEDENTS DYING AFTER AUGUST 16, 1954

■ **Paragraph 1.** The authority citation for part 20 continues to read in part as follows:

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

■ **Par. 2.** Section 20.2036–1 is amended by:

■ 1. Revising paragraph (b)(1)(ii).

■ 2. Adding two sentences at the end of paragraph (c)(1)(i).

■ 3. Adding paragraph (c)(1)(ii) *Example 1.*

■ 4. Removing the third sentence of paragraph (c)(2)(i) and adding three new sentences in its place.

■ 5. Redesignating paragraphs (c)(2)(ii) and (c)(2)(iii) as paragraphs (c)(2)(iii) and (c)(2)(iv), respectively.

■ 6. Adding new paragraph (c)(2)(ii) and text to newly-designated paragraph (c)(2)(iii).

■ 7. Revising the introductory text of and adding *Example 7* and *Example 8* to newly-designated paragraph (c)(2)(iv).

■ 8. Adding two sentences at the end of paragraph (c)(3).

The revisions and additions read as follows:

§ 20.2036–1 Transfers with retained life estate.

* * * * *

(b) * * * (1) * * *

(ii) A decedent reserved the right to receive the income, annuity, or other payment from transferred property after the death of another person who was in fact enjoying the income, annuity, or other payment at the time of the decedent's death. In such a case, the amount to be included in the decedent's gross estate under this section does not include the value of the outstanding interest of the other person as determined in paragraphs (c)(1)(i) and (c)(2)(ii) of this section. See also, paragraphs (c)(1)(ii) *Example 1* and (c)(2)(iv) *Example 8* of this section. If the other person predeceased the decedent, the reservation by the decedent may be considered to be either for life, or for a period that does not in fact end before death.

* * * * *

(c) * * *

(1) * * *

(i) * * * If this section applies to an interest retained by the decedent in a trust or otherwise and the terms of the trust or other governing instrument provide that, after the decedent's death, payments the decedent was receiving during life are to continue to be made to the decedent's estate for a specified period (as opposed to payments that were payable to the decedent prior to the decedent's death but were not actually paid until after the decedent's death), such payments that become payable after the decedent's death are not includible in the decedent's gross estate under section 2033 because they are properly reflected in the value of the trust corpus included under this section. Payments that become payable to the decedent prior to the decedent's date of death, but are not paid until after the decedent's date of death, are includible in the decedent's gross estate under section 2033.

(ii) * * *

Example 1. Decedent (D) creates an irrevocable inter vivos trust. The terms of the trust provide that all of the trust income is to be paid to D and D's child, C, in equal shares during their joint lives and, on the death of the first to die of D and C, all of the trust income is to be paid to the survivor. On the death of the survivor of D and C, the remainder is to be paid to another individual, F. Subsequently, D dies survived by C. Fifty percent of the value of the trust corpus is includible in D's gross estate under section 2036(a)(1) because, under the terms of the trust, D retained the right to receive one-half of the trust income for D's life. In addition, the excess (if any) of the value of the remaining 50 percent of the trust corpus, over the present value of C's outstanding life estate in that 50 percent of trust corpus, also is includible in D's gross estate under section 2036(a)(1), because D retained the right to receive all of the trust income for such time as D survived C. If C had predeceased D, then 100 percent of the trust corpus would have been includible in D's gross estate.

* * * * *

(2) * * *

(i) * * * The portion of the trust's corpus includible in the decedent's gross estate for Federal estate tax purposes is that portion of the trust corpus necessary to provide the decedent's retained use or retained annuity, unitrust, or other payment (without reducing or invading principal). In the case of a retained annuity or unitrust, the portion of the trust's corpus includible in the decedent's gross estate is that portion of the trust corpus necessary to generate sufficient income to satisfy the retained annuity or unitrust (without reducing or invading principal), using the interest rates provided in section 7520 and the adjustment factors prescribed in § 20.2031–7 (or § 20.2031–7A), if applicable. The computation is illustrated in paragraph (c)(2)(iv), *Examples 1, 2,* and *3* of this section.

* * *

(ii) *Decedent's retained annuity following a current annuity interest of another person.* If the decedent retained the right to receive an annuity or other payment (rather than income) after the death of the current recipient of that interest, then the amount includible in the decedent's gross estate under this section is the amount of trust corpus required to produce sufficient income to satisfy the entire annuity or other payment the decedent would have been entitled to receive if the decedent had survived the current recipient (thus, also including the portion of that entire amount payable to the decedent before the current recipient's death), reduced by the present value of the current recipient's interest. However, the amount includible shall not be less than the amount of corpus required to produce sufficient income to satisfy the annuity or other payment the decedent was entitled, at the time of the decedent's death, to receive for each year. In addition, in no event shall the amount includible exceed the value of the trust corpus on the date of death. Finally, in calculating the present value of the current recipient's interest, the exhaustion of trust corpus test described in § 20.7520–3(b)(2) (exhaustion test) is not to be applied, even in cases where § 20.7520–3(b)(2) would otherwise require it to be applied. The following steps implement this computation.

(A) *Step 1:* Determine the fair market value of the trust corpus on the decedent's date of death.

(B) *Step 2:* Determine, in accordance with paragraph (c)(2)(i) of this section, the amount of corpus required to generate sufficient income to pay the annuity, unitrust, or other payment (determined on the date of the decedent's death) payable to the decedent for the trust year in which the decedent's death occurred.

(C) *Step 3:* Determine, in accordance with paragraph (c)(2)(i) of this section, the amount of corpus required to generate sufficient income to pay the annuity, unitrust, or other payment that the decedent would have been entitled to receive for each trust year if the decedent had survived the current recipient.

(D) *Step 4:* Determine the present value of the current recipient's annuity, unitrust, or other payment (without applying the exhaustion test).

(E) *Step 5:* Reduce the amount determined in Step 3 by the amount determined in Step 4, but not to below the amount determined in Step 2.

(F) *Step 6:* The amount includible in the decedent's gross estate under this section is the lesser of the amounts determined in Step 5 and Step 1.

(iii) *Graduated retained interests*—(A) *In general.* For purposes of this section, a *graduated retained interest* is the grantor's reservation of a right to receive an annuity, unitrust, or other payment as described in paragraph (c)(2)(i) of this section, payable at least annually, that increases (but does not decrease) over a period of time, not more often than annually.

(B) *Other definitions*—(*1*) *Base amount.* The *base amount* is the amount of corpus required to generate the annuity, unitrust, or other payment payable for the trust year in which the decedent's death occurs. See paragraph (c)(2)(i) of this section for the calculation of the base amount.

(*2*) *Periodic addition.* The *periodic addition* in a graduated retained interest for each year after the year in which decedent's death occurs is the amount (if any) by which the annuity, unitrust, or other payment that would have been payable for that year if the decedent had survived exceeds the total amount of payments that would have been payable for the year immediately preceding that year. For example, assume the trust instrument provides that the grantor is to receive an annual annuity payable to the grantor or the grantor's estate for a 5-year term. The initial annual payment is $100,000, and each succeeding annual payment is to be 120 percent of the amount payable for the preceding year. Assuming the grantor dies in the second year of the trust (whether before or after the due date of the second annual payment), the periodic additions for years 3, 4, and 5 of the trust are as follows:

	(1) Annual payment	(2) Prior year payment	(1 − 2) Periodic addition
Year 3	144,000	120,000	24,000
Year 4	172,800	144,000	28,800
Year 5	207,360	172,800	34,560

(*3*) *Corpus amount.* For each trust year in which a periodic addition occurs (increase year), the *corpus amount* is the amount of trust corpus which, starting from the decedent's date of death, is necessary to generate an amount of income sufficient to pay the periodic addition, beginning in the increase year and continuing in perpetuity, without reducing or invading principal. For each year with a periodic addition, the corpus amount required as of the decedent's date of death is the product of two factors: The first is the result of dividing the periodic addition (adjusted for payments made more frequently than annually, if applicable, and for payments due at the beginning, rather than the end, of a payment period (see Table K or J of § 20.2031–7(d)(6)) by the section 7520 rate (periodic addition/rate)); and the second is 1 divided by the sum of 1 and the section 7520 rate raised to the T power (1/(1 + rate)∧T). The second factor applies a present value discount to reflect the period beginning with the date of death and ending on the last day of the trust year immediately before the year for which the periodic addition is first payable.

(*i*) The corpus amount is determined as follows:

$$\frac{\text{(Periodic Addition) x (Adjustment Factor)}}{\text{Section 7520 Rate}} \times \frac{1}{(1+\text{ Section 7520 Rate})^{T}}$$

(*ii*) The adjustment factor, if applicable, is the factor for payments made more frequently than annually and for payments due at the beginning, rather than the end, of a calendar period (see Table K or J of § 20.2031–7(d)(6)). T equals the time period in years from the decedent's date of death through the last day of the trust year immediately before the year for which the periodic addition is first payable.

(C) *Amount includible.* The amount includible in the gross estate in the case of a graduated retained interest is the sum of the base amount and the corpus amount for each year for which a periodic addition is first payable. The sum of these amounts represents the amount of trust principal that would be necessary to generate the annual payments that would have been paid to the decedent if the decedent had survived and had continued to receive the graduated retained interest. The amount of trust corpus includible in a decedent's gross estate under this section, however, shall not exceed the fair market value of the trust corpus on the decedent's date of death. The provisions of this section also apply to graduated retained interests in transferred property not held in trust.

(iv) *Examples.* The application of paragraphs (c)(2)(i), (c)(2)(ii), and (c)(2)(iii) of this section is illustrated in the following examples:

* * * * *

Example 7. (i) On November 1, year N, D transfers assets valued at $2,000,000 to a GRAT. Under the terms of the GRAT, the trustee is to pay to D an annuity for a 5-year term that is a qualified interest described in section 2702(b). The annuity amount is to be paid annually at the end of each trust year, on October 31st. The first annual payment is to be $100,000. Each succeeding payment is to be 120 percent of the amount paid in the preceding year. Income not distributed in any year is to be added to principal. If D dies during the 5-year term, the payments are to be made to D's estate for the balance of the GRAT term. At the end of the 5-year term, the trust is to terminate and the corpus is to be distributed to C, D's child. D dies on January 31st of the third year of the GRAT term. On the date of D's death, the value of the trust corpus is $3,200,000, the section 7520 interest rate is 6.8 percent, and the adjustment factor from Table K of § 20.2031–7 is 1.0000. D's executor does not elect to value the gross estate as of the alternate valuation date pursuant to section 2032.

(ii) The amount includible in D's gross estate under section 2036(a)(1) as described in paragraph (c)(2)(iii)(C) of this section is determined and illustrated as follows:

A GRAT Year	B Annual Annuity Payment	C Periodic Addition	D Required Principal: C x Adj. Factor / 0.068	E Deferral Period: Death to GRAT Year	F Present Value Factor: 1/(1+.068)^E	G Corpus or Base Amount At Death: D x F
3	144,000	n/a	2,117,647	n/a	n/a	2,117,647
4	172,800	28,800	423,529	0.747945	0.951985	403,193
5	207,360	34,560	508,235	1.747945	0.891372	453,026
					Total:	2,973,866

(iii) Specifically:

(A) *Column A.* First, determine the year of the trust term during which the decedent's death occurs, and the number of subsequent years remaining in the trust term for which the decedent retained or reserved an interest. In this example, D dies during year 3, with two additional years remaining in the term.

(B) *Column B.* Under the formula specified in the trust, the annuity payment to be made on October 31st of the 3rd year of the trust term is $144,000. Using that same formula, determine the annuity amounts for years 4 and 5.

(C) *Column C.* Determine the periodic addition for year 4 and year 5 by subtracting the annuity amount for the preceding year from the annuity amount for that year; the periodic addition for that year is the amount of the increase in the annuity amount for that year.

(D) *Columns D through G for year 3.* For the year of the decedent's death (year 3), determine the principal required to produce the annuity amount (Column D) by multiplying the annuity amount (Column B) by the adjustment factor (in this case 1.0000) and by dividing the product by the applicable interest rate under section 7520. Because this is the year of decedent's death and reflects the annuity amount payable to the decedent in that year, there is no deferral, so this is also the Base Amount (the amount of corpus required to produce the annuity for year 3) (Column G).

(E) *Columns D through G for years 4 and 5.* For each succeeding year of the trust term during which the periodic addition will not be payable until a year subsequent to the year of the decedent's death, determine the principal required to produce the periodic addition payable for that year (Column D) by multiplying the periodic addition (Column C) by the adjustment factor and by dividing the product by the applicable interest rate under section 7520. Compute the factors to reflect the length of the deferral period (Column E) and the present value (Column F) as described in paragraph (c)(2)(iii)(B)(*3*) of this section. Multiply the amount of corpus in Column D by the factors in Columns E and F to determine the Corpus Amount for that year (Column G).

(F) *Column G total.* The sum of the amounts in Column G represents the total amount includable in the gross estate (but not in excess of the fair market value of the trust on the decedent's date of death).

(iv) An illustration of the amount of trust corpus (as of the decedent's death) necessary to produce the scheduled payments is as follows:

		Year 3	Year 4	Year 5	Corpus Amount
2nd Periodic Addition	$34,560	Deferral period		$453,026	$453,026
1st Periodic Addition	$28,800	Deferral period	$403,193		$403,193
Annuity in year of death	$144,000	$2,117,647			$2,117,647
Total amount (sum) included in gross estate					$2,973,866

(v) A total corpus amount (as defined in paragraph (c)(2)(iii)(B)(*3*) of this section) of $2,973,866 constitutes the principal required as of decedent's date of death to produce (without reducing or invading principal) the annual payments that D would have received if D had survived and had continued to receive the retained annuity. Therefore, $2,973,866 of the trust corpus is includible in D's gross estate under section 2036(a)(1). The remaining $226,134 of the trust corpus is not includible in D's gross estate under section 2036(a)(1). The result would be the same if D's retained annuity instead had been payable to D for a term of 5 years, or until D's prior death, at which time the GRAT would have terminated and the trust corpus would have become payable to another.

(vi) If, instead, D's annuity was to have been paid on a monthly or quarterly basis, then the periodic addition would have to be adjusted as provided in paragraph (c)(2)(iii)(B)(*3*) of this section. Specifically, in Column D of the Table for years 4 and 5 in this example, the amount of the principal required would be computed by multiplying the periodic addition by the appropriate factor from Table K or J of § 20.2031–7(d)(6) before dividing as indicated and computing the amounts in Columns E through G. In addition, Column D in year 3 also would have to be so adjusted. Under the facts presented, section 2039 does not apply to include any amount in D's gross estate by reason of this retained interest. See § 20.2039–1(e).

Example 8. (i) D creates an irrevocable inter vivos trust. The terms of the trust provide that an annuity of $10,000 per year is to be paid to D and C, D's child, in equal shares during their joint lives. On the death of the first to die of D and C, the entire $10,000 annuity is to be paid to the survivor for life. On the death of the survivor of D and C, the remainder is to be paid to another individual, F. Subsequently, D dies survived by C. On D's date of death, the fair market value of the trust is $120,000 and the section 7520 rate is 7 percent. At the date of D's death, the amount of trust corpus needed to produce D's annuity interest ($5,000 per year) is $71,429 ($5,000/0.07). In addition, assume the present value of C's right to receive $5,000 annually for the remainder of

C's life is $40,000. The portion of the trust corpus includible in D's gross estate under section 2036(a)(1) is $102,857, determined as follows:

(ii) *Step 1:* Fair market value of corpus	$120,000
(iii) *Step 2:* Corpus required to produce D's date of death annuity ($5,000/0.07)	71,429
(iv) *Step 3:* Corpus required to produce D's annuity if D had survived C ($10,000/0.07)	142,857
(v) *Step 4:* Present value of C's interest	40,000
(vi) *Step 5:* The amount determined in Step 3, reduced by the amount determined in Step 4, but not to below the amount determined in Step 2 ($142,857—$40,000, but not less than $71,429)	102,857
(vii) *Step 6:* The lesser of the amounts determined in Steps 5 and 1 ($102,857 or $120,000)	102,857

(3) *Effective/applicability dates.* * * * All but the last two sentences at the end of paragraph (c)(1)(i) of this section are applicable to the estates of decedents dying after August 16, 1954. The first, second, and sixth sentences in paragraph (c)(2)(i) of this section and all but the introductory text, *Example 7,* and *Example 8* of paragraph (c)(2)(iv) of this section are applicable to the estates of decedent's dying on or after July 14, 2008. Paragraph (b)(1)(ii) of this section, the last two sentences at the end of paragraph (c)(1)(i) of this section, *Example 1* of paragraph (c)(1)(ii) of this section, the third, fourth, and fifth sentences in paragraph (c)(2)(i) of this section; paragraph (c)(2)(ii) of this section; paragraph (c)(2)(iii) of this section; and the introductory text, *Example 7,* and *Example 8* of paragraph (c)(2)(iv) of this section are applicable to the estates of decedents dying on or after November 8, 2011.

Approved: October 27, 2011.

Steven T. Miller,

Deputy Commissioner for Services and Enforcement.

Emily S. McMahon,

Acting Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 2011–28824 Filed 11–7–11; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2011–0973]

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

AGENCY: Coast Guard, DHS.

ACTION: Notice of temporary deviation from regulations.

SUMMARY: The Commander, Thirteenth Coast Guard District, has issued a temporary deviation from the regulation governing the operation of the Burlington Northern Santa Fe Railway Bridge across the Lake Washington Ship Canal, mile 0.1, at Seattle, WA. The deviation is necessary to facilitate replacement of a counterweight trunnion bearing. This deviation allows the bridge to remain in the down or closed position during the maintenance period.

DATES: This deviation is effective from 8 p.m. on November 8, 2011 through 5 p.m. on November 22, 2011.

ADDRESSES: Documents mentioned in this preamble as being available in the docket are part of docket USCG–2011–0973 and are available online by going to *http://www.regulations.gov,* inserting USCG–2011–0973 in the ''Keyword'' box and then clicking ''Search''. They are also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email the Bridge Administrator, Coast Guard Thirteenth District; *telephone* (206) 220–7282 *email randall.d.overton@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, *telephone* (202) 366–9826.

SUPPLEMENTARY INFORMATION: Burlington Northern Santa Fe (BNSF) Railway has requested to not open the BNSF Rail Bascule Bridge across the Lake Washington Ship Canal, mile 0.1, for vessel traffic for a 14 day period to facilitate heavy maintenance on the bridge. The bridge provides 43 feet of vertical clearance above mean high water while in the closed position. Under normal operations this bridge opens on signal as required by 33 CFR 117.5 and 33 CFR 117.1051(c). The deviation period is from 8 p.m. November 8, 2011 through 5 p.m. November 22, 2011. This deviation allows the draw span of the BNSF Railway Bridge across the Lake Washington Ship Canal, mile 0.1, to remain in the closed position and to not open for maritime traffic from 8 p.m. November 8, 2011 through 5 p.m. November 22, 2011. This time frame was selected because it corresponds with the closure of the Army Corps of Engineering Hiram M. Chittenden lock immediately upstream or inland of the bridge on the Lake Washington Ship Canal. This stretch of the Lake Washington Ship Canal experiences heavy waterway usage and is utilized by vessels ranging from commercial tug and barge to pleasure craft. Mariners have been notified and will be kept informed of the bridge's operational status via the Coast Guard Notice to Mariners publication and Broadcast Notice to Mariners as appropriate. Vessels which do not require a bridge opening may continue to transit beneath the bridge during this closure period. Due to the nature of work being performed the draw span will be unable to open for maritime traffic during this maintenance period.

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

Dated: October 26, 2011.

Randall D. Overton,

Bridge Administrator.

[FR Doc. 2011–28846 Filed 11–7–11; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2011–0578]

RIN 1625–AA00

Safety Zone; Chicago Harbor, Navy Pier Southeast, Chicago, IL

AGENCY: Coast Guard, DHS.

ACTION: Notice of enforcement of regulation.

SUMMARY: The Coast Guard will enforce the Navy Pier Southeast Safety Zone in Chicago Harbor from December 3, 2011 through January 1, 2012. This action is necessary and intended to ensure safety

of life on the navigable waters of the United States immediately prior to, during, and immediately after fireworks events. During the aforementioned period, restrictions will be enforced upon, and control movement of, vessels in a specified area immediately prior to, during, and immediately after fireworks events. During the enforcement period, no person or vessel may enter the safety zones without permission of the Captain of the Port, Sector Lake Michigan.

DATES: The regulations in 33 CFR 165.931 will be enforced at various times and on various dates from 5:45 p.m. on December 3, 2011 to 12:30 a.m. on January 1, 2012.

FOR FURTHER INFORMATION CONTACT: If you have questions on this notice, call or email BM1 Adam Kraft, Prevention Department, Coast Guard Sector Lake Michigan, Milwaukee, WI at (414) 747–7154, *email Adam.D.Kraft@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce the Safety Zone; Chicago Harbor, Navy Pier Southeast, Chicago, IL listed in 33 CFR 165.931 for the following events:

(1) *Navy Pier Fireworks;* on December 3, 2011 from 5:45 p.m. until 6:30 p.m.; on December 31, 2011 from 8 p.m. until 8:45 p.m.; and on December 31, 2011 from 11:45 p.m. until 12:30 a.m. on January 1, 2012.

All vessels must obtain permission from the Captain of the Port, Sector Lake Michigan, or his or her on-scene representative to enter, move within or exit the safety zone. Vessels and persons granted permission to enter the safety zone shall obey all lawful orders or directions of the Captain of the Port, Sector Lake Michigan, or his or her on-scene representative. While within a safety zone, all vessels shall operate at the minimum speed necessary to maintain a safe course.

This notice is issued under authority of 33 CFR 165.931 and 5 U.S.C. 552(a). In addition to this notice in the **Federal Register**, the Coast Guard will provide the maritime community with advance notification of these enforcement periods via broadcast Notice to Mariners or Local Notice to Mariners. The Captain of the Port, Sector Lake Michigan, will issue a Broadcast Notice to Mariners notifying the public when enforcement of the safety zone established by this section is suspended. If the Captain of the Port, Sector Lake Michigan, determines that the safety zone need not be enforced for the full duration stated in this notice, he or she may use a Broadcast Notice to Mariners to grant general permission to enter the safety zone. The Captain of the Port, Sector Lake Michigan, or his or her on-scene representative may be contacted via VHF Channel 16.

Dated: October 13, 2011.

M.W. Sibley,

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

[FR Doc. 2011–28885 Filed 11–7–11; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

37 CFR Parts 2 and 7

[Docket No. PTO–T–2010–0014]

RIN 0651–AC39

Trademark Technical and Conforming Amendments

AGENCY: United States Patent and Trademark Office, Commerce.

ACTION: Final rule.

SUMMARY: The United States Patent and Trademark Office (''USPTO'') is adopting as a final rule, with minor changes, an interim final rule amending the Rules of Practice in Trademark Cases and the Rules of Practice in Filings Pursuant to the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (''Madrid Rules'') to implement the Trademark Technical and Conforming Amendment Act of 2010. The interim final rule was published in the **Federal Register** on June 24, 2010. This final rule makes minor changes to the interim final rule to incorporate additional statutory language being implemented.

DATES: This rule is effective on November 8, 2011.

FOR FURTHER INFORMATION CONTACT: Cynthia C. Lynch, Office of the Deputy Commissioner for Trademark Examination Policy, by telephone at (571) 272–8742.

SUPPLEMENTARY INFORMATION:

Background

On June 24, 2010, the USPTO published an interim final rule at 75 FR 35973 amending the Rules of Practice in Trademark Cases and the Madrid Rules to implement the Trademark Technical and Conforming Amendment Act of 2010 (''TTCAA''), Public Law 111–146, 124 Stat. 66 (2010). This legislation and the implementing rule harmonized the framework for submitting trademark registration maintenance filings to the USPTO by permitting holders of international registrations with an extension of protection to the United States under the Madrid Protocol (''Madrid Protocol registrants'') to file Affidavits or Declarations of Use or Excusable Nonuse at intervals identical to those for nationally issued registrations. In addition, all trademark owners may now cure deficiencies in their maintenance filings outside of the statutory filing period upon payment of a deficiency surcharge, specifically including when the affidavit or declaration was not filed in the name of the owner of the registration.

The interim final rule provided a 60-day comment period that ended August 23, 2010. No comments were received. For the reasons given in the interim final rule, the USPTO is adopting the interim final rule amending 37 CFR parts 2 and 7 as a final rule, with minor changes.

The rule is changed slightly for purposes of clarification. Specifically, 37 CFR 2.163(a), 2.164(a), and 7.39(c) are amended to reflect that deficiencies may be corrected after notification from the USPTO. These revisions reflect the amendments to Sections 8 and 71 of the Lanham Act, 15 U.S.C. 1058 and 1141k, providing that deficiencies may be corrected after notification of the deficiency.

Rule Making Considerations

This document adopts as a final rule, with minor procedural changes, the interim final rule that is already in effect. The changes from the interim rule contained in this final rule constitute interpretative rules or rules of agency practice and procedure and accordingly, are not subject to the requirements for prior notice and comment. *See* 5 U.S.C. 553(b)(3)(A). The rule changes relate solely to the procedures for maintaining a Federal trademark registration, and merely implement the TTCAA, so that the Rules of Practice in Trademark Cases and the Madrid Rules are consistent with the statutory revisions. Thus, prior notice and an opportunity for public comment are not required pursuant to 5 U.S.C. 553(b)(A) (or any other law). *See Cooper Techs. Co.* v. *Dudas,* 536 F.3d 1330, 1336–37, 87 USPQ2d 1705, 1710 (Fed. Cir. 2008) (stating that 5 U.S.C. 553, and thus 35 U.S.C. 2(b)(2)(B), does not require notice and comment rule making for '' 'interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.' '' (quoting 5 U.S.C. 553(b)(A)), *Bachow Communications Inc.* v. *FCC,* 237 F.3d 683, 690 (DC Cir. 2001) (rules governing an application process are ''rules of agency organization, procedure, or practice'' and are exempt from the Administrative Procedure Act's notice and comment requirement); *see*

also Merck & Co., Inc. v. *Kessler,* 80 F.3d 1543, 1549–50, 38 USPQ2d 1347, 1351 (Fed. Cir. 1996) (the rules of practice promulgated under the authority of former 35 U.S.C. 6(a) (now in 35 U.S.C. 2(b)(2)) are not substantive rules (to which the notice and comment requirements of the APA apply)), and *Fressola* v. *Manbeck,* 36 USPQ2d 1211, 1215 (D.D.C. 1995) (''[i]t is extremely doubtful whether any of the rules formulated to govern patent or trademark practice are other than 'interpretive rules, general statements of policy, * * * procedure, or practice.' '') (quoting C.W. Ooms, The United States Patent Office and the Administrative Procedure Act, 38 Trademark Rep. 149, 153 (1948)).

Rule Making Requirements

Executive Order 13132: This rule making does not contain policies with federalism implications sufficient to warrant preparation of a Federalism Assessment under Executive Order 13132 (Aug. 4, 1999).

Executive Order 12866: This rule making has been determined to be not significant for purposes of Executive Order 12866 (Sept. 30, 1993).

Executive Order 13563 (Improving Regulation and Regulatory Review): The USPTO has complied with Executive Order 13563. Specifically, the USPTO has, to the extent feasible and applicable: (1) Made a reasoned determination that the benefits justify the costs of the rule; (2) tailored the rule to impose the least burden on society consistent with obtaining the regulatory objectives; (3) selected a regulatory approach that maximizes net benefits; (4) specified performance objectives; (5) identified and assessed available alternatives; (6) involved the public in an open exchange of information and perspectives among experts in relevant disciplines, affected stakeholders in the private sector and the public as a whole, and provided online access to the rule making docket; (7) attempted to promote coordination, simplification and harmonization across government agencies and identified goals designed to promote innovation; (8) considered approaches that reduce burdens and maintain flexibility and freedom of choice for the public; and (9) ensured the objectivity of scientific and technological information and processes.

Regulatory Flexibility Act: As prior notice and an opportunity for public comment are not required pursuant to 5 U.S.C. 553 (or any other law), neither a regulatory flexibility analysis nor a certification under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.)* is required for this final rule. *See* 5 U.S.C. 603.

Paperwork Reduction Act: This rule involves information collection requirements which are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). The collection of information involved in this rule has been reviewed and previously approved by OMB under control number 0651–0051. Changes in this rule would not affect the information collection requirements associated with the information collection under OMB control number 0651–0051.

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

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

Congressional Review Act: Under the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*), prior to issuing any final rule, the USPTO will submit a report containing the final rule and other required information to the United States Senate, the United States House of Representatives, and the Comptroller General of the Government Accountability Office. However, this action is not a major rule as defined by 5 U.S.C. 804(2).

List of Subjects

37 CFR Part 2

Administrative practice and procedure, Trademarks.

37 CFR Part 7

Administrative practice and procedure, Trademarks, International registration.

Accordingly, the interim final rule amending 37 CFR parts 2 and 7, which was published at 75 FR 35973 on June 24, 2010, is adopted as a final rule with the following changes:

PART 2—RULES OF PRACTICE IN TRADEMARK CASES

■ 1. The authority citation for 37 CFR Part 2 continues to read as follows:

Authority: 15 U.S.C. 1123, 35 U.S.C. 2, unless otherwise noted.

■ 2. Revise § 2.163(a) to read as follows:

§ 2.163 Acknowledgment of receipt of affidavit or declaration.

* * * * *

(a) If the affidavit or declaration is filed within the time periods set forth in section 8 of the Act, deficiencies may be corrected after notification from the Office if the requirements of § 2.164 are met.

* * * * *

■ 3. Revise § 2.164(a) introductory text to read as follows:

§ 2.164 Correcting deficiencies in affidavit or declaration.

(a) If the affidavit or declaration is filed within the time periods set forth in section 8 of the Act, deficiencies may be corrected after notification from the Office, as follows:

* * * * *

PART 7—RULES OF PRACTICE IN FILINGS PURSUANT TO THE PROTOCOL RELATING TO THE MADRID AGREEMENT CONCERNING THE INTERNATIONAL REGISTRATION OF MARKS

■ 4. The authority citation for 37 CFR Part 7 continues to read as follows:

Authority: 15 U.S.C. 1123, 35 U.S.C. 2, unless otherwise noted.

■ 5. Revise § 7.39(c) introductory text to read as follows:

§ 7.39 Acknowledgment of receipt of and correcting deficiencies in affidavit or declaration of use in commerce or excusable nonuse.

* * * * *

(c) If the affidavit or declaration is filed within the time periods set forth in section 71 of the Act, deficiencies may be corrected after notification from the Office, as follows:

* * * * *

Dated: November 1, 2011.

David J. Kappos,

Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

[FR Doc. 2011–28890 Filed 11–7–11; 8:45 am]

BILLING CODE 3510–16–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 9

[FRL–9488–4]

OMB Approvals Under the Paperwork Reduction Act; Technical Amendment; Community Right-to-Know Toxic Chemical Release Reporting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) (44 U.S.C.3501 *et seq.*) EPA is issuing a technical amendment to amend the table that lists the Office of Management and Budget (OMB) control numbers issued under the Paperwork Reduction Act; Technical Amendment; Community Right-to-Know Toxic Chemical Release Reporting.

DATES: *Effective Date:* This final rule is effective November 8, 2011.

FOR FURTHER INFORMATION CONTACT: Cassandra Vail, Toxics Release Inventory Program Division, Office of Information Analysis and Access (2844T), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; *telephone number:* (202) 566–0753; *email address: vail.cassandra@epa.gov.*

SUPPLEMENTARY INFORMATION: EPA is amending the table of currently approved Information Collection Request (ICR) control numbers under the heading 40 CFR part 9; Toxic Chemical Release Reporting Community Right-to-Know issued by OMB under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) for various regulations.

EPA will continue to present OMB control numbers in a consolidated table format to be codified in 40 CFR part 9 of the Agency's regulations. The table lists CFR citations with reporting, recordkeeping, or other information collection requirements, and the current OMB control numbers. This listing of the OMB control numbers and their subsequent codification in the CFR satisfies the requirements of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) and OMB's implementing regulations at 5 CFR part 1320.

EPA finds that there is ''good cause'' under section 553(b)(B) of the Administrative Procedure Act, 5 U.S.C. 553(b)(B), to amend this table without prior notice and comment.

I. Administrative Requirements

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and is therefore not subject to review by the Office of Management and Budget. In addition, this action does not impose any enforceable duty, contain any unfunded mandate, or impose any significant or unique impact on small governments as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). This rule also does not require prior consultation with State, local, and tribal government officials as specified by Executive Order 12875 (58 FR 58093, October 28, 1993) or Executive Order 13084 (63 FR 27655 (May 10, 1998), or involve special consideration of environmental justice related issues as required by Executive Order 12898 (59 FR 7629, February 16, 1994). Because this action is not subject to notice-and-comment requirements under the Administrative Procedure Act or any other statute, it is not subject to the regulatory flexibility provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This rule also is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997) because EPA interprets E.O. 13045 as applying only to those regulatory actions that are based on health or safety risks, such that the analysis required under section 5–501 of the Order has the potential to influence the regulation. This rule is not subject to E.O. 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. Section 808 allows the issuing agency to make a good cause finding that notice and public procedure is impracticable, unnecessary or contrary to the public interest. This determination must be supported by a brief statement. 5 U.S.C. 808(2). As stated previously, EPA has made such a good cause finding, including the reasons therefore, and established an effective date of November 8, 2011. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 9

Environmental protection, Reporting and recordkeeping requirements.

Dated: October 28, 2011.

Jeff Wells,

Acting Director, Toxic Release Inventory Program Division, Office of Information Analysis and Access.

For the reasons set out in the preamble, 40 CFR part 9 is amended as follows:

PART 9-[AMENDED]

■ 1. The authority citation for part 9 continues to read as follows:

Authority: 7 U.S.C. 135 *et seq.,* 136–136y; 15 U.S.C. 2001, 2003, 2005, 2006, 2601–2671; 21 U.S.C. 331j, 346a, 348; 31 U.S.C. 9701; 33 U.S.C. 1251 *et seq.,* 1311, 1313d, 1314, 1318, 1321, 1326, 1330, 1342, 1344, 1345 (d) and (e), 1361; E.O. 11735, 38 FR 21243, 3 CFR, 1971–1975 Comp. p. 973; 42 U.S.C. 241, 242b, 243, 246, 300f, 300g, 300g–1, 300g–2, 300g–3, 300g–4, 300g–5, 300g–6, 300j–1, 300j–2, 300j–3, 300j–4, 300j–9, 1857 *et seq.,* 6901–6992k, 7401–7671q, 7542, 9601–9657, 11023, 11048.

■ 2. In § 9.1 the table is amended by revising the entries under the heading ''Toxic Chemical Release Reporting; Community Right-to-Know'' to read as follows:

§ 9.1 OMB approvals under the Paperwork Reduction Act.

* * * * *

40 CFR citation	OMB control No.
* * * * *	
Toxic Chemical Release Reporting: Community Right-to-Know	
Part 372, subpart A	2025–0009
372.22	2025–0009
372.25	2025–0009
372.27	2025–0009
372.30	2025–0009
372.38	2025–0009
Part 372, subpart C	2025–0009
Part 372, subpart D	2025–0009
372.85	2025–0009
372.95	2025–0009
* * * * *	

[FR Doc. 2011–28927 Filed 11–7–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2011–0312; FRL–9485–4]

Revisions to the California State Implementation Plan, San Joaquin Valley Unified Air Pollution Control District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is finalizing approval of revisions to the San Joaquin Valley Unified Air Pollution Control District (SJVUAPCD) portion of the California State Implementation Plan (SIP). These revisions were proposed in the **Federal Register** on June 16, 2011, and concern volatile organic compound (VOC) emissions from architectural coatings. We are approving a local rule that regulates these emission sources under the Clean Air Act as amended in 1990 (CAA or the Act).

DATES: *Effective Date:* This rule is effective on December 8, 2011.

ADDRESSES: EPA has established docket number EPA–R09–OAR–2011–0312 for this action. Generally, documents in the docket for this action are available electronically at *http://www.regulations.gov* or in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed at *http://www.regulations.gov*, some information may be publicly available only at the hard copy location (e.g., copyrighted material, large maps, multi-volume reports), and some may not be available in either location (e.g., confidential business information (CBI)). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: David Grounds, EPA Region IX, (415) 972–3019, *grounds.david@epa.gov*.

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

Table of Contents

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

I. Proposed Action

On June 16, 2011 (76 FR 35167), EPA proposed to approve the following rule into the California SIP.

Local agency	Rule title	Adopted	Submitted
SJVUAPCD Rule 4601	Architectural Coatings	12/17/09	05/17/10

We proposed to approve this rule because we determined that it complied with the relevant CAA requirements. Our proposed action contains more information on the rule and our evaluation.

II. Public Comments and EPA Responses

EPA's proposed action provided a 30-day public comment period. During this period, we received no comments.

III. EPA Action

No comments were submitted that change our assessment that the submitted rule complies with the relevant CAA requirements. Therefore, as authorized in section 110(k)(3) of the Act, EPA is fully approving this rule into the California SIP.

IV. Statutory and Executive Order Reviews

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

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide EPA with the discretionary authority to address disproportionate human health or environmental effects with practical, appropriate, and legally permissible methods under Executive Order 12898 (59 FR 7629, February 16, 1994).

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

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

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the

appropriate circuit by January 9, 2012. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

List of Subjects in 40 CFR Part 52

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

Dated: October 3, 2011.

Keith Takata,

Acting Regional Administrator, Region IX.

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

PART 52—[AMENDED]

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

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

Subpart F—California

■ 2. Section 52.220 is amended by adding paragraphs (c)(379)(i)(C)(*6*) to read as follows:

§ 52.220 Identification of plan.

* * * * *

(c) * * *

(379) * * *

(i) * * *

(C) * * *

(*6*) Rule 4601, ''Architectural Coatings'', amended on December 17, 2009.

* * * * *

[FR Doc. 2011–28788 Filed 11–7–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 372

[EPA–HQ–TRI–2009–0844; FRL–9488–5]

RIN 2025–AA27

Hydrogen Sulfide; Community Right-to-Know Toxic Chemical Release Reporting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Lifting of Administrative Stay for Hydrogen Sulfide; Correction.

SUMMARY: The Environmental Protection Agency published in the **Federal Register** of October 17, 2011, a document lifting the Administrative Stay of the reporting requirements for hydrogen sulfide. The Office of the Federal Register mistakenly lifted the stay of the reporting requirements for methyl mercaptan, and the document also inadvertently left out language in the preamble and contained incorrect language in the amendatory instruction section, which section is required by 1 CFR 21.1. This document affirms that the stay on the reporting requirements for methyl mercaptan was not lifted and sets out the language in the preamble and the amendatory instruction section as it should have printed.

DATES: Effective on October 17, 2011.

FOR FURTHER INFORMATION CONTACT: Daniel R. Bushman, Environmental Analysis Division, Office of Information Analysis and Access (2842T), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; *telephone number:* (202) 566–0743; *fax number:* (202) 566–0677; *email: bushman.daniel@epa.gov*.

SUPPLEMENTARY INFORMATION: The Environmental Protection Agency published a document on August 22, 1994 (59 FR 43048) imposing stays on the reporting requirements for hydrogen sulfide and methyl mercaptan found at 40 CFR 372.65. The document published in the **Federal Register** of October 17, 2011 (76 FR 64022) should have lifted the Administrative Stay of the reporting requirements for only hydrogen sulfide. The Office of the Federal Register mistakenly lifted the stay of the reporting requirements for methyl mercaptan as well. The document also inadvertently left out language in the preamble and contained incorrect language in the amendatory instruction section, which section is required by 1 CFR 21.1, regarding the lifted stay of hydrogen sulfide reporting requirements.

In FR Doc. 2011–23534 published on October 17, 2011 (76 FR 64022), make the following corrections.

1. On page 64025, in the second column, add a new paragraph before the beginning of section IV as follows:

''In order to lift the stay, as a procedural matter, EPA must include an instruction to the Office of the Federal Register, as required by 1 CFR 21.1. This instruction does not alter or change the content or text of any regulatory provision.''

2. On page 64037, in the third column following the signature, correctly revise the amendatory language to read as follows:

''Therefore, 40 CFR part 372 is affected as follows:

PART 372—[RESTATED]

■ 1. The authority citation for part 372 continues to read as follows:

Authority: 42 U.S.C. 11023 and 11048.

§ 372.65 [Affected]

■ 2. Section 372.65 is affected by lifting the reporting stay on the hydrogen sulfide entry and all related dates under paragraph (a), and by lifting the stay on the entry for CAS No. 7783–06–4 and all related dates under paragraph (b).''

Dated: November 2, 2011.

Malcolm D. Jackson,

Assistant Administrator and Chief Information Officer.

[FR Doc. 2011–28888 Filed 11–7–11; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 110321211–1289–02]

RIN 0648–BA94

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Reef Fish Fishery of the Gulf of Mexico; Gag Grouper Closure Measures

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; interim measures extended.

SUMMARY: NMFS issues this temporary rule to extend the effective date of interim measures to reduce overfishing of gag in the Gulf of Mexico (Gulf) implemented by a temporary rule published by NMFS on June 2, 2011. This temporary rule extends the interim measures implemented to reduce overfishing of gag in the Gulf by reducing the commercial quota for gag and, thus, the combined commercial quota for shallow-water grouper species (SWG), establishing a 2-month recreational season for gag, and suspending red grouper multi-use allocation in the Gulf grouper and tilefish individual fishing quota (IFQ) program, as recommended by the Gulf of Mexico Fishery Management Council (Council). The intended effect of this rule is to reduce overfishing of the gag resource in the Gulf.

DATES: The effective date for the temporary rule published at 76 FR 31874, June 2, 2011, is extended from November 30, 2011, to June 2, 2012, unless NMFS publishes a superseding document in the **Federal Register** or until suspended by another final rule.

ADDRESSES: Copies of the final regulatory flexibility analysis (FRFA), a regulatory impact review, and an environmental assessment (EA) may be obtained from the Southeast Regional Office Web site at: *http://sero.nmfs.noaa.gov/sf/GrouperSnapperandReefFish.htm.*

FOR FURTHER INFORMATION CONTACT: Peter Hood, Southeast Regional Office, NMFS, *telephone:* (727) 824–5305, or *email: Peter.Hood@noaa.gov.*

SUPPLEMENTARY INFORMATION: The reef fish fishery of the Gulf of Mexico is managed under the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico (FMP). The FMP was prepared by the Council and is implemented through regulations at 50 CFR part 622 under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

On June 2, 2011, NMFS published the final temporary rule (76 FR 31874) to implement measures to reduce the commercial quota for gag from 1.49 million lb (0.68 million kg) to 430,000 lb (195,045 kg), reduce the commercial SWG quota from 6.22 million lb (2.82 million kg) to 5.16 million lb (2.34 million kg), suspend red grouper multi-use allocation in the Gulf grouper and tilefish IFQ program, and implement a recreational fishing season for gag from September 16 through November 15, with a 2-fish daily bag limit. This temporary rule extends these measures for an additional 186 days, unless this rule is superseded by subsequent rulemaking. The purpose of the interim measures and this extension of the rule is to reduce the overfishing of the gag resource in the Gulf while long-term management measures are developed and implemented through Amendment 32 to the FMP, approved by the Council at its August 2011 meeting. Amendment 32 will include management measures to end overfishing of gag, allow the gag stock to rebuild, and co-manage gag and red grouper by implementing concurrent management measures. The proposed rule for Amendment 32 published on November 2, 2011 (76 FR 67656) and requested public comment. Section 305(c)(2) of the Magnuson-Stevens Act provides the Council the authority to request interim measures, if necessary, to reduce overfishing. The Council, at its October 2011 meeting concurred with extending the interim measures currently in place. Section 305(c)(3)(B) of the Magnuson-Stevens Act allows for interim measures to be extended for one additional period of 186 days provided that the public has had an opportunity to comment on the interim measures and that the Council is actively preparing a plan amendment to address the overfishing on a permanent basis. A proposed temporary rule, published on April 21, 2011 (76 FR 22345), requested public comments on these same interim measures. NMFS responded to these comments in the final temporary rule published on June 2, 2011 (76 FR 31874), and they are not repeated here.

Classification

The Administrator, Southeast Region, NMFS, (RA) has determined that the interim measures this temporary rule extends are necessary for the conservation and management of the Gulf gag stock, until more permanent measures are implemented, and is consistent with the Magnuson-Stevens Act and other applicable laws. The Council has developed and submitted Amendment 32 to establish long-term measures to end the overfishing of Gulf gag and rebuild the stock. Amendment 32 and its associated regulations are still being implemented and are not expected to become effective until sometime in early 2012.

This temporary rule has been determined to be not significant for purposes of E.O. 12866.

This temporary rule is exempt from the procedures of the Regulatory Flexibility Act because the rule is issued without opportunity for prior notice and comment.

An EA was prepared for the interim measures contained in the June 2, 2011, temporary rule (76 FR 31874). Because the conditions that existed at the time the June 2, 2011, temporary rule was implemented have not changed, the impacts of continuing the interim measures through this extension have already been considered. Copies of the EA are available from NMFS (see **ADDRESSES**).

The Assistant Administrator for Fisheries, NOAA (AA) finds good cause under 5 U.S.C. 553 (b)(B) to waive prior notice and opportunity for public comment on this temporary rule extension. Providing prior notice and opportunity for public comment would be contrary to the public interest. This rule would continue interim measures implemented by the June 2, 2011, temporary rule, for not more than an additional 186 days beyond the current expiration date of November 29, 2011. The conditions prompting the initial temporary rule still remain, and more permanent measures to be completed through Amendment 32 have not yet been finalized. Failure to extend these interim measures, while NOAA finalizes the more permanent measures in Amendment 32, would result in additional overfishing of the Gulf gag stock, which is contrary to the public interest and in violation of National Standard 1 of the Magnuson-Stevens Act.

For the aforementioned reasons, the AA also finds good cause under 5 U.S.C. 553(d)(3) to waive the 30-day delay in effectiveness of this rule.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: November 3, 2011.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

[FR Doc. 2011–28917 Filed 11–7–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 635

RIN 0648–XA802

[Docket No. 110210132–1275–02]

Atlantic Highly Migratory Species; Atlantic Bluefin Tuna Fisheries

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; inseason quota transfer and General category retention limit adjustment.

SUMMARY: NMFS has determined that an Atlantic bluefin tuna (BFT) quota transfer is appropriate, and transfers 50 metric tons (mt) from the Reserve category to the General category for the remainder of the 2011 fishing year. NMFS also has determined that the General category daily BFT retention limit should be adjusted from three to two large medium or giant BFT for the remainder of the 2011 fishing year (*i.e.,* through December 31, 2011) based on consideration of the regulatory determination criteria regarding inseason adjustments. This action applies to Atlantic Tunas General category (commercial) permitted vessels and Highly Migratory Species (HMS) Charter/Headboat category permitted vessels (when fishing commercially for BFT).

DATES: Effective November 6, 2011, through December 31, 2011.

FOR FURTHER INFORMATION CONTACT: Sarah McLaughlin or Tom Warren, (978) 281–9260.

SUPPLEMENTARY INFORMATION: Regulations implemented under the authority of the Atlantic Tunas Convention Act (16 U.S.C. 971 *et seq.*) and the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act; 16 U.S.C. 1801 *et seq.*) governing the harvest of BFT by persons and vessels subject to U.S. jurisdiction are found at 50 CFR part 635. Section 635.27 subdivides the U.S. BFT quota recommended by the International Commission for the Conservation of Atlantic Tunas (ICCAT) among the various domestic fishing categories, consistent with the allocations established in the Consolidated Highly Migratory Species Fishery Management Plan (Consolidated HMS FMP) (71 FR 58058, October 2, 2006) and subsequent rulemaking.

The 2011 BFT fishing year began on January 1, 2011, and ends December 31, 2011. The 2011 BFT quota specifications (76 FR 39019, July 5, 2011) established a quota of 435.1 mt for the General category fishery (the commercial tunas fishery in which handgear is used). Each of the General category time periods (January, June–August, September, October–November, and December) is allocated a portion of the annual General category quota, thereby ensuring extended fishing opportunities throughout the fishing season, particularly in years when catch rates are high. The General category fishery is open until December 31, 2011, or until the General category quota is reached. The 2011 BFT quota specifications also established a Reserve category of 70.5 mt for inseason adjustments, and potential quota transfers, scientific research collection, and accounting for potential overharvest in any category except the Purse Seine category.

Inseason Transfer to the General Category

Under § 635.27(a)(7), NMFS has the authority to allocate any portion of the Reserve category to any category quota in the fishery, other than the Angling category school BFT subquota (for which there is a separate reserve), after considering determination criteria provided under § 635.27(a)(8), which include: The usefulness of information obtained from catches in the particular category for biological sampling and monitoring of the status of the stock; the catches of the particular category quota to date and the likelihood of closure of that segment of the fishery if no adjustment is made; the projected ability of the vessels fishing under the particular category quota to harvest the additional amount of BFT before the end of the fishing year; the estimated amounts by which quotas for other gear categories of the fishery might be exceeded; effects of the adjustment on BFT rebuilding and overfishing; effects of the adjustment on accomplishing the objectives of the fishery management plan; variations in seasonal distribution, abundance, or migration patterns of BFT; effects of catch rates in one area precluding vessels in another area from having a reasonable opportunity to harvest a portion of the category's quota; and a review of dealer reports, daily landing trends, and the availability of the BFT on the fishing grounds.

NMFS has considered the determination criteria regarding inseason adjustments and their applicability to the General category fishery for the remainder of the 2011 fishing year. These considerations include, but are not limited to, the following. As of October 26, 2011, the General category has landed 413.1 mt, or 95 percent of its 2011 quota of 435.1 mt. Overall, approximately 64 percent of the available commercial BFT quota (775.4 mt) has been harvested. Several Atlantic tuna dealers are currently providing biological samples from BFT caught by General category vessels to support ongoing NMFS-approved research regarding reproduction status and feeding habits of BFT. Continued landings of BFT would support the collection of a broad range of data for these studies and for stock monitoring purposes. Some categories are not expected to use their available 2011 quotas (*i.e.,* approximately 200 mt or more may remain unused). NMFS will need to account for 2011 BFT landings and dead discards within the U.S. quota, consistent with ICCAT recommendations. While transferring quota from the Reserve category decreases the amount of unused quota that would be available, if needed, to account for all landings and dead discards within the total 2011 U.S. quota once the dead discard information is available, NMFS' best estimates of current dead discards and quota that will remain unused indicate that the risk of exceeding the overall quota is small. This risk is also outweighed by the potential benefit of keeping the General category, which is successfully harvesting available quota, open for the remainder of the year.

A quota transfer at this time would provide additional opportunities to harvest the U.S. BFT quota without exceeding it, while preserving the opportunity for General category fishermen to participate in the winter BFT fishery in the mid-Atlantic region that typically begins in December when commercial-sized BFT become available in that area. Per the Consolidated HMS FMP, the December General category fishery is allocated 5.2 percent of the General category quota (*i.e.,* 22.6 mt for December 2011).

Based on the considerations above, as well as the available quota, fishery performance in recent years, and the availability of BFT on the fishing grounds, NMFS has determined that a quota transfer is warranted and transfers 50 mt of the 70.5 mt of the Reserve category to the General category. Thus, the General category quota is adjusted to 485.1 mt for the 2011 fishing year. Once the adjusted General category quota has been reached, or on December 31, 2011 (whichever comes first), the 2011 General category fishery will be closed. The 2012 General category fishery begins January 1, 2012.

Reduction of General Category Daily Retention Limit

Under 50 CFR 635.23(a)(4), NMFS may increase or decrease the daily retention limit of large medium and giant BFT over a range of zero to a maximum of three per vessel based on consideration of the criteria provided under § 635.27(a)(8), as listed above.

For the 2011 fishing year to date, NMFS adjusted the General category limit from the default level of one large medium or giant BFT as follows: two large medium or giant BFT for January (75 FR 79309, December 20, 2010), and three large medium or giant BFT for June through August (76 FR 32086, June 3, 2011) and three large medium or giant BFT for September through December (76 FR 52886, August 24, 2011). In these actions, NMFS indicated that additional retention limit adjustments could be made, if necessary.

As indicated above, the General category has landed 413.1 mt, or 95 percent of its 2011 quota of 435.1 mt based on landings through October 26, 2011. Based on considerations of the available quota, fishery performance in recent years (landings and discards), and the availability of BFT on the fishing grounds, NMFS has determined that the General category retention limit should be reduced. Accordingly, NMFS adjusts the General category retention limit from three to two large medium or giant BFT per vessel per day/trip effective *November 14, 2011,* through December 31, 2011. NMFS expects that this retention limit, in conjunction with

the 50-mt quota transfer, would allow the General category to remain open through the end of the fishing year while not risking overharvest of the U.S. BFT quota, including accounting for dead discards as required by ICCAT.

Regardless of the duration of a fishing trip, the daily retention limit applies upon landing. For example, whether a vessel fishing under the General category limit takes a two-day trip or makes two trips in one day, the daily limit of two fish may not be exceeded upon landing. This General category retention limit is effective in all areas, except for the Gulf of Mexico, and applies to vessels permitted in the General category as well as to those HMS Charter/Headboat permitted vessels fishing commercially for BFT.

This adjustment is intended to provide a reasonable opportunity to harvest the U.S. landings quota of BFT without exceeding it, while maintaining an equitable distribution of fishing opportunities; to help achieve optimum yield in the General category BFT fishery; to collect a broad range of data for stock monitoring purposes; and to be consistent with the objectives of the Consolidated HMS FMP.

Monitoring and Reporting

NMFS selected the daily retention limit for the remainder of the 2011 fishing year after examining an array of data as it pertains to the determination criteria. These data included, but were not limited to, current and previous catch and effort rates in the BFT fisheries, quota availability, previous public comments on inseason management measures, and stock status. NMFS will continue to monitor the BFT fishery closely through the mandatory dealer landing reports, which NMFS requires to be submitted within 24 hours of a dealer receiving BFT. Depending on the level of fishing effort and catch rates of BFT, NMFS may determine that additional action is necessary to ensure available quota is not exceeded or to enhance scientific data collection from, and fishing opportunities in, all geographic areas. NMFS will address the January 2012 General category daily retention limit via a separate inseason action later in the year, if necessary.

Closure of the General category or subsequent adjustments to the daily retention limits, if any, will be published in the **Federal Register**. In addition, fishermen may call the Atlantic Tunas Information Line at (888) 872–8862 or (978) 281–9260, or access *http://www.hmspermits.gov,* for updates on quota monitoring and retention limit adjustments.

Classification

The Assistant Administrator for NMFS (AA) finds that it is impracticable and contrary to the public interest to provide prior notice of, and an opportunity for public comment on, this action for the following reasons:

The regulations implementing the Consolidated HMS FMP provide for inseason retention limit adjustments to respond to the unpredictable nature of BFT availability on the fishing grounds, the migratory nature of this species, and the regional variations in the BFT fishery. Based on available BFT quotas, fishery performance in recent years, and the availability of BFT on the fishing grounds, a quota transfer is warranted to provide additional opportunities to harvest the U.S. BFT quota, including preserving the opportunity for General category fishermen to participate in the winter BFT fishery in the mid-Atlantic region that typically begins in December. A reduction in the General category daily retention limit is necessary to extend fishing opportunities throughout the fishing year while reducing the risk of combined landings and dead discards exceeding the available U.S. quota, consistent with ICCAT recommendations.

Affording prior notice and opportunity for public comment to implement these retention limits is impracticable as it would preclude NMFS from acting promptly to allow continued harvest of BFT that are available on the fishing grounds via a quota transfer from the Reserve category to the General category. Therefore, the AA finds good cause under 5 U.S.C. 553(b)(B) to waive prior notice and the opportunity for public comment. For all of the above reasons, and because this action relieves a restriction (*i.e.,* the General category retention limit will remain open due to the quota transfer from the Reserve category rather than closing at this time), there is also good cause under 5 U.S.C. 553(d) to waive the 30-day delay in effectiveness.

This action is being taken under 50 CFR 635.23(a)(4) and 635.27(a)(7), and is exempt from review under Executive Order 12866.

Authority: 16 U.S.C. 971 *et seq.* and 1801 *et seq.*

Dated: November 3, 2011.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

[FR Doc. 2011–28906 Filed 11–3–11; 4:15 pm]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 635

[Docket No. 0906221072–91425–02]

RIN 0648–XA781

Atlantic Highly Migratory Species; Inseason Action To Close the Commercial Non-Sandbar Large Coastal Shark Fishery in the Atlantic Region

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Fishery closures.

SUMMARY: NMFS is closing the commercial fishery for non-sandbar large coastal sharks (LCS) in the Atlantic region. This action is necessary under existing regulations because landings in this fishery have exceeded 80 percent of the available quota.

DATES: The commercial non-sandbar LCS fishery in the Atlantic region is closed effective 11:30 p.m. local time November 15, 2011, until the effective date of the final 2012 shark season specifications, which NMFS will publish as a separate document in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Karyl Brewster-Geisz or Peter Cooper, (301) 427–8503; (fax) (301) 713–1917.

SUPPLEMENTARY INFORMATION: The Atlantic shark fisheries are managed under the 2006 Consolidated Atlantic Highly Migratory Species (HMS) Fishery Management Plan (FMP), its amendments, and its implementing regulations found at 50 CFR part 635 and issued under authority of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 *et seq.*).

Under § 635.5(b)(1), shark dealers are required to report to NMFS every two weeks all sharks landed. Dealer reports for fish received between the 1st and 15th of any month must be received by NMFS by the 25th of that month. Dealer reports for fish received between the 16th and the end of any month must be received by NMFS by the 10th of the following month. Under § 635.28(b)(2), when NMFS projects that fishing season landings for a species group have reached or are about to reach 80 percent of the available quota, NMFS will file for publication with the Office of the Federal Register a notice of closure for that shark species group that will be effective no fewer than 5 days from the

date of filing. From the effective date and time of the closure until NMFS announces, via a notice in the **Federal Register,** that additional quota is available and the season is reopened, the fishery for that species group is closed, even across fishing years.

On December 8, 2011 (75 FR 76302), NMFS announced that the non-sandbar LCS fishery quota in the Atlantic region for the 2011 fishing year would be 190.4 metric tons (mt) dressed weight (dw) (419,756 lb dw). Dealer reports through November 1, 2011, indicate that 140.6 mt dw or 74 percent of the available quota for non-sandbar LCS Atlantic fishery has been landed. Assuming landings continue at the current rate, NMFS projects that 83 percent of the quota will be landed by November 15. Dealer reports received to date indicate that 22 percent of the quota was landed from the opening of the fishery on July 15, 2011, through July 31, 2011; 20 percent of the quota was landed in August; 21 percent of the quota was landed in September; and 11 percent of the quota was landed in October. Because this exceeds the 80 percent threshold specified in the regulations, NMFS is closing the commercial non-sandbar LSC fishery in the Atlantic region as of 11:30 p.m. local time November 15, 2011. This closure does not affect any other shark fishery.

As such, as of November 15, 2011, all commercial non-sandbar LCS fisheries in all regions and fisheries will be closed. All of the pelagic shark fisheries will remain open.

During this closure a fishing vessel issued an Atlantic Shark limited access permit (LAP) pursuant to § 635.4 may not possess or sell a non-sandbar LCS. A shark dealer, issued a permit pursuant to § 635.4, may not purchase or receive non-sandbar LCS from a vessel issued an Atlantic Shark Limited Access Permit, except that a permitted shark dealer or processor may possess sharks that were harvested, off-loaded, and sold, traded, or bartered, prior to the effective date of the closure and were held in storage consistent with 50 CFR 635.28(b)(4). Additionally, a shark dealer issued a Federal permit pursuant to § 635.4, may in accordance with state regulations, purchase or receive a non-sandbar LCS if the shark was harvested, off-loaded, and sold, traded, or bartered from a vessel that fishes only in state waters and had not been issued an Atlantic Shark LAP, HMS Angling permit, or HMS Charter/Headboat permit pursuant to § 635.4.

Classification

Pursuant to 5 U.S.C. 553(b)(B), the Assistant Administrator for Fisheries, NOAA (AA), finds that providing for prior notice and public comment for this action is impracticable and contrary to the public interest because the fisheries are currently underway, and any delay in this action would cause overharvest of the quotas and be inconsistent with management requirements and objectives. Similarly, affording prior notice and opportunity for public comment on this action is contrary to the public interest because if the quotas are exceeded, the affected public is likely to experience reductions in the available quotas and a lack of fishing opportunities in future seasons. Thus, for these reasons, the AA also finds good cause to waive the 30-day delay in effective date pursuant to 5 U.S.C. 553(d)(3). This action is required under 50 CFR 635.28(b)(2) and is exempt from review under Executive Order 12866.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: November 3, 2011.

Steven Thur,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2011–28921 Filed 11–7–11; 8:45 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 76, No. 216
Tuesday, November 8, 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 205

[Document Number AMS–NOP–11–0058; NOP–11–09PR]

RIN 0581–AD15

National Organic Program; Proposed Amendments to the National List of Allowed and Prohibited Substances (Crops, Livestock and Processing)

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This proposed rule would amend the U.S. Department of Agriculture's (USDA's) National List of Allowed and Prohibited Substances (National List) to reflect recommendations submitted to the Secretary of Agriculture (Secretary) by the National Organic Standards Board (NOSB) on October 28, 2010, and April 29, 2011. The recommendations addressed in this proposed rule pertain to changing the annotation for one substance, tetracycline, currently allowed for use in organic crop production, and adding two substances, formic acid and attapulgite, along with any restrictive annotations, for use in organic livestock production and organic processing, respectively.

DATES: Comments must be received by January 9, 2012.

ADDRESSES: Interested persons may comment on the proposed rule using the following procedures:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Toni Strother, Agricultural Marketing Specialist, National Organic Program, USDA–AMS–NOP, 1400 Independence Ave. SW. Room 2646—So., Ag Stop 0268, Washington, DC 20250–0268.

Instructions: All submissions received must include the docket number AMS–NOP–11–0058; NOP–11–09PR, and/or Regulatory Information Number (RIN) 0581–AD15 for this rulemaking. You should clearly indicate the topic and section number of this proposed rule to which your comment refers. You should clearly indicate whether you support the action being proposed for the substances in this proposed rule. You should clearly indicate the reason(s) for your position. You should also supply information on alternative management practices, where applicable, that support alternatives to the proposed action. You should also offer any recommended language change(s) that would be appropriate to your position. Please include relevant information and data to support your position (*e.g.,* scientific, environmental, manufacturing, industry, impact information, *etc.*). Only relevant material supporting your position should be submitted. All comments received will be posted without change to *http://www.regulations.gov.*

Document: For access to the document to read background documents or comments received, go to *http://www.regulations.gov.* Comments submitted in response to this proposed rule will also be available for viewing in person at USDA–AMS, National Organic Program, Room 2646—South Building, 1400 Independence Ave. SW., Washington, DC, from 9 a.m. to 12 noon and from 1 p.m. to 4 p.m., Monday through Friday (except official Federal holidays). Persons wanting to visit the USDA South Building to view comments received in response to this proposed rule are requested to make an appointment in advance by calling (202) 720–3252.

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

SUPPLEMENTARY INFORMATION:

I. Background

On December 21, 2000, the Secretary established, within the National Organic Program (NOP) (7 CFR part 205), the National List regulations §§ 205.600 through 205.607. This National List identifies the synthetic substances that may be used and the nonsynthetic (natural) substances that may not be used in organic production. The National List also identifies synthetic, nonsynthetic nonagricultural and nonorganic agricultural substances that may be used in organic handling. The Organic Foods Production Act of 1990, as amended (7 U.S.C. 6501 *et seq.*) (OFPA), and NOP regulations, in § 205.105, specifically prohibit the use of any synthetic substance in organic production and handling unless the synthetic substance is on the National List. Section 205.105 also requires that any nonorganic agricultural and any nonsynthetic nonagricultural substance used in organic handling be on the National List.

Under the authority of the OFPA, as amended (7 U.S.C. 6501–6522), the National List can be amended by the Secretary based on recommendations developed by the NOSB. Since established, the NOP has published multiple 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) December 13, 2010 (75 FR 77521); and March 14, 2011 (76 FR 13501). Additionally, proposed amendments to the National List were published on November 8, 2010 (75 FR 68505) and on May 5, 2011 (76 FR 25612).

This proposed rule would amend the National List to reflect three recommendations submitted to the Secretary by the NOSB on October 28, 2010, and April 29, 2011. Based upon their evaluation of petitions submitted by industry participants and review of technical reports, the NOSB recommended that the Secretary revise the annotation for one substance (tetracycline) for organic crop production on § 205.601, add one substance (formic acid) to § 205.603(b) for organic livestock production, and add one substance (attapulgite) to § 205.605(a) for organic processing. The exemptions for use of each substance in organic production were evaluated by the NOSB using the criteria specified in OFPA (7 U.S.C. 6517–6518).

II. Overview of Proposed Amendments

The following provides an overview of the proposed amendments to

designated sections of the National List regulations:

Section 205.601 Synthetic Substances Allowed for Use in Organic Crop Production

This proposed rule would amend § 205.601 by changing the annotation at paragraph (i)(12) to add an expiration date and specify the permitted use for the following substance:

Tetracycline. Tetracycline, in the form of oxytetracycline calcium complex, was included in the National List as originally published on December 21, 2000 (FR 65 80548), for use for fire blight control only. Tetracycline is a broad-spectrum antibiotic for control of bacteria, fungi and mycoplasma-like organisms which functions by inhibiting protein synthesis in bacteria and altering bacterial membranes so that vital genetic material is leaked. For regulatory purposes, the Environmental Protection Agency (EPA) uses the term oxytetracycline to refer to pesticides containing either calcium oxytetracycline or hydroxytetracycline monohydrochloride (oxytetracycline hydrochloride). Oxytetracycline is registered with the EPA for the following agronomic uses: Fire blight of apples, pears, peaches and nectarines; pear decline; bacterial spot on peaches and nectarines; lethal yellowing of coconut palm; and lethal decline of pritchardia palm.

Oxytetracyclines are derived from the soil bacteria, *Streptomyces,* by a fermentation process. Technical grade tetracycline is a pale yellow to tan crystalline powder, is freely soluble in water, and decomposes above 180 degrees Celsius. Formulated products containing the technical grade oxytetracycline calcium complex and oxytetracyline hydrochloride for fire blight are wettable powders which are spray-applied using ground or aircraft equipment on foliage at early bloom stage, when fire blight infection usually occurs. Application may also occur by injection into the tree trunks using an injection device and an aqueous solution of oxytetracycline calcium and/or oxytetracycline hydrochloride. In addition to agronomic uses, oxytetracyclines are also antibiotics used in human and animal drugs to treat bacterial diseases.[1]

On July 6, 2010, AMS published a final rule (75 FR 38693), amending the listing for tetracycline to allow the use of another form of tetracycline, oxytetracycline hydrochloride, and adding an expiration date of October 21, 2012, in accordance with the NOSB November 2008 recommendation. In October 2010, a petition was submitted requesting the removal of the October 21, 2012 expiration date. In effect, the petitioner requested an allowance for the use of tetracycline to control fire blight in apples and pears beyond the substance's current expiration date.

The NOSB Crops Committee reviewed the October 2010 petition to remove the expiration date from the current tetracycline annotation and initially issued a Committee proposal against the petitioner's request. The Committee referenced their concerns over antibiotic resistance and availability of fire blight resistant varieties as alternatives to tetracycline use as the basis for their proposal.[2] This proposal would have, in effect, retained the October 21, 2012 expiration date for tetracycline, after which the substance could no longer be used in organic crop production.

At its April 26–29, 2011, meeting in Seattle, WA, the NOSB received public comment on the Crops Committee's proposal to reject the petitioner's request. During the meeting, the NOSB discussed and received comments on potential alternatives to tetracycline, the challenges with the efficacy and adoption of those alternative strategies, and the potential impact of not allowing tetracycline for fire blight control after October 2012. Many commenters discussed the scope and availability of alternative methods for fire blight control including the use of fire blight resistant root stocks, biological controls, streptomycin, and apple and pear varieties that are less susceptible to fire blight. Comments from producers and researchers informed the NOSB that fire blight resistant root stocks and some biological controls are not yet commercially available.[3] These commenters also stated that the efficacy of commercially available biological control products is inconsistent in reducing disease incidence, thus discouraging producers from using these products instead of tetracycline. Comments further described widespread pathogen resistance to streptomycin in certain areas of the country, such as the Pacific Northwest, which has decreased its effectiveness against fire blight. Commenters stated that this resistance to streptomycin has prompted some producers to use tetracycline as an alternative. In addition, the NOSB was informed that consumer demand is linked to apple and pear varieties which are more susceptible to fire blight. Growers in Washington State produced 88% of organic apples and 79% of organic pears harvested in the U.S. in 2008, and cultivars accounting for the highest proportion of this production are highly or moderately susceptible to fire blight.[4] [5] The petitioner also commented that at least 38 of 50 organic apple and pear producers surveyed in Washington State felt that if the exemption for the use of tetracycline was allowed to expire on October 21, 2012, then they would be forced to reduce their acreage of susceptible varieties or exit the organic apple and pear production industry.[6]

Based upon the public comments, the NOSB Crops Committee revised their proposal at the April 2011 NOSB meeting and recommended extending the allowance for the use of tetracycline to control fire blight in apples and pears until October 21, 2014. The NOSB voted on and issued a final recommendation in support of this proposal. The NOSB concluded that use of tetracycline should be permitted to continue through October 21, 2014, as options for biological controls and resistant varieties and rootstocks are further developed for commercial use. In their recommendation, the NOSB specified that the annotation include language to convey that the use of tetracycline is limited to apples and pears. The addition of ''apples and pears'' in the annotation accurately identifies the allowed use of this substance in organic production and would not change current use patterns.

The NOSB recommendation also stated that the Board expects the industry to make progress in the development of alternatives for fire blight control. The NOSB recommendation conveyed this expectation in stating that, ''members of the industry will collaborate and coordinate efforts in preparing for the

[1] Technical Report on Tetracycline (oxytetracycline). April 1, 2011. Available in petitioned substances database, under ''T,'' at the NOP Web site: *http://www.ams.usda.gov/nop.*

[2] NOSB Crops Committee Recommendation on Tetracycline. April 2011. Available at the NOP Web site: *http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5089511&acct=nosb.*

[3] Transcript from the April 26–29, 2011 NOSB meeting is available under the NOSB section of the NOP Web site at: *http://www.ams.usda.gov/nop.*

[4] U.S. Department of Agriculture, National Agricultural Statistics Service. 2007 Census of Agriculture: Organic Production Survey: Organic Fruit and Tree Nuts Harvested from Certified Organic Farms, Table 24, 2008. Available at: *http://www.agcensus.usda.gov/Publications/2007/Online_highlights/Organics/ORGANICS.pdf.*

[5] The petition was submitted by the Washington State Horticultural Association, and is available from the NOP Web site in the Petitioned Substances Database, *http://www.ams.usda.gov/NOPPetitionedSubstancesDatabase.*

[6] Summarized from 2010 survey of organic apple and pear growers in Washington State: *Organic Orchards: Needs and Priorities,* conducted by David Granatstein (WSU–CSANR), Mark LaPierre, Wilbur-Ellis Co., and Nadine Lehrer, WSU–TFRC.

eventual removal of this material from the National List, specifically optimizing the use of resistant rootstocks and cultivars, preventive management methods, and the use of alternative, allowed biological and chemical controls whenever warranted.'' [7]

In response to the requests by the NOSB and the industry for additional resources to support research on alternatives to tetracycline in organic production, the NOP issued requests to the USDA Agricultural Research Service and the National Institute of Food and Agriculture in May of 2011 for assistance in prioritizing research in the following areas: (1) The efficacy of combinations of substances for fire blight management; (2) breeding, production, and propagation of resistant cultivars and rootstocks that are commercially viable; and (3) cultural practices, crop management, disease forecasting and other production practices that can optimize control of this disease.[8]

The Secretary has reviewed and proposes to accept the NOSB's recommendation. This proposed rule would amend § 205.601(i)(12) of the National List by: (1) Inserting the qualifying words ''in apples and pears''; between the words ''control'' and ''only,'' in the current annotation and (2) replacing the current expiration date of ''October 21, 2012'' with the new expiration date, ''October 21, 2014,'' after which tetracycline may not be used in organic apple and pear crop production for fire blight control.

Section 205.603 Synthetic Substances Allowed for Use in Organic Livestock Production

This proposed rule would amend § 205.603 by redesignating current paragraphs (b)(2) through (b)(7) as paragraphs (b)(3) through (b)(8) for the purpose of adding the following substance as an external parasiticide at (b)(2):

Formic acid (CAS #64–18–6). Formic acid was petitioned for use in May 2010, as a pesticide for suppression of *Varroa* mites.[9] *Varroa* mites attach themselves to the abdomens of bees and extract fluids from the circulatory system, causing the bees to weaken and die. Infestations can quickly destroy a hive and spread easily to nearby hives. Formic acid is a colorless liquid with a pungent odor which is miscible in water. This substance is the simplest carboxylic acid and is naturally occurring in small amounts in some insects and plants and is a natural component of honey. The manufacturing process for formic acid begins with the hydrolysis of methyl formate. Methanol and carbon monoxide are combined along with a strong base to produce methyl formate, which is then hydrolyzed to produce formic acid.[10] Formic acid is considered corrosive to metals and biological tissue, and occupational exposure to these fumigant products can cause eye, skin, and mucosal irritation.[11] This can be mitigated by the use of personal protective equipment. Fumigant mite control products for beehives generally consist of a gel pad impregnated with formic acid which is contained in a sealed plastic pouch. Application consists of cutting vents in the pouch and setting it in the hive, where it releases vapors that diffuse throughout the hive. The volatilization of formic acid causes mite deaths by asphyxiation generally without harm to exposed bees. It can also penetrate capped cells and sealed brood cells where mites are feeding.[12]

The use of synthetic formic acid is regulated by other Federal agencies. Formic acid has antibacterial properties that make it effective as a preservative, and the Food and Drug Administration (FDA) permits its use as a food additive in the feed and drinking water of animals (21 CFR 573.480). FDA also permits the use of formic acid as flavoring agent in processed foods (21 CFR 172.515). The Environmental Protection Agency (EPA) has exempted synthetic formic acid from the requirement of a tolerance in or on honey and honeycomb when used to control tracheal mites and suppress *Varroa* mites in bee colonies, and applied in accordance with label use directions (40 CFR 180.1178).[13] The EPA has examined the potential for formic acid residues to appear in beeswax and honey and concluded that residues above those found naturally are not expected when a formic acid pesticide product is used as directed.[14] Synthetic formic acid is currently permitted in Canada and the European Union for use in organic apiculture to control parasitic mites.

At its October 25–28, 2010, meeting in Madison, WI, the NOSB recommended adding formic acid to the National List for use in organic livestock production solely as a pesticide within honeybee hives. The NOSB evaluated formic acid against the evaluation criteria of 7 U.S.C. 6517 and 6510 of the OFPA and received public comment at this meeting.[15] During the NOSB deliberations, the Board noted that they had not received any public comments against the addition of formic acid to the National List. The NOSB deliberations over the petition for this substance heavily relied upon the information provided by the petitioner. According to the formic acid petition, there are several methods for controlling mite populations in honeybee hives. These methods include those that are mechanical (*e.g.* trapping) and biochemical such as the use of synthetic sucrose octanoate esters (currently listed on § 205.603) for control for *Varroa* mites. However, data was provided by the petitioner illustrating that the allowed biochemical and mechanical control methods do not have the same efficacy as formic acid in the climatic conditions in Hawaii, one of the U.S.'s highest-producing organic honey regions.[16] The information presented by the petitioner and considered by the NOSB is generally supported by a June 2011 technical report for formic acid that the NOSB Livestock Committee accepted as sufficient.

During their deliberations, the NOSB also considered formic acid in the context of their final recommendations for apiculture standards from 2001 and 2010 and feedback from the Apiculture Working Group. Based upon their review of this information, the NOSB issued a final recommendation to add formic acid to the National List at

[7] NOSB Formal Recommendation on Tetracycline. April 29, 2011. Available at the NOP Web site: *http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5091701*.

[8] May 2011 Letters submitted by NOP to USDA ARS and NIFA on fire blight research. Available at the NOP Web site: *http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5091325*.

[9] The petition was submitted by the Hawaii Department of Agriculture, and is retrievable from the NOP Web site in the Petitioned Substances Database: *http://www.ams.usda.gov/NOPPetitionedSubstancesDatabase*.

[10] Hazardous Substances Data Bank (HSDB). 2010. Formic Acid, CASRN: 64–18–6. Last revised 4–27–2010. Retrieved February 15, 2011, from *http://toxnet.nlm.nih.gov*.

[11] NOAA (CAMEO Chemical), 2011. Formic Acid, Retrieved February 15, 2011 from *http://cameochemicals.noaa.gov/chemical/3513*.

[12] Technical Report on Formic acid. June 1, 2011. Available in petitioned substances database, under ''F,'' at the NOP Web site: *www.ams.usda.gov/nop*.

[13] Tracheal mites lay eggs inside bees' tracheal tubes, and their larvae feed on the bee after the eggs hatch.

[14] EPA, 2010. Formic Acid (214900) Fact Sheet, Retrieved February 15, 2011, from *http://www.epa.gov/oppbppd1/biopesticides/ingredients/factsheets/factsheet_214900.htm*.

[15] The record contains acknowledgement that the Board had requested a Technical Report for formic acid. However, this report was not available for review by the October 2010 meeting. The NOSB stated that, based on the information contained in the petition, they concluded that the substance is consistent with the OFPA evaluation criteria.

[16] Transcripts from the April 26–29, 2011 meeting can be retrieved from the NOSB section of the NOP Web page.

§ 205.603(b) with an annotation that would limit the substance's use to a pesticide solely within honeybee hives. In their recommendation, the NOSB did not limit the use of formic acid only for treatment of *Varroa* mites, which was the use specified by the petitioner. Since EPA registers formic acid as a pesticide to control *Varroa* and tracheal mites, their recommendation and this proposed rule would, in effect, allow the use of formic acid to control both *Varroa* and tracheal mites in organic apiculture.

At the October 2010 NOSB meeting, the NOP and NOSB discussed the placement of formic acid on the National List. The NOP raised the question of whether listing formic acid, a miticide, under § 205.603(b) is appropriate given that § 205.603(b) specifies that substances under this section be limited to use as ''a topical treatment, *external parasiticide* (emphasis added) or local anesthetic as applicable''. The NOSB explained that their research indicated that mites can be considered a parasite. The NOSB also stated that listing formic acid at § 205.603(b) would be consistent with the listing for sucrose octanoate esters, another substance in this National List section which is approved for use in apiculture to control *Varroa* mites. Through this proposed rule, the NOP is seeking comments on the placement of formic acid on the National List. Furthermore, the NOP may reconsider the placement of formic acid on the National List as part of any future rulemaking on organic apiculture standards. In the NOP's consideration of the addition of formic acid to the National List, the NOP would also like to reiterate that registered pesticide products intended for use in organic production and handling must also be evaluated for compliance with EPA's August 2004 list of inert ingredients, minus any revoked inert ingredients.

The Secretary has reviewed and proposes to accept the NOSB's recommendation. Consistent with the NOSB recommendation, this proposed rule would amend § 205.603 of the National List by adding formic acid (CAS #64–18–6) at paragraph (b)(2) as a synthetic substance allowed for use as follows:

Formic acid (CAS #64–18–6)—for use as a pesticide solely within honeybee hives.

Section 205.605 Nonagricultural (Nonorganic) Substances Allowed as Ingredients in or on Processed Products Labeled as ''Organic'' or ''Made With Organic (Specified Ingredients or Food Group(s))''

This proposed rule would amend § 205.605(a) of the National List regulations by adding the following substance:

Attapulgite. Attapulgite was petitioned for two uses: (1) As a nonsynthetic processing aid in organic handling for purifying vegetable and animal oils; and (2) as a livestock feed additive.[17] Attapulgite is the product of naturally occurring attapulgus clay that is mined and subsequently dried and pulverized into a fine bluish gray powder. Fine particle size and high porosity and surface area give attapulgite the capacity to absorb and adsorb various materials such as chlorophyll, metals and other impurities to improve the appearance, flavor and stability of plant and animal oils. The clay is added to heated liquid oil, stirred, and filtered out of the oil. According to the petitioner, adverse effects to human health would not be expected from occupational exposure to this product through inhalation or ingestion when proper protective equipment is utilized.[18] The FDA has listed this substance in the database, Everything Added to Food in the United States (EAFUS) (Doc. No. 1943) and references this substance among those generally regarded as safe in 21 CFR part 582.99 when used as an adjuvant for pesticide chemicals. The EPA permits attapulgite as an inert ingredient eligible in minimum risk pesticides applied for food and non-food uses which are exempt from federal registration under Section 25(b) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). The EPA has determined that attapulgite is exempt from the requirement of a tolerance when used as an inert ingredient in pesticide formulations applied pre- and post-harvest per 40 CFR 180.910.[19]

At its April 26–29, 2011, meeting in Seattle, WA, the NOSB recommended adding attapulgite to the National List for use as a processing aid in organic handling of plant and animal oils. The NOSB did not receive public comments against this recommendation. During their deliberations, the NOSB noted that bentonite, a material already on the National List which can serve a similar bleaching function as attapulgite, requires acid activation. The NOSB explained that, though acid activation can be used to enhance bleaching properties of attapulgite, acid activation is not required for the substance to function as a processing aid and, therefore, may be preferable to the use of bentonite. The NOSB did not, however, recommend restricting the use of attapulgite to non-acid activated forms. During this public meeting, the NOSB evaluated attapulgite against the evaluation criteria of 7 U.S.C. 6517 and 6510 of the OFPA, received public comment, and concluded the substance is consistent with the OFPA evaluation criteria. Based upon the evaluation criteria, public comment, and the petitioner's request, the NOSB issued a final recommendation to add attapulgite to the National List.

The Secretary has reviewed and proposes to accept the NOSB recommendation. Consistent with the NOSB recommendation, this proposed rule would amend § 205.605(a) of the National List by adding attapulgite as follows:

Attapulgite—as a processing aid in the handling of plant and animal oils.

III. Related Documents

Two notices were published regarding the meetings of the NOSB and deliberations on recommendations and substances petitioned for amending the National List. Substances and recommendations included in this proposed rule were announced for NOSB deliberation in the following **Federal Register** notices: (1) 76 FR 12013, March 4, 2011, (Attapulgite and Tetracycline); (2) 75 FR 57194, September 20, 2010, (Formic acid).

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) and 6518(n) of the 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

[17] Due to the nonsynthetic classification of this substance, a petition for use as an additive for organic livestock feed is not required.

[18] The petition was submitted by the Oil-Dri Corporation of America, and is retrievable from the NOP Web site in the Petitioned Substances Database: *http://www.ams.usda.gov/NOPPetitionedSubstancesDatabase*.

[19] Technical Report on Attapulgite. February 1, 2010. A copy of this report is available in the petitioned substances database, *http://www.ams.usda.gov/NOPPetitionedSubstancesDatabase*.

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/nop*.

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 proposed 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 proposed rule would not alter the authority of the Secretary under the Federal Meat Inspection Act (21 U.S.C. 601–624), the Poultry Products Inspection Act (21 U.S.C. 451–471), or the Egg Products Inspection Act (21 U.S.C. 1031–1056), 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 *et seq.*) 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 proposed rule would not be significant. The effect of this proposed rule would be to allow the use of additional substances in agricultural production and handling. This action would relax the regulations published in the final rule and would provide small entities with more tools to use in day-to-day operations. 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.

Based on USDA data from the Economic Research Service (ERS), the U.S. organic sector included nearly 13,000 certified organic crop and livestock operations at the end of 2008. These operations contained more than 4.8 million certified acres consisting of 2,665,382 acres of cropland and 2,160,577 acres of pasture and rangeland. The total acreage under organic management represents a twelve percent increase from 2007.[20] AMS believes that most of the certified production and handling operations would be classified as 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.[21] Between 1990 and 2008, organic food sales have historically demonstrated a growth rate between 15 to 24 percent each year. In 2010, organic food sales grew 7.7%.[22]

In addition, USDA has accredited 93 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 proposed rule. Accordingly, OMB clearance is not required by the Paperwork Reduction Act of 1995, 44 U.S.C. 3501, chapter 35.

E. Executive Order 13175

This proposed rule has been reviewed in accordance with the requirements of Executive Order 13175, Consultation and Coordination with Indian Tribal Governments. The review reveals that this regulation will not have substantial

[20] 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/.*

[21] 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.*

[22] Organic Trade Association's *2011 Organic Industry Survey*. Available at: *http://www.ota.com.*

and direct effects on Tribal governments and will not have significant Tribal implications.

F. General Notice of Public Rulemaking

This proposed rule reflects recommendations submitted by the NOSB to the Secretary to amend the annotation for one substance and to add two substances on the National List. A 60-day period for interested persons to comment on this rule is provided and is deemed appropriate.

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.

For the reasons set forth in the preamble, 7 CFR part 205, Subpart G is proposed to be amended as follows:

PART 205—NATIONAL ORGANIC PROGRAM

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

Authority: 7 U.S.C. 6501–6522.

2. Section 205.601 paragraph (i)(12) is revised to read as follows:

§ 205.601 Synthetic substances allowed for use in organic crop production.

* * * * *

(i) * * *

(12) Tetracycline, for fire blight control in apples and pears only until October 21, 2014.

* * * * *

3. Section 205.603 is amended by:

A. Redesignating paragraphs (b)(2) through (b)(7) as paragraphs (b)(3) through (b)(8); and

B. Adding new paragraph (b)(2) to read as follows:

§ 205.603 Synthetic substances allowed for use in organic livestock production.

* * * * *

(b) * * *

(2) Formic acid (CAS #64–18–6)—for use as a pesticide solely within honeybee hives.

* * * * *

4. In § 205.605(a), the substance ''Attapulgite'' is added in alphabetical order to read as follows:

§ 205.605 Nonagricultural (nonorganic) substances allowed as ingredients in or on processed products labeled as ''organic'' or ''made with organic (specified ingredients or food groups(s)).''

* * * * *

(a) * * *

Attapulgite—as a processing aid in the handling of plant and animal oils.

* * * * *

Dated: November 1, 2011.

David R. Shipman,

Acting Administrator, Agricultural Marketing Service.

[FR Doc. 2011–28800 Filed 11–7–11; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Office of Advocacy and Outreach

7 CFR Part 2502

RIN 0503–AA49

Agricultural Career and Employment Grants Program; Withdrawal

AGENCY: Office of Advocacy and Outreach, Departmental Management, USDA.

ACTION: Proposed rule; withdrawal.

SUMMARY: On October 27, 2011, USDA submitted a proposed rule concerning grants to assist agricultural employers and farm workers by improving the supply, stability, safety, and training of the agricultural labor force. The Department intended this document to be submitted as an interim rule. Therefore, the proposed rule is withdrawn. In the Rules and Regulations section of this issue of the **Federal Register**, USDA is publishing the interim rule.

DATES: As of November 8, 2011, the proposed rule published October 27, 2011, at 76 FR 66656, is withdrawn.

FOR FURTHER INFORMATION CONTACT: Christine Chavez, Program Leader, Farmworker Coordination, Office of Advocacy and Outreach, U.S. Department of Agriculture, 1400 Independence Avenue SW., Stop 9801, Washington, DC 20250, Voice: (202) 205–4215, Fax: (202) 720–7136, Email: *christine.chavez@osec.usda.gov.*

SUPPLEMENTARY INFORMATION: USDA is withdrawing its proposed rule of October 27, 2011, entitled ''Agricultural Career and Employment Grants Program,'' because it was intended to publish in the **Federal Register** as an interim rule. This document officially withdraws the proposed rule. The interim rule can be found in the Rules and Regulation section of this issue of the **Federal Register**.

Signed in Washington, DC, on November 3, 2011.

Pearlie Reed,

Assistant Secretary for Administration for the Office of the Secretary.

[FR Doc. 2011–29033 Filed 11–7–11; 8:45 am]

BILLING CODE P

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

9 CFR Parts 319 and 381

[Docket No. FSIS–2010–0012]

RIN 0583–AD41

Common or Usual Name for Raw Meat and Poultry Products Containing Added Solutions—Reopening of Comment Period

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Proposed rule; reopening of comment period.

SUMMARY: The Food Safety and Inspection Service (FSIS) is reopening for 60 days the comment period for the proposed rule, ''Common or Usual Name for Raw Meat and Poultry Products Containing Added Solutions.'' It is also providing information concerning data used to develop the proposed rule and providing examples of labels about which FSIS has concerns.

DATES: The comment period for the proposed rule published July 27, 2011, at 76 FR 44855, is reopened. Submit comments by January 9, 2012.

ADDRESSES: FSIS invites interested persons to submit relevant comments on the implementation of this proposed rule. Comments may be submitted by either of the following methods:

- *Federal eRulemaking Portal:* This Web site provides the ability to type short comments directly into the comment field on this Web page or attach a file for lengthier comments. Go to *http://www.regulations.gov.* Follow the online instructions at that site for submitting comments.
- *Mail, including floppy disks or CD–ROMs, and hand- or courier-delivered items:* Send to U.S. Department of Agriculture (USDA), FSIS, Docket Clerk, Patriots Plaza 3, 1400 Independence Avenue SW., Room 8–163A, Mailstop 3782, Washington, DC 20250–3700.

Instructions: All items submitted by mail or electronic mail must include the Agency name and docket number FSIS–2010–0012. Comments received in response to this docket will be made available for public inspection and

posted without change, including any personal information, to *http://www.regulations.gov.*

Docket: For access to background documents or comments received, go to the FSIS Docket Room at the address listed above between 8:30 a.m. and 4:30 p.m., Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Ms. Rosalyn Murphy-Jenkins, Director, Labeling and Program Delivery Division, Office of Policy and Program Development, FSIS, USDA, (301) 504–0879.

SUPPLEMENTARY INFORMATION: On July 27, 2011, FSIS published the proposed rule ''Common or Usual Name for Raw Meat and Poultry Products Containing Added Solutions'' (76 FR 44855) to amend its regulations to establish a common or usual name for raw meat and poultry products that do not meet standard of identity regulations and to which solutions have been added. The Agency proposed that the common or usual name for such products include an accurate description of the raw meat or poultry component, the percentage of added solution incorporated into the raw meat or poultry product, and the individual ingredients or multi-ingredient components in the solution listed in the descending order of predominance by weight. FSIS also proposed that the print for all words in the common or usual name appear in a single font size, color, and style of print and that the name appear on a single-color contrasting background. In addition, the Agency proposed to remove the standard of identity regulation for ''ready-to-cook poultry products to which solutions are added.'' The comment period for the proposed rule ended on September 26, 2011.

The Agency received a request for a 60 day extension of the comment period. The letter explained that additional time to comment was necessary because the proposed amendments are important to many meat and poultry companies. FSIS agrees that the proposed amendments are important, and, to provide more time for constructive comment, the Agency is reopening the comment period for the proposed rule. The comment period will close on January 9, 2012.

The letter also requested the information, data, and evidence that FSIS considered in developing the proposed rule. In addition, the request asked the Agency for examples of specific labels in the marketplace about which it has concerns.

The Agency responded that the information, data, and evidence on which it based the proposed amendments can be found in the Truthful Labeling Coalition's (TLC) petition and attachments referenced in the proposed rule (76 FR 44857). The TLC petition and its attachments are available in the FSIS Docket Room and on its Web site (*http://www.fsis.usda.gov/Regulations_&_Policies/Proposed_Rules/index.asp*).

In response to the request for specific labels in the marketplace that FSIS has concerns about, examples of such labels are included in the Sorensen Associates Consumer Research Study (*http://www.fsis.usda.gov/PDF/Petition_Truthful_Labeling_Coalition_Attachments.pdf*) and ''Attachment B'' of the TLC petition (*http://www.fsis.usda.gov/PDF/Petition_Truthful_Labeling_Coalition.pdf*). To provide further examples, the Agency posted additional representative samples of marketplace labels (*http://www.fsis.usda.gov/PDF/2010-0012_Examples.pdf*).

The Agency's response to the request for information, data, and evidence that FSIS considered in developing the proposed rule is posted on its Web site at (*http://www.fsis.usda.gov/regulations_&_policies/Proposed_Rules/index.asp*).

Additional Public Notification

FSIS will announce this notice online through the FSIS Web page located at *http://www.fsis.usda.gov/regulations_&_policies/Federal_Register_Publications_&_Related_Documents/index.asp.*

FSIS will also make copies of this **Federal Register** publication available through the FSIS Constituent Update, which is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, and other types of information that could affect or would be of interest to constituents and stakeholders. The Update is communicated via Listserv, a free electronic mail subscription service for industry, trade groups, consumer interest groups, health professionals, and other individuals who have asked to be included. The Update is also available on the FSIS Web page. Through the Listserv and Web page, FSIS is able to provide information to a much broader and more diverse audience. In addition, FSIS offers an electronic mail subscription service which provides automatic and customized access to selected food safety news and information. This service is available at *http://www.fsis.usda.gov/News_&_Events/Email_Subscription/.* Options range from recalls to export information to regulations, directives and notices. Customers can add or delete subscriptions themselves, and have the option to password protect their accounts.

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Done at Washington, DC, on November 1, 2011.

Alfred V. Almanza,

Administrator.

[FR Doc. 2011–28796 Filed 11–7–11; 8:45 am]

BILLING CODE P

DEPARTMENT OF ENERGY

10 CFR Part 430

[Docket No. EERE–2011–BT–DET–0072]

RIN 1904–AC66

Energy Conservation Program for Consumer Products: Proposed Determination To Treat Non-Compressor Residential Refrigeration Products as Covered Products

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

ACTION: Proposed determination.

SUMMARY: The U.S. Department of Energy (DOE) has preliminarily determined that residential refrigeration products that do not incorporate a compressor qualify as covered products under Part B of Title III of the Energy Policy and Conservation Act (EPCA), as amended. DOE reached this preliminary conclusion because classifying products of such type as covered products is necessary or appropriate to carry out the purposes of EPCA, and the average U.S. household energy use for such products, (*e.g.,* thermoelectric wine chillers) is likely to exceed the 100 kilowatt-hour (kWh) per year threshold required for coverage.

DATES: DOE will accept written comments, data, and information on this notice, but no later than December 8, 2011.

ADDRESSES: Interested persons may submit comments, identified by docket number EERE–2011–BT–DET–0072, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov* Follow the instructions for submitting comments.
- *Email: Brenda.Edwards@ee.doe.gov.* Include EERE–2011–BT–DET–0072 and/or RIN 1904–AC66 in the subject line of the message.
- *Mail:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J, Proposed Determination for Residential Refrigeration Products that do not Incorporate a Compressor, EERE–2011–BT–DET–0072 and/or RIN 1904–AC66, 1000 Independence Avenue SW., Washington, DC 20585–0121. *Phone:* (202) 586–2945. Please submit one signed paper original.
- *Hand Delivery/Courier:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, 6th Floor, 950 L'Enfant Plaza, SW., Washington, DC 20024. *Phone:* (202) 586–2945. Please submit one signed paper original.

Instructions: All submissions received must include the agency name and docket number or RIN for this rulemaking.

Docket: For access to the docket to read background documents or comments received, go to the U.S. Department of Energy, 6th Floor, 950 L'Enfant Plaza, SW., Washington, DC 20024, (202) 586–2945, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays. Please call Ms. Brenda Edwards at (202) 586–2945 for additional information regarding visiting the Resource Room.

FOR FURTHER INFORMATION CONTACT: Mr. Lucas Adin, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Program, EE–2J, 1000 Independence Avenue SW., Washington, DC 20585–0121. *Telephone:* (202) 287–1317. *Email: Lucas.Adin@ee.doe.gov.*

In the Office of General Counsel, contact Mr. Michael Kido, U.S. Department of Energy, Office of the General Counsel, GC–71, 1000 Independence Avenue SW., Washington, DC 20585–0121. *Telephone:* (202) 586–8145. *Email: Michael.Kido@hq.doe.gov;* or Ms. Jennifer Tiedeman, U.S. Department of Energy, Office of the General Counsel, GC–71, 1000 Independence Avenue SW., Washington, DC 20585–0121. *Telephone:* (202) 287–6111. *Email: Jennifer.Tiedeman@hq.doe.gov.*

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I. Statutory Authority

Title III of the Energy Policy and Conservation Act (EPCA), as amended (42 U.S.C. 6291 *et seq.*), sets forth various provisions designed to improve energy efficiency. Part B of Title III of EPCA (42 U.S.C. 6291–6309) established the ''Energy Conservation Program for Consumer Products Other Than Automobiles,'' which covers consumer products and certain commercial products (hereafter referred to as ''covered products'').[1]

EPCA specifies a list of covered consumer products that includes refrigerators, refrigerator-freezers, and freezers (referred to collectively as ''residential refrigeration products'') that can be operated by alternating current (AC) electricity, are not designed to be used without doors, and include a compressor and condenser as an integral part of the cabinet assembly. (42 U.S.C. 6292(a)(1)) This proposed coverage determination addresses those residential refrigeration products that do not meet these specific criteria.

In addition to specifying a list of covered residential and commercial products, EPCA permits the Secretary of Energy to classify additional types of consumer products as covered products when certain prerequisites have been met. For a given product to be classified as a covered product, the Secretary must determine that (1) Covering that product is either necessary or appropriate to carry out the purposes of EPCA and (2) the average annual per-household energy use by products of such type is likely to exceed 100 kWh per year. (42 U.S.C. 6292(b)(1)).

After first determining whether the above criteria are met, the Secretary may prescribe energy conservation standards for a covered product. See 42 U.S.C. 6295(o) and (p). In order to set standards for a given product that has been added as a newly covered product pursuant to 42 U.S.C. 6292(b)(1), the Secretary must determine that four additional criteria are met. First, the average per household energy use within the United States by the products of such type (or class) exceeded 150 kilowatt-hours (or its BTU equivalent) for any 12-month period ending before such determination. Second, the aggregate household energy use within the United States by products of such type (or class) exceeded 4,200,000,000 kilowatt-hours (or its BTU equivalent) for any such 12-month period. Third, a substantial improvement in the energy efficiency of products of such type (or class) is technologically feasible. And fourth, the application of a labeling rule under 42 U.S.C. 6294 to such type (or class) is not likely to be sufficient to induce manufacturers to produce, and consumers and other persons to purchase, covered products of such type (or class) that achieve the maximum energy efficiency that is technologically feasible and economically justified. (42 U.S.C. 6295(l)(1)).

In addition to the above, if DOE issues a final determination that non-compressor residential refrigeration products are covered products, DOE will consider test procedures for these products and will determine if they satisfy the provisions of 42 U.S.C. 6295(l)(1) during the course of any energy conservation standards rulemaking.

II. Current Rulemaking Process

DOE has not previously conducted an energy conservation standard rulemaking for non-compressor equipped residential refrigeration products. If, after public comment, DOE issues a final determination of coverage for this product, DOE will consider both test procedures and energy conservation standards for these products.

Additionally, assuming that DOE determines that the criteria for extending coverage to non-compressor

[1] Upon codification in the U.S. Code, Part B was re-designated Part A for editorial reasons.

residential refrigeration products are met and that accompanying energy conservation standards are warranted, DOE will, consistent with EPCA, propose a test procedure for these products. In developing an appropriate procedure, DOE will take steps to help ensure that the procedure is not unduly burdensome to conduct for measuring the energy efficiency, energy use or estimated annual operating cost of these products during a representative average use cycle or period of use. (42 U.S.C. 6293(b)(3)) In carrying out this process, DOE initially prepares a notice of proposed rulemaking (NOPR) and allows interested parties to present oral and written data, views, and arguments with respect to such procedures. DOE also considers relevant information, including technological developments relating to energy use or energy efficiency of the covered products.

With respect to energy conservation standards, DOE typically prepares an Energy Conservation Standards Rulemaking Framework Document (the framework document). The framework document explains the issues, analyses, and process that it is considering for the development of energy conservation standards for the product(s) to be addressed by the standard. After DOE receives comments on the framework document, DOE typically prepares an Energy Conservation Standards Rulemaking preliminary analysis, and an accompanying technical support document (TSD) that provides the details of DOE's analysis. The preliminary analysis typically provides initial draft analyses of potential impacts of energy conservation standards on consumers, manufacturers, and the nation. Neither of these steps is legally required and DOE may, depending on the circumstances of a particular case, combine these steps when preparing a new standards rulemaking.

DOE also typically publishes a notice of proposed rulemaking (NOPR) as part of the energy conservation standards rulemaking. The NOPR provides DOE's proposal for potential energy conservation standards and a summary of the results of DOE's supporting technical analysis. The details of DOE's energy conservation standards analysis are provided in an accompanying TSD. DOE's analysis describes both the burdens and benefits of potential standards, pursuant to 42 U.S.C. 6295(o). Because non-compressor residential refrigeration products would be newly covered under 42 U.S.C. 6292(b)(1), DOE would also consider, as noted above, whether these products satisfy certain specified criteria before prescribing standards for them. See 42 U.S.C. 6295(l)(1). After the publication of the NOPR, DOE affords interested persons an opportunity during a period of not less than 60 days to provide oral and written comment. After receiving and considering the comments on the NOPR, and not less than 90 days after the publication of the NOPR, DOE would issue the final rule prescribing any new energy conservation standards for residential refrigeration products that do not incorporate a compressor.

III. Scope of Coverage

DOE proposes in this determination to extend coverage to refrigeration products that are not currently covered under existing authority for residential refrigeration products (42 U.S.C. 6292(a)(1)) because they use alternative refrigeration technologies that do not include a compressor and condenser unit as an integral part of the cabinet assembly. Hence, DOE is proposing to extend coverage to those residential refrigeration products that operate using AC electricity but use either thermoelectric-based or absorption-based systems. In addition, while some non-compressor refrigeration products operate using energy sources other than AC electricity, it is DOE's understanding that most, if not all, of these products would likely fall outside the scope of coverage as consumer products under EPCA because they are primarily used in mobile applications such as recreational vehicles. See 42 U.S.C. 6292(a) (excluding from coverage ''those consumer products designed solely for use in recreational vehicles and other mobile equipment'').

DOE seeks feedback from interested parties on this scope of coverage.

IV. Evaluation of the Annual Energy Use of Thermoelectric and Absorption Refrigeration Products

The following sections describe DOE's evaluation of whether residential refrigeration products that do not incorporate a compressor fulfill the EPCA criteria for being added as covered products. As stated previously, DOE may classify a consumer product as a covered product if (1) Classifying products of such type as covered products is necessary and appropriate to carry out the purposes of EPCA; and (2) the average annual per-household energy use by products of such type is likely to exceed 100 kilowatt-hours (or its Btu equivalent) per year. 42 U.S.C. 6292(b)(1).

A. Coverage Necessary or Appropriate To Carry Out Purposes of EPCA

To satisfy the purposes of EPCA, the coverage of non-compressor residential refrigeration products is both necessary and appropriate to carry out the purposes of EPCA. These products consume energy generated from limited energy supplies and their regulation would be likely to result in the improvement of their energy efficiency. Accordingly, establishing standards for these products fall squarely within the overall statutory goals set out in EPCA to: (1) Conserve energy supplies through energy conservation programs; and (2) provide for improved energy efficiency of major appliances and certain other consumer products. (42 U.S.C. 6201)

In a related matter, DOE recently set energy conservation standards and accompanying test procedures for residential refrigerators, refrigerator-freezers, and freezers (collectively, refrigeration products). See 76 FR 57516 (Sept. 15, 2011) (amending energy conservation standards for residential refrigeration products) and 75 FR 78810 (Dec. 16, 2010) (amending current test procedures and issuing an interim final rule to create revised test procedures for products manufactured starting in 2014). During DOE's efforts to amend the standards for these products, interested parties urged DOE to include wine chillers as part of this effort. See 75 FR 59470, 59486 (Sept. 27, 2010) (residential refrigeration products NOPR, noting industry's urging that DOE consider wine storage products within the scope of the standards rulemaking). Wine chillers are devices used to store bottles of wine at temperatures that are higher than those used to store fresh food. Wine chillers, which typically use either a conventional compressor-condenser or a thermoelectric-based system, have a temperature range of between 45 °F and 55 °F, compared to 39 °F for the safe storage of fresh food used in refrigerators and refrigerator-freezers. Given the different purposes served by these products and their accompanying performance characteristic differences, DOE decided to generally address these wine chiller products in a separate rulemaking. 76 FR at 57534.

Consistent with this approach, DOE is currently considering initiating an energy conservation standard rulemaking addressing wine chillers. As a prerequisite to the setting of standards for these products, DOE is interested in ensuring that both compressor-based and non-compressor-based products would be covered as part of this approach in order to prevent a mass

shift in the market from compressor-based to alternative refrigeration technologies such as thermoelectric- and absorption-based systems that currently fall outside of EPCA's scope of coverage for refrigeration products. As explained below, DOE has reason to believe that products that use these alternative technologies are less efficient than products using conventional compressor-based refrigeration systems. As a result, a shift by manufacturers to use these alternative technologies could have an adverse impact on overall energy efficiency. To address this potential problem, and to provide a more comprehensive approach to the treatment of wine chillers generally, DOE seeks to establish coverage over products that employ these alternative technologies pursuant to the Agency's authority under 42 U.S.C. 6292(b).

Available information collected by DOE suggests that products using thermoelectric technology will be much less efficient than their compressor-equipped counterparts.[2] DOE is also aware that residential refrigeration products using thermoelectric technology have become commercially available—particularly, wine chillers. Similarly, a limited number of products using absorption technology, which is also less energy efficient than compressor-based refrigeration technology, are also commercially available. Hence, DOE believes that coverage and energy standards for these products are necessary in order to ensure that the existing standards for compressor-based refrigeration products and potential future standards for compressor-based wine chillers are not undermined by a switch to less-efficient technologies.

B. Average Household Energy Use

DOE estimated the average household energy use for two of the primary types of residential refrigeration products that do not incorporate a compressor—thermoelectric wine chillers and absorption refrigeration products.

Thermoelectric wine chillers incorporate cooling modules that utilize the Peltier effect.[3] DOE obtained limited data to estimate their average household energy use and deduced the magnitude of thermoelectric wine chiller energy use from a combination of (1) Thermoelectric wine chiller market data, (2) energy use data for vapor compression (*i.e.,* conventional compressor/condenser-based) wine chillers, and (3) thermoelectric module efficiency.

To estimate the size of the thermoelectric wine chiller market, DOE purchased data on wine chiller sales in the U.S. from 2007 to 2010 from the NPD Group, Inc. (NPD), a marketing research firm.[4] NPD reports that these data represent 30- to 45-percent of the total wine chiller market, yielding a total estimate of between 580,000 to 880,000 unit sales in the U.S. for the year 2009. Unfortunately, the NPD data do not differentiate between vapor compression and thermoelectric products. Therefore, DOE researched manufacturer product offerings to approximate the thermoelectric share of the wine chiller market.

Specifically, DOE researched two of the three largest wine chiller brands based on sales figures in the NPD database, Haier[5] and Vinotemp,[6] and determined that 69-percent and 82-percent, respectively, of their wine chiller product offerings for capacities of fewer than 30 bottles are thermoelectric. Because the NPD data also indicate that 80 percent of the wine chiller market is comprised of products with capacities of fewer than 30 bottles, DOE surmised that thermoelectric wine chillers represent a large fraction of the wine chiller market, specifically within the portion of the market comprised of products with capacities of fewer than 30 bottles.

To estimate vapor compression wine chiller energy use, DOE relied on the annual energy use of vapor compression wine chiller products permitted under California's maximum energy use standards[7] as well as the NPD sales data cited above. The California Energy Commission (CEC) currently specifies a maximum allowable energy use for wine chillers as a function of internal volume. From the purchased NPD sales data, which cover the years 2007 to 2010, DOE deduced an internal volume for each model listed in the database. Using this information, DOE developed a range of vapor compression annual energy use values for the range of internal volumes of models in the NPD database, assuming that the energy use of these products is the maximum allowed by the CEC standard. This derived annual energy use ranges from 305 to 392 kWh for wine chillers with capacities of fewer than 30 bottles.

Additionally, during the recent standards rulemaking for residential refrigeration products, DOE tested a thermoelectric refrigerator. The results from those tests showed that this particular product's efficiency was an order of magnitude lower than that of a conventional comparable vapor compression product.[8] These results suggest that the energy use of thermoelectric refrigeration products could be much higher than that of vapor compression products.

However, because these observations are based on limited testing of a single thermoelectric product purchased in 2008, DOE recently performed metering of four thermoelectric wine chillers with capacities of six, 12, 15, and 28 bottles during the period from May 27, 2011 to June 28, 2011. While the metering was conducted in a non-controlled ambient environment with room temperatures varying between 64 °F and 85 °F, DOE believed that the additional measurements would improve DOE's understanding of typical thermoelectric wine chiller energy use, since a greater number of data points would be likely to improve the confidence of the measured values, because the initial product was not a wine chiller, and because thermoelectric refrigeration technology may have evolved in the past three years. The measured energy use for the four units over the approximately one-month time period varied between 18 to 50 kWh, with the high value associated with the 28 bottle capacity wine chiller. Assuming wine chillers are powered year-round, *i.e.,* consumers do not unplug the units for extended periods of time, the monthly consumption translates into annual energy use values of 218 to 598 kWh, which closely match the values derived for vapor compression units from the NPD and CEC data.

The limited metered data clearly indicate that thermoelectric wine chiller annual energy use exceeds the 100 kWh per year threshold set by EPCA for establishing coverage. DOE notes that the range of thermoelectric wine chiller energy use based on the metering is

[2] See, for example, the residential refrigeration product energy conservation standard rulemaking TSD, Chapter 4, Screening Analysis, *http://www1.eere.energy.gov/buildings/appliance_standards/residential/pdfs/refrig_nopr_tsd_2010-09-23.pdf.*

[3] The Peltier effect refers to the creation of a temperature differential across a device comprised of two dissimilar electrical conductors by passing an electric current through the junction between them.

[4] NPD Group, Inc., available at *http://www.npd.com/corpServlet?nextpage=corp_welcome.html.*

[5] Haier America Trading. (*http://www.haieramerica.com/wine-beer-beverage*).

[6] Vinotemp International. (*http://www.vinotemp.com/Browse.aspx/387/Wine-Coolers?gclid=CPSvs57hlaoCFQo0QgodCEEOxQ*).

[7] California Energy Commission, 2010 Appliance Efficiency Regulations, December 2010. CEC–400–2010–012. *http://www.energy.ca.gov/2010publications/CEC-400-2010-012/CEC-400-2010-012.PDF.*

[8] U.S. Department of Energy. *Final Rule Technical Support Document.* 2011. p. 4–12. Available at *http://www1.eere.energy.gov/buildings/appliance_standards/pdfs/refrig_finalrule_tsd.pdf.*

approximately the same as the derived range for vapor compression wine chillers. Although the implication is that thermoelectric units may have a level of energy consumption comparable to their vapor compression counterparts, DOE emphasizes that the test data are not conclusive and a prescribed test procedure to comprehensively measure their energy use is currently unavailable. As an example of the limitations of the recorded data, the metered tests likely indicate the low end of possible energy use because they did not capture the energy impacts from door openings, nor did they include steps to verify that compartment temperatures were maintained at 55 °F per CEC test procedure requirements. Had these steps been included as part of the measurements, the measured energy consumption of the thermoelectric products examined by DOE would have likely been significantly higher. Consequently, DOE believes that the limited metering data should not be the sole basis for estimating energy use for products of this type.

In contrast with thermoelectric refrigeration products, absorption refrigeration products use a fluid-based refrigeration cycle that relies upon heat addition, which is typically provided by electric resistance heaters or fuels such as natural gas and propane. Such systems ''compress'' [9] the refrigerant, which is typically ammonia, using a sorbent fluid, which is typically water.[10] The refrigerant is absorbed by the fluid, creating a liquid solution containing the refrigerant. This solution is transferred from the ''low-pressure'' to the ''high-pressure'' sides of the system as a liquid, and the refrigerant is subsequently boiled out of the solution by heating it. Most absorption systems used for small refrigeration products employ an inert gas on the low-pressure side of the system, usually hydrogen or helium for ammonia-water systems, which allows the partial pressure of the refrigerant gas to remain low while boosting the total gas pressure. This significantly reduces the total pressure difference between the ''high pressure'' and ''low pressure'' sides. The system eliminates the expansion valve and replaces the pumping action of a mechanical compressor with the thermal siphon driven by the heat input, similar to the arrangement used in coffee makers to lift the boiling water to the top of the coffee maker. By generating By moving the refrigerant from the evaporator back to the condenser using the sorbent, an absorption system generates refrigeration using heat input.

Electric-powered absorption units are commonly used by the hotel industry since they are much quieter than products with a compressor. These products would be part of the coverage determination proposed in this notice. Natural gas- or propane-fired absorption units are used primarily in mobile applications, remote areas, and mobile residences that do not have reliable access to electricity—these products would not be part of the coverage determination as proposed. Electric-powered absorption products tend to have a fairly significant level of energy use. As an example, the energy use of the Dometic CS 52 DV, a representative absorption refrigeration wine chiller product, is reported by the manufacturer to use 1.25 kWh per day in a 68 °F ambient environment,[11] which translates into an annual energy use of 456 kWh, assuming these products are powered year-round. Very small (< 1.5 cubic foot) absorption-cooled refrigerators provided by hotels for their guests use approximately 310 kWh/yr as reported by the manufacturer, or up to 530 kWh/yr in limited field testing.[12] [13] DOE seeks comment on the market share and penetration of all absorption refrigeration products. DOE also seeks comment on whether coverage should also be considered for fuel-fired units.

Based upon these evaluations of the two primary types of residential refrigeration products that do not incorporate a compressor (*i.e.* thermoelectric-based wine chillers and absorption-based refrigeration products), DOE has been able to develop estimates of their annual energy use that indicate that these products consume significantly more than 100 kWh annually. Therefore, DOE has tentatively determined that the average annual per household energy use for residential refrigeration products that do not incorporate a compressor is likely to exceed the 100 kWh threshold set by EPCA.

V. Procedural Issues and Regulatory Review

A. Review Under Executive Order 12866

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

B. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act of 1996) requires preparation of an initial regulatory flexibility analysis for any rule that, by law, must be proposed for public comment, unless the agency certifies that the proposed rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. A regulatory flexibility analysis examines the impact of the rule on small entities and considers alternative ways of reducing negative effects. Also, as required by E.O. 13272, ''Proper Consideration of Small Entities in Agency Rulemaking'' 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003 to ensure that the potential impact of its rules on small entities are properly considered during the DOE rulemaking process. 68 FR 7990 (February 19, 2003). DOE makes its procedures and policies available on the Office of the General Counsel's Web site at *http://www.gc.doe.gov*.

DOE reviewed today's proposed determination under the provisions of the Regulatory Flexibility Act and the policies and procedures published on February 19, 2003. If adopted, today's proposed determination would set no standards; they would only positively determine that future standards may be warranted and should be explored in an energy conservation standards and test procedure rulemaking. Economic impacts on small entities would be considered in the context of such rulemakings. On the basis of the

[9] ''Compress'' in this context has a different meaning that in conventional compressor-based refrigeration products because, for the absorption systems in most of these products, the refrigerant is moved from a region of low partial pressure to a region of high partial pressure rather than actually being compressed.

[10] A sorbent fluid is one that absorbs gas of another substance (in this case the refrigerant) in an exothermic process similar to condensation.

[11] Dometic Corporation. (*https://www.dometic.com/enus/Americas/USA/Hotel-Equipment/Wine-Cellars/products/?productdataid=68705*).

[12] The Bartender AMB–302 1.1 cu. ft. refrigerator is reported to consume 840 Wh per day, or 307 kWh/yr (*http://www.atlanticminifridge.com/Brochures/AMF_Minibar_Brochure.pdf*).

[13] DOE also undertook field monitoring of absorption-cooled hotel ''mini'' refrigerators (the Dometic RH 341 LD with 1.4 cu. ft. capacity, and the Bartender AMB–302 with 1.1 cu. ft. capacity) in two hotels in the San Francisco Bay Area in March-April 2010. A total of 48 refrigerators were metered over a period of approximately two weeks, resulting in annualized energy use measurements from 307 to 528 kWh/yr.

foregoing, DOE certifies that the proposed determination, if adopted, would have no significant economic impact on a substantial number of small entities. Accordingly, DOE has not prepared a regulatory flexibility analysis for this proposed determination. DOE will transmit this certification and supporting statement of factual basis to the Chief Counsel for Advocacy of the Small Business Administration for review under 5 U.S.C. 605(b).

C. Review Under the Paperwork Reduction Act of 1995

This proposed determination that residential refrigeration products that do not incorporate a compressor meet the criteria for covered products for which the Secretary may prescribe energy conservation standards pursuant to 42 U.S.C. 6295(o) and (p) will impose no new information or record-keeping requirements. Accordingly, the Office of Management and Budget (OMB) clearance is not required under the Paperwork Reduction Act. (44 U.S.C. 3501 *et seq.*)

D. Review Under the National Environmental Policy Act of 1969

In this notice, DOE proposes to positively determine that future standards may be warranted and that environmental impacts should be explored in an energy conservation standards rulemaking. DOE has determined that review under the National Environmental Policy Act of 1969 (NEPA), Public Law 91–190, codified at 42 U.S.C. 4321 *et seq.* is not required at this time. NEPA review can only be initiated ''as soon as environmental impacts can be meaningfully evaluated'' (10 CFR 1021.213(b)). This proposed determination would only determine that future standards may be warranted, but would not itself propose to set any specific standard. DOE has, therefore, determined that there are no environmental impacts to be evaluated at this time. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

E. Review Under Executive Order 13132

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

F. Review Under Executive Order 12988

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

G. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4, codified at 2 U.S.C. 1501 *et seq.*) requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and tribal governments and the private sector. For regulatory actions likely to result in a rule that may cause expenditures by State, local, and Tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a) and (b)) UMRA requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and tribal governments on a proposed ''significant intergovernmental mandate.'' UMRA also requires an agency plan for giving notice and opportunity for timely input to small governments that may be potentially affected before establishing any requirement that might significantly or uniquely affect them. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. 62 FR 12820 (March 18, 1997). (This policy also is available at *http://www.gc.doe.gov*). DOE reviewed today's proposed determination pursuant to these existing authorities and its policy statement and determined that the proposed determination contains neither an intergovernmental mandate nor a mandate that may result in the expenditure of $100 million or more in any year, so the UMRA requirements do not apply.

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

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

Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

I. Review Under Executive Order 12630

Pursuant to E.O. 12630, ''Governmental Actions and Interference with Constitutionally Protected Property Rights'' 53 FR 8859 (March 15, 1988), DOE determined that this proposed determination would not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

J. Review Under the Treasury and General Government Appropriations Act of 2001

The Treasury and General Government Appropriation Act of 2001 (44 U.S.C. 3516, note) requires agencies to review most disseminations of information they make to the public under guidelines established by each agency pursuant to general guidelines issued by the Office of Management and Budget (OMB). The OMB's guidelines were published at 67 FR 8452 (February 22, 2002), and DOE's guidelines were published at 67 FR 62446 (October 7, 2002). DOE has reviewed today's proposed determination under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

K. Review Under Executive Order 13211

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

DOE has concluded that today's regulatory action proposing to determine that residential refrigeration products that do not incorporate a compressor meet the criteria for covered products for which the Secretary may prescribe energy conservation standards pursuant to 42 U.S.C. 6295(o) and (p) would not have a significant adverse effect on the supply, distribution, or use of energy. This action is also not a significant regulatory action for purposes of E.O. 12866, and the OIRA Administrator has not designated this proposed determination as a significant energy action. Therefore, this proposed determination is not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects for this proposed determination.

L. Review Under the Information Quality Bulletin for Peer Review

On December 16, 2004, OMB, in consultation with the Office of Science and Technology Policy (OSTP), issued its Final Information Quality Bulletin for Peer Review (the Bulletin). 70 FR 2664 (January 14, 2005). The Bulletin establishes that certain scientific information shall be peer reviewed by qualified specialists before it is disseminated by the Federal government, including influential scientific information related to agency regulatory actions. The purpose of the Bulletin is to enhance the quality and credibility of the Government's scientific information. DOE has determined that the analyses conducted for this rulemaking do not constitute ''influential scientific information,'' which the Bulletin defines as ''scientific information the agency reasonably can determine will have or does have a clear and substantial impact on important public policies or private sector decisions.'' 70 FR 2667 (January 14, 2005). The analyses were subject to pre-dissemination review prior to issuance of this rulemaking.

DOE will determine the appropriate level of review that would be applicable to any future rulemaking to establish energy conservation standards for set-top boxes and network equipment.

VI. Public Participation

A. Submission of Comments

DOE will accept comments, data, and information regarding this notice of proposed determination no later than the date provided at the beginning of this notice. After the close of the comment period, DOE will review the comments received and determine whether residential refrigeration products that do not incorporate a compressor are covered products under EPCA.

Comments, data, and information submitted to DOE's email address for this proposed determination should be provided in WordPerfect, Microsoft Word, PDF, or text (ASCII) file format. Submissions should avoid the use of special characters or any form of encryption, and wherever possible comments should include the electronic signature of the author. No telefacsimiles (faxes) will be accepted.

According to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit two copies: One copy of the document should have all the information believed to be confidential deleted. DOE will make its own determination as to the confidential status of the information and treat it according to its determination.

Factors of interest to DOE when evaluating requests to treat submitted information as confidential include (1) A description of the items; (2) whether and why such items are customarily treated as confidential within the industry; (3) whether the information is generally known or available from public sources; (4) whether the information has previously been made available to others without obligations concerning its confidentiality; (5) an explanation of the competitive injury to the submitting persons which would result from public disclosure; (6) a date after which such information might no longer be considered confidential; and (7) why disclosure of the information would be contrary to the public interest.

B. Issues on Which DOE Seeks Comments

DOE welcomes comments on all aspects of this proposed determination. DOE is particularly interested in receiving comments from interested parties on the following issues related to the proposed determination for residential refrigeration products that do not incorporate a compressor:

(1) Is the proposed scope of coverage for residential refrigeration products that do not incorporate a compressor sufficient or are there aspects to this proposed scope that require modification?

(2) Should the scope of coverage be extended to also include products that are not powered or activated solely by AC power input, for instance products that are fired with natural gas or propane? What are the annual shipments of such products?

(3) DOE notes that since the statutory definition of a refrigerator excludes certain products—namely, those devices that are designed to be used without doors—DOE is interested in whether its scope of coverage should also include products that are designed to be used

without doors. DOE is also interested in information regarding the existence and examples of these types of products. Assuming that these types of products exist, what are their annual shipments?

(4) DOE is interested in whether classifying residential refrigeration products that do not incorporate a compressor as covered products is necessary or appropriate to carry out the purposes of EPCA.

(5) DOE seeks stock and shipment data for residential refrigeration products that do not incorporate a compressor, segregated by different product types.

(6) DOE seeks information regarding energy test procedures suited for residential refrigeration products that do not incorporate a compressor.

(7) DOE seeks information regarding energy use of these products.

(8) DOE seeks information concerning the extent to which similar coverage may be appropriate for commercial or industrial products that utilize similar refrigeration technologies.

(9) DOE seeks calculations and accompanying values for household and national energy consumption.

(10) DOE seeks information as to the availability or lack of availability of technologies for improving energy efficiency of residential refrigeration products that do not incorporate a compressor.

The Department is interested in receiving views concerning other relevant issues that participants believe would affect DOE's ability to establish test procedures and energy conservation standards for residential refrigeration products that do not incorporate a compressor. The Department invites all interested parties to submit in writing by December 8, 2011, comments and information on matters addressed in this notice and on other matters relevant to consideration of a determination for residential refrigeration products that do not incorporate a compressor.

After the expiration of the period for submitting written statements, the Department will consider all comments and additional information that is obtained from interested parties or through further analyses, and it will prepare a final determination. If DOE determines that residential refrigeration products that do not incorporate a compressor qualify as covered products, DOE will consider initiating rulemakings to develop test procedures and energy conservation standards for residential refrigeration products that do not incorporate a compressor. Members of the public will be given an opportunity to submit written and oral comments on any proposed test procedure and standards.

List of Subjects in 10 CFR Part 430

Administrative practice and procedure, Confidential business information, Energy conservation, Reporting and recordkeeping requirements.

Issued in Washington, DC, on November 1, 2011.

Kathleen B. Hogan,

Deputy Assistant Secretary for Energy Efficiency and Renewable Energy.

[FR Doc. 2011–28928 Filed 11–7–11; 8:45 am]

BILLING CODE 6450–01–P

SMALL BUSINESS ADMINISTRATION

13 CFR Parts 121, 124, 125, 126, and 127

RIN 3245–AG23

Small Business Size and Status Integrity

AGENCY: U.S. Small Business Administration (SBA).

ACTION: Proposed rule; reopening of comment period.

SUMMARY: SBA is reopening the comment period for the proposed rule published in the **Federal Register** on October 7, 2011. In that rule SBA proposed to amend its regulations to implement provisions of the Small Business Jobs Act of 2010 (Jobs Act) pertaining to small business size and status integrity. SBA proposed to amend its program regulations to implement statutory provisions establishing that there is a presumption of loss equal to the value of the contract or other instrument when a concern willfully seeks and receives an award by misrepresentation. SBA proposed to amend its program regulations to implement statutory provisions that provide that the submission of an offer or application for an award intended for small business concerns will be deemed a size or status certification or representation in certain circumstances. SBA proposed to amend its program regulations to implement statutory provisions that provide that an authorized official must sign in connection with a size or status certification or representation for a contract or other instrument. SBA proposed to amend its regulations to implement statutory provisions that provide that concerns that fail to update their size or status in the Online Representations and Certifications Application (ORCA) database (or any successor thereto) at least annually shall no longer be identified in the database as small or some other socioeconomic status, until the representation is updated. SBA proposed to amend its regulations to clarify when size is determined for purposes of entry into the 8(a) Business Development and HUBZone programs. The proposed rule provided a 30-day comment period closing on November 7, 2011.

SBA is reopening the comment period for an additional 30 days in response to the significant level of interest generated by the proposed rule among small businesses. Given the scope of the proposed rule and the nature of the issues raised by the comments received to date, SBA believes that affected businesses need more time to review the proposal and prepare their comments.

DATES: The comment period for the proposed rule published on October 7, 2011 (76 FR 62313) is extended through December 8, 2011.

ADDRESSES: You may submit comments, identified by RIN: 3245–AG23, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail, for paper, disk, or CD/ROM submissions:* Dean Koppel, U.S. Small Business Administration, Office of Government Contracting, 409 Third Street SW., 8th Floor, Washington, DC 20416.
- *Hand Delivery/Courier:* Dean Koppel, U.S. Small Business Administration, Office of Government Contracting, 409 Third Street SW., 8th Floor Washington, DC 20416.

SBA will post all comments on *http://www.regulations.gov.* If you wish to submit confidential business information (CBI) as defined in the User Notice at *http://www.Regulations.gov,* please submit the information to Dean Koppel, U.S. Small Business Administration, Office of Government Contracting, 409 Third Street SW., 8th Floor, Washington, DC 20416, or send an email to *Dean.Koppel@sba.gov.* Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make the final determination on whether it will publish the information or not.

FOR FURTHER INFORMATION CONTACT: Dean Koppel, Office of Government Contracting, 409 Third Street SW., Washington, DC 20416; (202) 205–9751; *Dean.Koppel@sba.gov.*

Dated: November 2, 2011.

Joseph G. Jordan,

Associate Administrator, Government Contracting and Business Development.

[FR Doc. 2011–28827 Filed 11–7–11; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2011–1223; Directorate Identifier 2011–NM–173–AD]

RIN 2120–AA64

Airworthiness Directives; Bombardier, Inc. Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain Bombardier, Inc. Model CL–600–2B16 (CL–601–3A, CL–601–3R, and CL–604 Variants) airplanes. This proposed AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

There have been several occurrences of the air driven generator (ADG) failure to power essential buses during functional tests of the ADG. It was found that the low threshold setting of the circuit protection on the ADG generator control unit (GCU) can prevent the supply of power from the ADG to the essential buses. In the event of an emergency, loss of power to the essential buses can prevent continued safe flight.

* * * * *

The proposed AD would require actions that are intended to address the unsafe condition described in the MCAI.

DATES: We must receive comments on this proposed AD by December 23, 2011.

ADDRESSES: You may send comments by any of the following methods:

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

For service information identified in this proposed AD, contact Bombardier, Inc., 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; *telephone* (514) 855–5000; *fax* (514) 855–7401; *email thd.crj@aero.bombardier.com; Internet http://www.bombardier.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington. For information on the availability of this material at the FAA, call (425) 227–1221.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Assata Dessaline, Aerospace Engineer, Avionics and Flight Test Branch, ANE–172, FAA, New York Aircraft Certification Office (ACO), 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; *telephone* (516) 228–7301; *fax* (516) 794–5531.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2011–1223; Directorate Identifier 2011–NM–173–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

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

Discussion

Transport Canada Civil Aviation (TCCA), which is the aviation authority for Canada, has issued Canadian Airworthiness Directive CF–2011–25, dated July 25, 2011 (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

There have been several occurrences of the air driven generator (ADG) failure to power essential buses during functional tests of the ADG. It was found that the low threshold setting of the circuit protection on the ADG generator control unit (GCU) can prevent the supply of power from the ADG to the essential buses. In the event of an emergency, loss of power to the essential buses can prevent continued safe flight.

This directive mandates the replacement of the ADG GCU.

You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

Bombardier, Inc. has issued Service Bulletin 605–24–003, dated April 25, 2011; and Service Bulletin 604–24–023, dated April 25, 2011. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

Differences Between This AD and the MCAI or Service Information

We have reviewed the MCAI and related service information and, in general, agree with their substance. But we might have found it necessary to use different words from those in the MCAI to ensure the AD is clear for U.S. operators and is enforceable. In making these changes, we do not intend to differ substantively from the information provided in the MCAI and related service information.

We might also have proposed different actions in this AD from those in the MCAI in order to follow FAA policies. Any such differences are highlighted in a NOTE within the proposed AD.

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 70 products of U.S. registry. We also estimate that it would take about 1 work-hour per product to comply with the basic requirements of this proposed AD. The average labor rate is $85 per work-hour. Required parts would cost about $0 per product. Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these parts. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $5,950, or $85 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

1. Is not a ''significant regulatory action'' under Executive Order 12866;
2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and
3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD and placed it in the AD docket.

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. The FAA amends § 39.13 by adding the following new AD:

Bombardier, Inc.: Docket No. FAA–2011–1223; Directorate Identifier 2011–NM–173–AD.

Comments Due Date

(a) We must receive comments by December 23, 2011.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Bombardier, Inc. Model CL–600–2B16 (CL–601–3A, CL–601–3R, and CL–604 Variants) airplanes, certificated in any category, serial numbers 5408 through 5665 inclusive, and 5701 through 5856 inclusive.

Subject

(d) Air Transport Association (ATA) of America Code 24: Electrical Power.

Reason

(e) The mandatory continuing airworthiness information (MCAI) states:

There have been several occurrences of the air driven generator (ADG) failure to power essential buses during functional tests of the ADG. It was found that the low threshold setting of the circuit protection on the ADG generator control unit (GCU) can prevent the supply of power from the ADG to the essential buses. In the event of an emergency, loss of power to the essential buses can prevent continued safe flight.

* * * * *

Compliance

(f) You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

Actions

(g) Within 36 months after the effective date of this AD, remove the ADG GCU, Hamilton Sundstrand part number (P/N) 761341A (Bombardier P/N 604–90800–7), and install a new or serviceable ADG GCU Hamilton Sundstrand P/N 761341B (Bombardier P/N 604–90800–27) in accordance with the Accomplishment Instructions of Bombardier Service Bulletin 605–24–003, dated April 25, 2011 (for serial numbers 5701 through 5856); and Bombardier Service Bulletin 604–24–023, dated April 25, 2011 (for serial numbers 5408 through 5665); as applicable.

Parts Installation

(h) As of the effective date of this AD, no person may install an ADG GCU, Hamilton Sundstrand P/N 761341A (Bombardier P/N 604–90800–7) on any airplane.

FAA AD Differences

Note 1: This AD differs from the MCAI and/or service information as follows:

No differences.

Other FAA AD Provisions

(i) The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, NY Aircraft Certification Office (ACO), ANE–170, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the ACO, send it to ATTN: Program Manager, Continuing Operational Safety, FAA, New York ACO, 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; *telephone* (516) 228–7300; *fax* (516) 794–5531. Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office. The AMOC approval letter must specifically reference this AD.

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

Related Information

(j) Refer to MCAI Canadian Airworthiness Directive CF–2011–25, dated July 25, 2011; Bombardier Service Bulletin 605–24–003, dated April 25, 2011; and Bombardier Service Bulletin 604–24–023, dated April 25, 2011; for related information.

Issued in Renton, Washington, on October 27, 2011.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2011–28857 Filed 11–7–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2011–1224; Directorate Identifier 2011–NM–175–AD]

RIN 2120–AA64

Airworthiness Directives; Bombardier, Inc. Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain Bombardier, Inc. Model CL–600–2B19 (Regional Jet Series 100 & 440) airplanes. This proposed AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

There have been several occurrences of the air driven generator (ADG) failure to power essential buses during functional tests of the ADG. It was found that the low threshold setting of the circuit protection on the ADG generator control unit (GCU) can prevent the supply of power from the ADG to the essential buses. In the event of an emergency, loss of power to the essential buses can prevent continued safe flight.

* * * * *

The proposed AD would require actions that are intended to address the unsafe condition described in the MCAI.

DATES: We must receive comments on this proposed AD by December 23, 2011.

ADDRESSES: You may send comments by any of the following methods:

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

For service information identified in this proposed AD, contact Bombardier, Inc., 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; telephone (514) 855–5000; fax (514) 855–7401; email *thd.crj@aero.bombardier.com;* Internet *http://www.bombardier.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington. For information on the availability of this material at the FAA, call (425) 227–1221.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Assata Dessaline, Aerospace Engineer, Avionics and Flight Test Branch, ANE–172, FAA, New York Aircraft Certification Office (ACO), 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; telephone (516) 228–7301; fax (516) 794–5531.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2011–1224; Directorate Identifier 2011–NM–175–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

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

Discussion

Transport Canada Civil Aviation (TCCA), which is the aviation authority for Canada, has issued Canadian Airworthiness Directive CF–2011–26, dated July 25, 2011 (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

There have been several occurrences of the air driven generator (ADG) failure to power essential buses during functional tests of the ADG. It was found that the low threshold setting of the circuit protection on the ADG generator control unit (GCU) can prevent the supply of power from the ADG to the essential buses. In the event of an emergency, loss of power to the essential buses can prevent continued safe flight.

This [TCCA] directive mandates the replacement of the ADG GCU.

You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

Bombardier, Inc. has issued Service Bulletin 601R–24–130, dated April 27, 2011. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

Differences Between This AD and the MCAI or Service Information

We have reviewed the MCAI and related service information and, in general, agree with their substance. But we might have found it necessary to use different words from those in the MCAI to ensure the AD is clear for U.S. operators and is enforceable. In making these changes, we do not intend to differ substantively from the information provided in the MCAI and related service information.

We might also have proposed different actions in this AD from those in the MCAI in order to follow FAA policies. Any such differences are highlighted in a NOTE within the proposed AD.

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 589 products of U.S. registry. We also estimate that it would take about 2 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is $85 per work-hour. Required

parts would cost about $0 per product. Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these parts. As we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $100,130, or $170 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

1. Is not a ''significant regulatory action'' under Executive Order 12866;

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

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

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD and placed it in the AD docket.

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. The FAA amends § 39.13 by adding the following new AD:

Bombardier, Inc.: Docket No. FAA–2011–1224; Directorate Identifier 2011–NM–175–AD.

Comments Due Date

(a) We must receive comments by December 23, 2011.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Bombardier, Inc. Model CL–600–2B19 (Regional Jet Series 100 & 440) airplanes, certificated in any category, serial number 7305 through 7990 inclusive, and 8000 through 8109 inclusive.

Subject

(d) Air Transport Association (ATA) of America Code 24: Electrical Power.

Reason

(e) The mandatory continuing airworthiness information (MCAI) states:

There have been several occurrences of the air driven generator (ADG) failure to power essential buses during functional tests of the ADG. It was found that the low threshold setting of the circuit protection on the ADG generator control unit (GCU) can prevent the supply of power from the ADG to the essential buses. In the event of an emergency, loss of power to the essential buses can prevent continued safe flight.

* * * * *

Compliance

(f) You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

Actions

(g) Within 24 months after the effective date of this AD, remove the ADG GCU, part number (P/N) 604–90800–7, and install a new or serviceable ADG GCU, P/N 604–90800–27, in accordance with the Accomplishment Instructions of Bombardier Service Bulletin 601R–24–130, dated April 27, 2011.

Parts Installation

(h) As of the effective date of this AD, no person may install an ADG GCU, P/N 604–90800–7, on any airplane.

FAA AD Differences

Note 1: This AD differs from the MCAI and/or service information as follows:

No differences.

Other FAA AD Provisions

(i) The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, New York Aircraft Certification Office (ACO), ANE–170, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the ACO, send it to *Attn:* Program Manager, Continuing Operational Safety, FAA, New York ACO, 1600 Stewart Avenue, Suite 10, Westbury, New York 11590; telephone (516) 228–7300; fax (516) 794–5531. Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office. The AMOC approval letter must specifically reference this AD.

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

Related Information

(j) Refer to MCAI Canadian Airworthiness Directive CF–2011–26, dated July 25, 2011; and Bombardier Service Bulletin 601R–24–130, dated April 27, 2011; for related information.

Issued in Renton, Washington, on October 27, 2011.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2011–28859 Filed 11–7–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2011–1222; Directorate Identifier 2010–NM–268–AD]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes Model 737–600, –700, –700C, –800, –900, and –900ER Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain The Boeing Company Airplanes Model 737–600, –700, –700C, –800, –900, and –900ER series airplanes. This proposed AD would require checking the escape slide girt for serviceability and replacement if necessary, modifying the cable routing provision, replacing the regulator padding, modifying the aspirator orientation, and modifying the valise. This proposed AD also would, for certain airplanes, require modifying or replacing the Vespel piston, modifying the pilot valve regulator, installing a new firing cable and safety pin, and modifying the slide valise. This proposed AD was prompted by reports of escape slides failing to deploy from the forward and aft right-hand doors during scheduled maintenance slide deployments, which could result in the slide being unusable during an emergency evacuation and increased likelihood of injury to passengers or crewmembers due to the difficulty in evacuating the aircraft.

DATES: We must receive comments on this proposed AD by December 23, 2011.

ADDRESSES: You may send comments by any of the following methods:

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

For service information identified in this proposed AD, contact Goodrich Corporation, Aircraft Interior Products, *Attn:* Technical Publications, 3414 South Fifth Street, Phoenix, Arizona 85040; *phone:* (602) 243–2270; *email: george.yribarren@goodrich.com; Internet: http://www.goodrich.com/TechPubs.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington. For information on the availability of this material at the FAA, call (425) 227–1221.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Patrick Gillespie, Aerospace Engineer, Cabin Safety & Environmental Systems Branch, ANM–150S, Seattle Aircraft Certification Office (ACO), FAA, 1601 Lind Avenue SW., Renton, Washington 98057–3356; *phone:* (425) 917–6429; *fax:* (425) 917–6590; *email: Patrick.Gillespie@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2011–1222; Directorate Identifier 2010–NM–268–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

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

Discussion

We have received eight reports from five operators of escape slides failing to deploy from the forward and aft right-hand doors during scheduled maintenance slide deployments. During the attempted escape slide deployments, the valise release cable was caught in the gap between the latch bracket and the lower edge of the aft side of the compartment latch bracket. This caused the door to stall, ultimately preventing the door from fully opening, which prevented escape slide deployment. This condition, if not corrected, could result in the escape slide being unusable during an emergency evacuation and increased likelihood of injury to passengers or crewmembers due to the difficulty in evacuating the aircraft.

Relevant Service Information

We reviewed Goodrich Service Bulletin 5A3307–25–389, dated November 8, 2010. This service information describes procedures for checking the escape slide girt for continued serviceability, and replacing the girt with a new girt if necessary. This service information also describes procedures for modifying the cable routing provision on the girt by removing three Velcro tabs and installing two fabric tunnels. Additionally, this service information describes procedures for modifying the valise by removing the parachute spring band and installing an aspirator support pad, replacing the regulator valve padding with new padding, and repacking the slide with the aspirator in a different orientation within the slide pack.

Concurrent Service Information

For slides having certain part numbers, Goodrich Service Bulletin 5A3307–25–389, dated November 8, 2010, specifies concurrent accomplishment of a modification specified in Goodrich Service Bulletin 5A3307–25–339, Revision 3, dated May 8, 2009. The modification involves modifying certain pilot valve regulators by replacing the trigger housing, bushing, and rod; installing a new firing cable and safety pin; and modifying the slide valise to accept the safety pin used with the modified valve.

For certain slides, Goodrich Service Bulletin 5A3307–25–389, dated November 8, 2010, also specifies concurrent accomplishment of Goodrich Service Bulletin 25–349, Revision 1, dated January 11, 2010, which describes procedures for modifying the Vespel piston in the regulator valves, or as an option to the modification, replacing the Vespel piston with a certain new or serviceable Vespel piston.

Other Relevant Rulemaking

Slides having part number (P/N) 5A3307–3 are affected by Boeing Service Bulletin 737–25–1491, dated

April 23, 2007, which is mandated by AD 2008–24–08, Amendment 39–15748 (73 FR 72320, November 28, 2008). The modification specified by Goodrich Service Bulletin 5A3307–25–339, Revision 3, dated May 8, 2009, is approved as an alternative method of compliance (AMOC) to the slide modification required by AD 2008–24–08.

FAA's Determination

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

Proposed AD Requirements

This proposed AD would require accomplishing the actions specified in Goodrich Service Bulletin 5A3307–25–389, dated November 8, 2010; Goodrich Service Bulletin 5A3307–25–339, Revision 3, dated May 8, 2009; and Goodrich Service Bulletin 25–349, Revision 1, dated January 11, 2010; described previously.

Costs of Compliance

We estimate that this proposed AD affects 557 airplanes of U.S. registry.

We estimate the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Check girt for serviceability, modify girt and valise, orientation, and replace padding.	2 work-hours × $85 per hour = $170.	$223	$393	$218,901.
Modify regulator valve, install cable and pin, and modify slide valise.	1 work-hour × $85 per hour = $85.	Between $1,749 and $1,836.	Between $1,834 and $1,921.	Between $1,021,538 and $1,069,997.
Modify Vespel piston	1 work-hour × $85 per hour = $85.	$0	$85	$47,345.
Optional Vespel piston replacement	1 work-hour × $85 per hour = $85.	$612	$697	$388,229.

We estimate the following costs to do any necessary replacements that would be required based on the results of the check of the girt. We have no way of determining the number of aircraft that might need these replacements.

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Girt replacement (Service Bulletin 5A3307–25–389)	1 work-hour × $85 per hour = $85	$942	$1,027

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

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

The Boeing Company: Docket No. FAA–2011–1222; Directorate Identifier 2010–NM–268–AD.

(a) Comments Due Date

We must receive comments by December 23, 2011.

(b) Affected ADs

This AD affects AD 2008–24–08, Amendment 39–15748 (73 FR 72320, November 28, 2008).

(c) Applicability

This AD applies to The Boeing Company Model 737–600, –700, –700C, –800, –900, and –900ER series airplanes, certificated in any category, with Goodrich Corporation door escape slide part number (P/N) 5A3086–1, –3, or –301, serial number (S/N) B3F001 through B3F611 inclusive; P/N 5A3088–1, –3, or –301, S/N B3A001 through B3A685 inclusive; or P/N 5A3307–1, –3, –5, or –301, S/N BNG0001 through BNG5707 inclusive.

(d) Subject

Joint Aircraft System Component (JASC)/ Air Transport Association (ATA) of America Code 25, Equipment/Furnishings.

(e) Unsafe Condition

This AD was prompted by reports of escape slides failing to deploy from the forward and aft right-hand doors during scheduled maintenance slide deployments. We are issuing this AD to prevent failure of an escape slide to deploy, which could result in the slide being unusable during an emergency evacuation and increased likelihood of injury to passengers or crewmembers due to the difficulty in evacuating the aircraft.

(f) Compliance

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

(g) Girt Check and Slide Modification

Within 36 months after the effective date of this AD: Do the actions in paragraph (g)(1) and (g)(2) of this AD.

(1) Check the girt for continued serviceability, in accordance with the Accomplishment Instructions of Goodrich Service Bulletin 5A3307–25–389, dated November 8, 2010. If the girt is unserviceable: Before further flight, replace the girt with a new girt, in accordance with the Accomplishment Instructions of Goodrich Service Bulletin 5A3307–25–389, dated November 8, 2010.

(2) Modify the cable routing provision on the girt, modify the valise, replace the regulator padding, and modify the aspirator orientation in the slide pack, in accordance with the Accomplishment Instructions of Goodrich Service Bulletin 5A3307–25–389, dated November 8, 2010

(h) Concurrent Requirements

(1) For slide P/N 5A3307–3 or 5A3307–301: Prior to or concurrently with accomplishing the actions required by paragraph (g) of this AD, modify the pilot valve regulator P/N 4A3865–2, –3, or –4, as applicable; install a new firing cable and safety pin; and modify the slide valise; in accordance with the Accomplishment Instructions of Goodrich Service Bulletin 5A3307–25–339, Revision 3, dated May 8, 2009.

(2) For slide P/N 5A3307–3, 5A3307–5, or 5A3307–301: Prior to or concurrently with accomplishing the actions required by paragraph (g) of this AD, modify the Vespel piston in the regulator valves or replace the Vespel piston with a new or serviceable Vespel piston P/N 3A3566–2 or 3A3832–2, as applicable, in accordance with the Accomplishment Instructions of Goodrich Service Bulletin 25–349, Revision 1, dated January 11, 2010.

(i) Credit for Actions Accomplished in Accordance With Previous Service Information

(1) Modifying the pilot valve regulator, installing a new firing cable and safety pin, or modifying the slide valise in accordance with Goodrich Service Bulletin 5A3307–25–339, Revision 1, dated September 26, 2003; or Revision 2, dated March 31, 2004; before the effective date of this AD is acceptable for compliance with the corresponding modification or installations required by paragraph (h) of this AD.

(2) Modifying or replacing the Vespel piston in the regulator valves, in accordance with Goodrich Service Bulletin 25–349, dated September 15, 2004, before the effective date of this AD is acceptable for compliance with the corresponding modification required by paragraph (h) of this AD.

(j) Parts Installation

As of the effective date of this AD, no person may install on any airplane a part identified in paragraph (j)(1), (j)(2), or (j)(3) of this AD.

(1) A regulator having P/N 4A3865–2, –3, or –4.

(2) An evacuation system having P/N 5A3086–1, –3, or –301, serial number (S/N) B3F001 through B3F611 inclusive; P/N 5A3088–1, –3, or –301, S/N B3A001 through B3A685 inclusive; or P/N 5A3307–1, –3, –5, or –301, S/N BNG0001 through BNG5707 inclusive.

(3) Regulator valve padding having P/N 3A4047–13.

(k) Alternative Methods of Compliance (AMOCs)

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

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

(l) Related Information

(1) For more information about this AD, contact Patrick Gillespie, Aerospace Engineer, Cabin Safety & Environmental Systems Branch, ANM–150S, Seattle Aircraft Certification Office (ACO), FAA, 1601 Lind Avenue SW., Renton, Washington 98057–3356; *phone:* (425) 917–6429; *fax:* (425) 917–6590; *email: Patrick.Gillespie@faa.gov.*

(2) For service information identified in this AD, contact Goodrich Corporation, Aircraft Interior Products, *Attn:* Technical Publications, 3414 South Fifth Street, Phoenix, Arizona 85040; *phone:* (602) 243–2270; *email: george.yribarren@goodrich.com; Internet: http://www.goodrich.com/ TechPubs.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, the FAA, 1601 Lind Avenue SW., Renton, Washington. For information on the availability of this material at the FAA, call (425) 227–1221.

Issued in Renton, Washington, on October 27, 2011.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2011–28856 Filed 11–7–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2011–1227; Directorate Identifier 2011–NM–100–AD]

RIN 2120–AA64

Airworthiness Directives; Bombardier, Inc. Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for all Bombardier, Inc. Model CL–600–2C10 (Regional Jet Series 700, 701, & 702) airplanes; Model CL–600–2D15 (Regional Jet Series 705) airplanes; and Model CL–600–2D24 (Regional Jet Series 900) airplanes. This proposed AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

A number of reports of aileron control stiffness have been received on Bombardier Regional Jet aeroplanes. Bombardier has reviewed the current maintenance tasks for the aileron control system and determined that an additional maintenance task is required.

* * * [A]ileron control stiffness during flight * * * could result in reduced controllability of the aeroplane.

The proposed AD would require actions that are intended to address the unsafe condition described in the MCAI.

DATES: We must receive comments on this proposed AD by December 23, 2011.

ADDRESSES: You may send comments by any of the following methods:

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

For service information identified in this proposed AD, contact Bombardier, Inc., 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; *telephone* (514) 855–5000; *fax* (514) 855–7401; *email thd.crj@aero.bombardier.com; Internet http://www.bombardier.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington. For information on the availability of this material at the FAA, call (425) 227–1221.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Cesar Gomez, Aerospace Engineer, Airframe and Mechanical Systems Branch, ANE–171, FAA, New York Aircraft Certification Office, 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; *telephone* (516) 228–7318; *fax* (516) 794–5531.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2011–1227; Directorate Identifier 2011–NM–100–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

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

Discussion

Transport Canada Civil Aviation (TCCA), which is the aviation authority for Canada, has issued Canadian Airworthiness Directive CF–2011–07, dated April 26, 2011 (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

> A number of reports of aileron control stiffness have been received on Bombardier Regional Jet aeroplanes. Bombardier has reviewed the current maintenance tasks for the aileron control system and determined that an additional maintenance task is required.
>
> This directive mandates revision of the approved maintenance schedule to incorporate the discard task for outboard wing aileron pulleys to prevent aileron control stiffness during flight which could result in reduced controllability of the aeroplane.

You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

Bombardier, Inc. has issued Temporary Revision 1–41, dated October 22, 2010, to Section 2—Systems/Powerplant Program of Part 1 of the Bombardier CL–600–2C10, CL–600–2D15, CL–600–2D24, CL–600–2E25 Maintenance Requirements Manual. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

Differences Between This AD and the MCAI or Service Information

We have reviewed the MCAI and related service information and, in general, agree with their substance. But we might have found it necessary to use different words from those in the MCAI to ensure the AD is clear for U.S. operators and is enforceable. In making these changes, we do not intend to differ substantively from the information provided in the MCAI and related service information.

We might also have proposed different actions in this AD from those in the MCAI in order to follow FAA policies. Any such differences are highlighted in a NOTE within the proposed AD.

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 398 products of U.S. registry. We also estimate that it would take about 1 work-hour per product to comply with the basic requirements of this proposed AD. The average labor rate is $85 per work-hour. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $33,830, or $85 per product.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator.

''Subtitle VII: Aviation Programs,'' describes in more detail the scope of the Agency's authority.

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

Regulatory Findings

We determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the

distribution of power and responsibilities among the various levels of government.

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

1. Is not a ''significant regulatory action'' under Executive Order 12866;

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

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

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD and placed it in the AD docket.

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. The FAA amends § 39.13 by adding the following new AD:

Bombardier, Inc.: Docket No. FAA–2011–1227; Directorate Identifier 2011–NM–100–AD.

Comments Due Date

(a) We must receive comments by December 23, 2011.

Affected ADs

(b) None.

Applicability

(c) This AD applies to all Bombardier, Inc. Model CL–600–2C10 (Regional Jet Series 700, 701, & 702) airplanes; Model CL–600–2D15 (Regional Jet Series 705) airplanes; and Model CL–600–2D24 (Regional Jet Series 900) airplanes; certificated in any category.

Subject

(d) Air Transport Association (ATA) of America Code 27: Flight controls.

Reason

(e) The mandatory continuing airworthiness information (MCAI) states:

A number of reports of aileron control stiffness have been received on Bombardier Regional Jet aeroplanes. Bombardier has reviewed the current maintenance tasks for the aileron control system and determined that an additional maintenance task is required.

* * * [A]ileron control stiffness during flight * * * could result in reduced controllability of the aeroplane.

Compliance

(f) You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

Actions

(g) Within 30 days after the effective date of this AD: Revise the maintenance program to incorporate Task 271000–218, discard of the outboard wing aileron pulleys, as specified in Bombardier Temporary Revision (TR) 1–41, dated October 22, 2010, to Section 2—Systems/Powerplant Program of Part 1 of the Bombardier CL–600–2C10, CL–600–2D15, CL–600–2D24, CL–600–2E25 Maintenance Requirements Manual (MRM). For this task, the initial compliance time starts at the applicable time specified in paragraphs (g)(1), (g)(2), (g)(3), or (g)(4) of this AD. Thereafter, operate the airplane according to the procedures and compliance times in Bombardier TR 1–41, dated October 22, 2010.

(1) For airplanes with 10,000 or less total flight hours as of the effective date of this AD: Prior to the outboard wing aileron pulley accumulating 12,000 total flight hours.

(2) For airplanes with more than 10,000 total flight hours but with 16,000 total flight hours or less as of the effective date of this AD: Prior to the outboard wing aileron pulley accumulating 17,300 total flight hours, or within 2,000 flight hours after the effective date of this AD, whichever is earlier.

(3) For airplanes with more than 16,000 total flight hours but with 20,000 total flight hours or less as of the effective date of this AD: Prior to the outboard wing aileron pulley accumulating 20,800 total flight hours, or within 1,300 flight hours after the effective date of this AD, whichever is earlier.

(4) For airplanes with more than 20,000 total flight hours as of the effective date of this AD: Within 800 flight hours after the effective date of this AD.

Note 1: The actions required by paragraphs (g) of this AD may be done by inserting a copy of Bombardier TR 1–41, dated October 22, 2010, into Section 2—Systems/Powerplant Program of Part 1 of the Bombardier CL–600–2C10, CL–600–2D15, CL–600–2D24, CL–600–2E25 MRM. When this TR has been included in the general revisions of the MRM, the general revisions may be inserted in the MRM, and the TR may be removed from the MRM, provided that the relevant information in the general revision is identical to that in Bombardier TR 1–41, dated October 22, 2010.

No Alternative Actions or Intervals

(h) After accomplishing the revision required by paragraph (g) of this AD, no alternative actions (*e.g.,* inspections) or intervals may be used unless the actions or intervals are approved as an alternative method of compliance (AMOC) in accordance with the procedures specified in paragraph (i)(1) of this AD.

FAA AD Differences

Note 2: This AD differs from the MCAI and/or service information as follows: No differences.

Other FAA AD Provisions

(i) The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, New York Aircraft Certification Office (ACO), ANE–170, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the ACO, send it to ATTN: Program Manager, Continuing Operational Safety, FAA, New York ACO, 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; *telephone* (516) 228–7300; *fax* (516) 794–5531. Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office. The AMOC approval letter must specifically reference this AD.

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

Related Information

(j) Refer to MCAI Transport Canada Civil Aviation Airworthiness Directive CF–2011–07, dated April 26, 2011; and Bombardier Temporary Revision 1–41, dated October 22, 2010, to Section 2—Systems/Powerplant Program of Part 1 of the Bombardier CL–600–2C10, CL–600–2D15, CL–600–2D24, CL–600–2E25 MRM; for related information.

Issued in Renton, Washington, on October 31, 2011.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2011–28835 Filed 11–7–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2011–1226; Directorate Identifier 2011–NM–006–AD]

RIN 2120–AA64

Airworthiness Directives; Fokker Services B.V. Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain Fokker Services B.V. Model F.28 Mark 0070 and 0100 airplanes. This proposed AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

A recent safety review revealed that the fuel crossfeed valves cannot be controlled when only emergency electrical power is available.

This condition, if not corrected, could (in combination with other factors) prevent an in-flight engine re-light following a double engine flame-out event, possibly resulting in loss of the aeroplane.

* * * * *

The proposed AD would require actions that are intended to address the unsafe condition described in the MCAI.

DATES: We must receive comments on this proposed AD by December 23, 2011.

ADDRESSES: You may send comments by any of the following methods:

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

For service information identified in this proposed AD, contact Fokker Services B.V., Technical Services Dept., P.O. Box 231, 2150 AE Nieuw-Vennep, the Netherlands; telephone +31 (0)252–627–350; fax +31 (0)252–627–211; email *technicalservices.fokkerservices@stork.com;* Internet *http://www.myfokkerfleet.com*. You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington. For information on the availability of this material at the FAA, call (425) 227–1221.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Tom Rodriguez, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, Washington 98057–3356; telephone (425) 227–1137; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2011–1226; Directorate Identifier 2011–NM–006–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

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

Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA Airworthiness Directive 2010–0158R1, dated November 8, 2010 (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

A recent safety review revealed that the fuel crossfeed valves cannot be controlled when only emergency electrical power is available.

This condition, if not corrected, could (in combination with other factors) prevent an in-flight engine re-light following a double engine flame-out event, possibly resulting in loss of the aeroplane.

Another review revealed that an unwanted configuration of the fuel fire shut-off valve indication logic had been introduced during production on a limited number of F28 Mark 0100 aeroplanes.

Furthermore, most of the current fuel crossfeed indications are based on the crossfeed selection made by the flight crew and not on the actual positions of the crossfeed valve actuators. In combination with other factors, the current crossfeed indications may mislead flight crews, possibly resulting in single engine in-flight shutdowns and/or unnecessary precautionary landings.

For the reasons described above, this AD requires modifications of the crossfeed valve control and power supply, of the crossfeed indication logic and power supply and of the fuel fire shut-off valve indication logic.

* * * * *

Required actions also include modifying the overhead panel (introduce provisions for a modified crossfeed indication), and for certain airplanes modifying the transfer logic of the center wing fuel tank. You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

Fokker Services B.V. has issued the following service bulletins:

- Fokker Profroma Service Bulletin SBF100–28–043, Revision 1, dated March 31, 2009, including Appendix II, Revision 2, dated July 22, 2010, including the following drawings:
  - Fokker Drawing W41194, Sheet 009, Issue F, dated March 31, 2009;
  - Fokker Drawing W41194, Sheet 016, Issue N, dated March 31, 2009;
  - Fokker Drawing W41194, Sheet 018, Issue S, dated March 31, 2009; and
  - Fokker Drawing W59221, Sheet 159, Issue ED, dated October 2, 2009.
- Fokker Service Bulletin SBF100–28–047, Revision 3, dated May 2, 2011, including Fokker Manual Change Notification—Operational Documentation MCNO–F100–060, dated June 10, 2011, and Manual Change Notification—Operational Document MCNO–F100–049, Revision 1, dated May 30, 2011, including the following drawings:
  - Fokker Drawing D42770, Sheet 6, Issue U, dated May 2, 2011;
  - Fokker Drawing D42780, Sheet 6, Issue T, dated May 2, 2011;
  - Fokker Drawing W41074, Sheet 100, Issue GB, dated May 2, 2011;
  - Fokker Drawing W41074, Sheet 101, Issue FW, dated May 2, 2011;
  - Fokker Drawing W41194, Sheets 010 and 012, Issue J, dated May 2, 2011;
  - Fokker Drawing W41194, Sheets 011, 013, and 015, Issue U, dated May 2, 2011;
  - Fokker Drawing W41194, Sheets 014, 019, and 020, Issue S, dated May 2, 2011;
  - Fokker Drawing W41194, Sheet

017, Issue Q, dated May 2, 2011;
- Fokker Drawing W41319, Sheets 063, 064, 065, 066, 069, 071, and 074, Issue DY, dated May 2, 2011;
- Fokker Drawing W41319, Sheets 067, 068, 070, 072, and 073, Issue DW, dated May 2, 2011;
- Fokker Drawing W46211, Sheet 71, Issue DL, dated April 21, 2009;
- Fokker Drawing W46211, Sheet 74, Issue DN, dated July 16, 2010;
- Fokker Drawing W46254, Sheets 30 through 36, Issue BL, dated March 30, 2009;
- Fokker Drawing W46254, Sheet 37, Issue BP, dated March 30, 2009; and
- Fokker Drawing W59221, Sheets 161 and 162, Issue FC, July 9, 2010.

- Fokker Service Bulletin SBF100–28–052, dated June 15, 2009, including Fokker Manual Change Notification—Operational Documentation MCNO–F100–052 and Manual Change Notification—Maintenance Documentation MCNM–F100–126, dated June 15, 2009, including the following drawings:
- Fokker Drawing D42126, Sheet 38, Issue AR, dated October 6, 1993;
- Fokker Drawing D42213, Sheet 2, Issue H, dated May 23, 1990;
- Fokker Drawing D42220, Sheet 60, Issue V, dated September 1, 1991;
- Fokker Drawing D42220, Sheet 71, Issue AQ, dated June 7, 1993;
- Fokker Drawing D42250, Sheet 23, Issue U, dated April 1993.

The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

Differences Between This AD and the MCAI or Service Information

We have reviewed the MCAI and related service information and, in general, agree with their substance. But we might have found it necessary to use different words from those in the MCAI to ensure the AD is clear for U.S. operators and is enforceable. In making these changes, we do not intend to differ substantively from the information provided in the MCAI and related service information.

We might also have proposed different actions in this AD from those in the MCAI in order to follow FAA policies. Any such differences are highlighted in a NOTE within the proposed AD.

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 6 products of U.S. registry. We also estimate that it would take about 86 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is $85 per work-hour. Required parts would cost about $4,180 per product. Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these costs. As we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $68,940, or $11,490 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

1. Is not a ''significant regulatory action'' under Executive Order 12866;

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

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

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD and placed it in the AD docket.

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. The FAA amends § 39.13 by adding the following new AD:

Fokker Services B.V: Docket No. FAA–2011–1226; Directorate Identifier 2011–NM–006–AD.

Comments Due Date

(a) We must receive comments by December 23, 2011.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Fokker Services B.V. Model F.28 Mark 0070 and 0100 airplanes; certificated in any category; serial numbers 11244 through 11585 inclusive.

Subject

(d) Air Transport Association (ATA) of America Code 28: Fuel.

Reason

(e) The mandatory continuing airworthiness information (MCAI) states:

A recent safety review revealed that the fuel crossfeed valves cannot be controlled when only emergency electrical power is available.

This condition, if not corrected, could (in combination with other factors) prevent an in-flight engine re-light following a double engine flame-out event, possibly resulting in loss of the aeroplane.

* * * * *

Compliance

(f) You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

Actions

(g) Within 24 months after the effective date of this AD, modify the crossfeed valve control and power supply, the crossfeed indication logic and power supply, and the fuel fire shut-off valve indication logic, in accordance with the Accomplishment Instructions of Fokker Service Bulletin SBF100–28–047, Revision 3, dated May 2, 2011, including Fokker Manual Change Notification—Operational Documentation MCNO–F100–060, dated June 10, 2011, and Manual Change Notification—Operational Document MCNO–F100–049, Revision 1, dated May 30, 2011, including the drawings specified in paragraphs (g)(1) through (g)(15) of this AD.

(1) Fokker Drawing D42770, Sheet 6, Issue U, dated May 2, 2011.

(2) Fokker Drawing D42780, Sheet 6, Issue T, dated May 2, 2011.

(3) Fokker Drawing W41074, Sheet 100, Issue GB, dated May 2, 2011.

(4) Fokker Drawing W41074, Sheet 101, Issue FW, dated May 2, 2011.

(5) Fokker Drawing W41194, Sheets 010 and 012, Issue J, dated May 2, 2011.

(6) Fokker Drawing W41194, Sheets 011, 013, and 015, Issue U, dated May 2, 2011.

(7) Fokker Drawing W41194, Sheets 014, 019, and 020, Issue S, dated May 2, 2011.

(8) Fokker Drawing W41194, Sheet 017, Issue Q, dated May 2, 2011.

(9) Fokker Drawing W41319, Sheets 063, 064, 065, 066, 069, 071, and 074, Issue DY, dated May 2, 2011.

(10) Fokker Drawing W41319, Sheets 067, 068, 070, 072, and 073, Issue DW, dated May 2, 2011.

(11) Fokker Drawing W46211, Sheet 71, Issue DL, dated April 21, 2009.

(12) Fokker Drawing W46211, Sheet 74, Issue DN, dated July 16, 2010.

(13) Fokker Drawing W46254, Sheets 30 through 36, Issue BL, dated March 30, 2009;

(14) Fokker Drawing W46254, Sheet 37, Issue BP, dated March 30, 2009.

(15) Fokker Drawing W59221, Sheets 161 and 162, Issue FC, July 9, 2010.

(h) Before or concurrent with the modification specified in paragraph (g) of this AD, do the applicable actions specified in paragraphs (h)(1) and (h)(2) of this AD:

(1) For all airplanes: Modify the overhead panel (introduce provisions for a modified crossfeed indication) in accordance with the Accomplishment Instructions of Fokker Profroma Service Bulletin SBF100–28–043, Revision 1, dated March 31, 2009, including Appendix II, Revision 2, dated July 22, 2010, including the drawings specified in paragraphs (h)(1)(i) through (h)(1)(iv) of this AD.

(i) Fokker Drawing W41194, Sheet 009, Issue F, dated March 31, 2009.

(ii) Fokker Drawing W41194, Sheet 016, Issue N, dated March 31, 2009.

(iii) Fokker Drawing W41194, Sheet 018, Issue S, dated March 31, 2009.

(iv) Fokker Drawing W59221, Sheet 159, Issue ED, dated October 2, 2009.

(2) For airplanes with serial numbers 11442 through 11585, equipped with the automatic fuel transfer system: Modify the transfer logic of the center wing fuel tank, in accordance with the Accomplishment Instructions of Fokker Service Bulletin SBF100–28–052, including Fokker Manual Change Notification—Operational Documentation MCNO–F100–052 and Manual Change Notification—Maintenance Documentation MCNM–F100–126, dated June 15, 2009, including the drawings specified in paragraphs (h)(2)(i) through (h)(2)(v) of this AD.

(i) Fokker Drawing D42126, Sheet 38, Issue AR, October 6, 1993.

(ii) Fokker Drawing D42213, Sheet 2, Issue H, dated May 23, 1990.

(iii) Fokker Drawing D42220, Sheet 60, Issue V, dated September 1, 1991.

(iv) Fokker Drawing D42220, Sheet 71, Issue AQ, dated June 7, 1993.

(v) Fokker Drawing D42250, Sheet 23, Issue U, dated April 1993.

Credit for Actions Accomplished in Accordance With Previous Service Information

(i) Modifications accomplished before the effective date of this AD according to the service bulletins specified in paragraphs (i)(1), (i)(2), (i)(3), and (i)(4) of this AD, as applicable, are considered acceptable for compliance with the corresponding action specified in this AD.

(1) Fokker Service Bulletin SBF100–28–043, including Appendix II, dated March 31, 2009.

(2) Fokker Service Bulletin SBF100–28–047, Revision 2, dated August 4, 2010.

(3) Fokker Service Bulletin SBF100–28–047, Revision 1, dated July 22, 2010.

(4) Fokker Service Bulletin SBF100–28–047, dated May 10, 2010.

FAA AD Differences

Note 1: This AD differs from the MCAI and/or service information as follows: No differences.

Other FAA AD Provisions

(j) The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Branch, send it to ATTN: Tom Rodriguez, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, Washington 98057–3356; telephone (425) 227–1137; fax (425) 227–1149. Information may be emailed to: *9-ANM-116-AMOC-REQUESTS@faa.gov.* Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office. The AMOC approval letter must specifically reference this AD.

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

Related Information

(k) Refer to MCAI European Aviation Safety Agency Airworthiness Directive 2010–0158R1, dated November 8, 2010; and the service bulletins specified in paragraphs (g) and (h) of this AD; for related information.

Issued in Renton, Washington, on October 28, 2011.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2011–28836 Filed 11–7–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2011–1228; Directorate Identifier 2011–NM–176–AD]

RIN 2120–AA64

Airworthiness Directives; Bombardier, Inc. Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain Bombardier, Inc. Model CL–600–2C10 (Regional Jet Series 700, 701, & 702), CL–600–2D15 (Regional Jet Series 705), CL–600–2D24 (Regional Jet Series 900), and CL–600–2E25 (Regional Jet Series 1000) airplanes. This proposed AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

[I]t was found that the * * * ADG [air driven generator] GCU [generator control unit] transformer primary winding can break due to thermal fatigue. Broken transformer primary winding can prevent the supply of power from the ADG to the essential buses. In the event of an emergency, failure for the essential buses to remain powered can prevent continued safe flight.

* * * * *

The proposed AD would require actions that are intended to address the unsafe condition described in the MCAI.

DATES: We must receive comments on this proposed AD by December 23, 2011.

ADDRESSES: You may send comments by any of the following methods:

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

For service information identified in this proposed AD, contact Bombardier, Inc., 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; telephone (514) 855–5000; fax (514) 855–7401; email *thd.crj@aero.bombardier.com*; Internet *http://www.bombardier.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington. For information on the availability of this material at the FAA, call (425) 227–1221.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Assata Dessaline, Aerospace Engineer, Avionics and Flight Test Branch, ANE–172, FAA, New York Aircraft Certification Office (ACO), 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; telephone (516) 228–7301; fax (516) 794–5531.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2011–1228; Directorate Identifier 2011–NM–176–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

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

Discussion

Transport Canada Civil Aviation (TCCA), which is the aviation authority for Canada, has issued Canadian Airworthiness Directive CF–2011–27, dated July 25, 2011 (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

> There have been several occurrences of the air driven generator (ADG) failure to power essential buses during functional tests of the ADG on aeroplane models CL–600–2B16 and CL–600–2B19. The aeroplane models CL–600–2C10, CL–600–2D15, CL–600–2D24, and CL–600–2E25 use the same ADG generator control unit (GCU) as models CL–600–2B16 and CL–600–2B19. However the aeroplane models CL–600–2C10, CL–600–2D15, CL–600–2D24, and CL–600–2E25 are installed with a different hydraulic pump and do not experience the same failure due to the low threshold setting of the circuit protection. However, it was found that the same ADG GCU transformer primary winding can break due to thermal fatigue. Broken transformer primary winding can prevent the supply of power from the ADG to the essential buses. In the event of an emergency, failure for the essential buses to remain powered can prevent continued safe flight.
>
> This [TCCA] directive mandates the replacement of the ADG GCU.

You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

Bombardier, Inc. has issued Service Bulletin 670BA–24–031, dated May 30, 2011. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

Differences Between This AD and the MCAI or Service Information

We have reviewed the MCAI and related service information and, in general, agree with their substance. But we might have found it necessary to use different words from those in the MCAI to ensure the AD is clear for U.S. operators and is enforceable. In making these changes, we do not intend to differ substantively from the information provided in the MCAI and related service information.

We might also have proposed different actions in this AD from those in the MCAI in order to follow FAA policies. Any such differences are highlighted in a NOTE within the proposed AD.

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 402 products of U.S. registry. We also estimate that it would take about 2 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is $85 per work-hour. Required parts would cost about $0 per product. Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these parts. As we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $68,340, or $170 per product.

Authority for This Rulemaking

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

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

that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

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

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

1. Is not a ''significant regulatory action'' under Executive Order 12866;

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

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

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD and placed it in the AD docket.

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. The FAA amends § 39.13 by adding the following new AD:

Bombardier, Inc.: Docket No. FAA–2011–1228; Directorate Identifier 2011–NM–176–AD.

Comments Due Date

(a) We must receive comments by December 23, 2011.

Affected ADs

(b) None.

Applicability

(c) This AD applies to the airplanes, certificated in any category, identified in paragraphs (c)(1), (c)(2), and (c)(3) of this AD.

(1) Bombardier, Inc. Model CL–600–2C10 (Regional Jet Series 700, 701, & 702) airplanes, serial numbers 10003 through 10319 inclusive.

(2) Bombardier, Inc. Model CL–600–2D15 (Regional Jet Series 705) and CL–600–2D24 (Regional Jet Series 900) airplanes, serial numbers 15001 through 15260 inclusive.

(3) Bombardier, Inc. Model CL–600–2E25 (Regional Jet Series 1000) airplanes, serial numbers 19001 through 19012 inclusive.

Subject

(d) Air Transport Association (ATA) of America Code 24: Electrical Power.

Reason

(e) The mandatory continuing airworthiness information (MCAI) states:

[I]t was found that the * * * ADG [air driven generator] GCU [generator control unit] transformer primary winding can break due to thermal fatigue. Broken transformer primary winding can prevent the supply of power from the ADG to the essential buses. In the event of an emergency, failure for the essential buses to remain powered can prevent continued safe flight.

* * * * *

Compliance

(f) You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

Actions

(g) Within 10,000 flight hours or 60 months after the effective date of this AD, whichever occurs first, remove the ADG GCU, part number (P/N) 604–90800–7, and install a new or serviceable ADG GCU, P/N 604–90800–27, in accordance with the Accomplishment Instructions of Bombardier Service Bulletin 670BA–24–031, dated May 30, 2011.

Parts Installation

(h) As of the effective date of this AD, no person may install an ADG GCU, P/N 604–90800–7, on any airplane.

FAA AD Differences

Note 1: This AD differs from the MCAI and/or service information as follows: No differences.

Other FAA AD Provisions

(i) The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, New York Aircraft Certification Office (ACO), ANE–170, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the ACO, send it to ATTN: Program Manager, Continuing Operational Safety, FAA, New York ACO, 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; telephone (516) 228–7300; fax (516) 794–5531. Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office. The AMOC approval letter must specifically reference this AD.

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

Related Information

(j) Refer to MCAI Canadian Airworthiness Directive CF–2011–27, dated July 25, 2011; and Bombardier Service Bulletin 670BA–24–031, dated May 30, 2011; for related information.

Issued in Renton, Washington, on October 31, 2011.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2011–28834 Filed 11–7–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2011–1225; Directorate Identifier 2010–NM–269–AD]

RIN 2120–AA64

Airworthiness Directives; Airbus Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain Airbus Model A300 B4–2C, B4–103, and B4–203 airplanes; Model A300 B4–600, B4–600R, and F4–600R series airplanes, and Model C4–605R Variant F airplanes (collectively called A300–600 series airplanes); and Model A310 series airplanes. This proposed AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

During a routine visual inspection on two A310 in-service aeroplanes, cracks were found in the wing MLG [main landing gear] rib 5 aft bearing forward lug. Laboratory examination of the cracked ribs confirmed that the cracks were the result of pitting corrosion in the forward lug hole. Also on both aeroplanes, medium to heavy corrosion was found in the forward lugs on the opposite wing after removal of the bushes. * * * This situation, if not corrected, could

affect the structural integrity of the MLG attachment [which could result in the collapse of the MLG].

* * * * *

The proposed AD would require actions that are intended to address the unsafe condition described in the MCAI.

DATES: We must receive comments on this proposed AD by December 23, 2011.

ADDRESSES: You may send comments by any of the following methods:

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

For service information identified in this proposed AD, contact Airbus SAS–EAW (Airworthiness Office), 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 44 51; email *account.airworth-eas@airbus.com;* Internet *http://www.airbus.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington. For information on the availability of this material at the FAA, call (425) 227–1221.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Dan Rodina, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, Washington 98057–3356; telephone (425) 227–2125; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2011–1225; Directorate Identifier 2010–NM–269–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

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

Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA Airworthiness Directive 2010–0251, dated November 29, 2010 (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

During a routine visual inspection on two A310 in-service aeroplanes, cracks were found in the wing MLG rib 5 aft bearing forward lug. Laboratory examination of the cracked ribs confirmed that the cracks were the result of pitting corrosion in the forward lug hole. Also on both aeroplanes, medium to heavy corrosion was found in the forward lugs on the opposite wing after removal of the bushes. Similarly to A310 aeroplanes, although there have been no reports of crack findings on any A300, A300–600 or A300–600ST aeroplanes, the differences in MLG rib 5 design compared to A310 aeroplanes does not allow the exclusion of the possibility of cracks. This situation, if not corrected, could affect the structural integrity of the MLG attachment [which could result in the collapse of the MLG].

In order to ensure the detection of any crack at an early stage in the forward lug of the RH and LH MLG rib 5 aft bearing forward lug, Airbus developed inspection programs which were rendered mandatory, initially by EASA AD 2006–0372–E [which corresponds with FAA AD 2007–03–18, Amendment 39–14929] and now by AD 2010–0250 applicable to A300B4/C4/F4 and A300–600 aeroplanes and AD 2007–0195 [which corresponds with FAA AD 2008–17–02, Amendment 39–15640] applicable to A310 aeroplanes.

More recently, it has been determined that the installation of new bushes with increased interference fit adequately corrects the unsafe condition and ensures the structural integrity of the MLG attachment. Installation of these bushes constitutes terminating action for the repetitive inspection requirements of the existing EASA AD 2010–0250 for A300B4/C4/F4 and A300–600 aeroplanes, and AD 2007–0195 for A310 aeroplanes.

For the reasons described above, this new AD requires installation of bushes with increased interference fit in the gear rib 5 aft bearing forward lug.

You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

Airbus has issued the following service bulletins:

- Airbus Mandatory Service Bulletin A300–57–0249, Revision 02, dated June 18, 2010 (for Airbus Model A300 B4–2C, B4–103, and B4–203 airplanes).
- Airbus Service Bulletin A300–57–6106, Revision 02, dated June 18, 2010 (for Airbus Model A300–600 series airplanes).
- Airbus Mandatory Service Bulletin A310–57–2090, Revision 02, dated June 18, 2010 (for Airbus Model A310 series airplanes).

The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

Differences Between This AD and the MCAI or Service Information

We have reviewed the MCAI and related service information and, in general, agree with their substance. But we might have found it necessary to use different words from those in the MCAI to ensure the AD is clear for U.S. operators and is enforceable. In making these changes, we do not intend to differ substantively from the information provided in the MCAI and related service information.

We might also have proposed different actions in this AD from those in the MCAI in order to follow FAA policies. Any such differences are highlighted in a NOTE within the proposed AD.

Costs of Compliance

Based on the service information, we estimate that this proposed AD would

affect about 215 products of U.S. registry. We also estimate that it would take about 38 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is $85 per work-hour. Required parts would cost about $4,590 per product. Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these costs. As we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $1,681,300, or $7,820 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

1. Is not a ''significant regulatory action'' under Executive Order 12866;

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

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

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD and placed it in the AD docket.

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. The FAA amends § 39.13 by adding the following new AD:

Airbus: Docket No. FAA–2011–1225; Directorate Identifier 2010–NM–269–AD.

Comments Due Date

(a) We must receive comments by December 23, 2011.

Affected ADs

(b) This AD affects AD 2007–03–18, Amendment 39–14929 (72 FR 5919, February 8, 2007); and AD 2008–17–02, Amendment 39–15640 (73 FR 47032, dated August 13, 2008).

Applicability

(c) This AD applies to airplanes, certified in any category, as specified in paragraphs (c)(1), (c)(2), and (c)(3) of this AD.

(1) Airbus Model A300 B4–2C, B4–103, and B4–203 airplanes; all serial numbers; except airplanes where the main landing gear (MLG) rib 5 forward lugs of the left hand (LH) and right hand (RH) wing have been repaired by installation of oversized interference fit bushes per Airbus Repair Instruction R57240221, or those where the LH and RH wing have had Airbus Mandatory Service Bulletin A300–57–0249 embodied in service.

(2) Airbus Model A300 B4–601, B4–603, B4–620, and B4–622 airplanes; Airbus Model A300 B4–605R and B4–622R airplanes; Airbus Model A300 F4–605R and F4–622R airplanes; and Airbus Model A300 C4–605R Variant F airplanes; all serial numbers; except airplanes where the MLG rib 5 forward lugs of the LH and RH wing have been repaired by installation of oversized interference fit bushes per Airbus Repair Instruction R57240221, or those where the LH and RH wing have had Airbus Service Bulletin A300–57–6106 embodied in service.

(3) Airbus Model A310–203, –204, –221, –222, –304, –322, –324, and –325 airplanes; all serial numbers; except airplanes where the MLG rib 5 forward lugs of the LH and RH wing have been repaired by installation of oversized interference fit bushes per Airbus Repair Instruction R57249121, or those where the LH and RH wing have had Airbus Mandatory Service Bulletin A310–57–2090 embodied in service.

Subject

(d) Air Transport Association (ATA) of America Code 57: Wings.

Reason

(e) The mandatory continuing airworthiness information (MCAI) states:

During a routine visual inspection on two A310 in-service aeroplanes, cracks were found in the wing MLG rib 5 aft bearing forward lug. Laboratory examination of the cracked ribs confirmed that the cracks were the result of pitting corrosion in the forward lug hole. Also on both aeroplanes, medium to heavy corrosion was found in the forward lugs on the opposite wing after removal of the bushes. * * *. This situation, if not corrected, could affect the structural integrity of the MLG attachment [which could result in the collapse of the MLG].

* * * * *

Compliance

(f) You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

Inspection and Corrective Actions

(g) Within 30 months after the effective date of this AD, install new bushes with increased interference fit in the gear rib 5 aft bearing forward lug on the RH and LH wing, in accordance with the Accomplishment Instructions of the applicable service bulletins specified in paragraphs (g)(1), (g)(2), and (g)(3) of this AD; except as specified in paragraph (h) of this AD.

(1) Airbus Mandatory Service Bulletin A300–57–0249, Revision 02, dated June 18, 2010 (for Model A300 B4–2C, B4–103, and B4–203 airplanes);

(2) Airbus Service Bulletin A300–57–6106, Revision 02, dated June 18, 2010 (for Model A300–600 series airplanes); and

(3) Airbus Mandatory Service Bulletin A310–57–2090, Revision 02, dated June 18, 2010 (for Airbus Model A310 series airplanes).

(h) If one wing had rib 5 forward lugs of the MLG repaired by installing oversized interference fit bushes in accordance with Airbus Repair Instruction R57240221 or Airbus Repair Instruction R57249121, as applicable to the airplane model, then installing new bushes with increased interference fit in the aft bearing forward lug of the gear rib, as specified in paragraph (h) of this AD, is required for the opposite wing only.

Terminating Action for Inspections Required by AD 2007–03–18, (72 FR 5919, February 8, 2007); and AD 2008–17–02, (73 FR 47032, Dated August 13, 2008)

(i) Installation of new bushes, as specified in paragraph (h) of this AD, is terminating action for the repetitive inspections required AD 2007–03–18, Amendment 39–14929 (72 FR 5919, February 8, 2007); and AD 2008–17–02, Amendment 39–15640 (73 FR 47032, dated August 13, 2008).

Credit for Actions Accomplished in Accordance With Previous Service Information

(j) Installations accomplished before the effective date of this AD, according to the applicable service bulletins specified paragraphs (j)(1), (j)(2), and (j)(3) of this AD, are considered acceptable for compliance with the corresponding installations specified in this AD.

(1) Airbus Service Bulletin A300–57–0249, dated May 22, 2007; or Airbus Service Bulletin A300–57–0249, Revision 01, dated December 19, 2007 (for Model A300 B4–2C, B4–103, and B4 203 airplanes);

(2) Airbus Service Bulletin A300–57–6106, May 22, 2007; or Airbus Service Bulletin A300–57–6106, Revision 01, January 28, 2008 (for Model A300–600 series airplanes); and

(3) Airbus Service Bulletin A310–57–2090, dated May 22, 2007; or Airbus Service Bulletin A310–57–2090, Revision 01, dated December 19, 2007 (for Model A310 series airplanes).

FAA AD Differences

Note 1: This AD differs from the MCAI and/or service information as follows: No differences.

Other FAA AD Provisions

(k) The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Branch, send it to *Attn:* Dan Rodina, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, Washington 98057–3356; telephone (425) 227–2125; fax (425) 227–1149. Information may be emailed to: *9-ANM-116-AMOC-REQUESTS@faa.gov.* Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office. The AMOC approval letter must specifically reference this AD.

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

Related Information

(l) Refer to MCAI European Aviation Safety Agency Airworthiness Directive 2010–0251, dated November 29, 2010; Airbus Mandatory Service Bulletin A300–57–0249, Revision 02, dated June 18, 2010; Airbus Service Bulletin A300–57–6106, Revision 02, dated June 18, 2010; and Airbus Mandatory Service Bulletin A310–57–2090, Revision 02, dated June 18, 2010; for related information.

Issued in Renton, Washington, on October 28, 2011.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2011–28833 Filed 11–7–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 183

[Docket No. FAA–2011–1149]

Clarification of Policy Regarding Designated Aircraft Dispatcher Examiners

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

ACTION: Notice of availability; request for comment.

SUMMARY: This document announces the availability of a revised section of FAA Order 8900.1, regarding the qualification, authority, and limitations of Designated Aircraft Dispatcher Examiners (DADEs). This section provides guidance to FAA employees on the responsibilities, qualifications, and oversight of DADEs under 14 CFR part 183. Under this proposed revision, the FAA is clarifying its policy regarding the qualifications, privileges, and limitations of these designees, in addition to establishing guidelines for DADEs when testing applicants for an Aircraft Dispatcher Certificate. Upon review of the comments and any necessary revision, this Order would cancel and replace FAA Order 8900.1, Volume 5, Chapter 5, Section 10, and Volume 13, Chapter 3, Sections 1–4, issued September 13, 2007.

DATES: Written comments must be received on or before December 8, 2011.

ADDRESSES: Send comments identified by docket number FAA–2011–1149 using any of the following methods:

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

Privacy: The FAA will post all comments it receives, without change, to *http://www.regulations.gov,* including any personal information the commenter provides. Using the search function of the docket web site, anyone can find and read the electronic form of all comments received into any FAA dockets, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, etc.). DOT's complete Privacy Act Statement can be found in the **Federal Register** published on April 11, 2000 (65 FR 19477–19478), as well as at *http://DocketsInfo.dot.gov.*

Docket: Background documents or comments received may be read at *http://www.regulations.gov* at any time. Follow the online instructions for accessing the docket or Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Theodora Kessaris, Technical Programs Branch, Air Transportation Division, Flight Standards Service, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; *telephone:* (202) 267–8166; *facsimile:* (202) 267–5229; *email: Theodora.kessaris@faa.gov.*

Background

FAA Order 8900.1, Flight Standards Information Management System, was issued on September 13, 2007. This order consolidated and replaced FAA Orders 8300.1, 8400.1, and 8700.1, the FAA's guidance to inspectors. Included in FAA Order 8900.1 is guidance regarding FAA oversight of various designees authorized under 14 CFR part 183. Designees are private persons that the FAA Administrator has designated to act as his representative in examining, inspecting and testing persons and aircraft for the purpose of issuing airman, operating and aircraft certificates. Included in the list of persons the Administrator may designate to perform these functions on his behalf are Designated Aircraft Dispatch Examiners (DADEs). Pursuant to 14 CFR 183.25(f), these designees may accept applications for and conduct written and practical tests for issuing aircraft dispatcher certificates under part 65. In some instances, DADEs may be authorized to issue temporary aircraft

dispatcher certificates to qualified applicants.

The provisions in 14 CFR part 183 do not establish qualification requirements for DADEs. In October 2008, the FAA published guidance for inspectors that addressed DADE qualifications and the FAA's oversight of DADEs. This guidance was not published for public comment. This proposed revision of the Order would clarify the 2008 guidance and include the following significant information:

• A DADE will not test outside of the geographic limits of the Certificate Holding District Office (CHDO) without prior permission from the CHDO.

This limitation is necessary to ensure proper oversight and monitoring of the administration of these tests by the appropriate FAA district office.

• A DADE will not be an employee of a 14 CFR part 65 course operator.

This limitation is necessary due to the potential for a conflict-of-interest which could occur based on the requirement under § 65.63(c)(1) for a course operator to maintain an 80% pass rate of its graduates, on the first testing attempt, as a condition for renewal of a course. The FAA is concerned that a DADE employed by such a course operator might not be objective when administering a test to an applicant who has graduated from the DADE's employer or affiliate.

• Time spent testing an applicant should be no more than 6 hours.

This time period is based on the national average which was verified by Aviation Safety Inspectors with oversight responsibility of DADEs. This time period takes into account the extensive requirements of the Aircraft Dispatcher Practical Test Standards (PTS), and the ability of a candidate for an aircraft dispatcher certificate to demonstrate his or her ability to manage a typical aircraft dispatcher's workload by completing each task in a timely manner.

• A DADE will not test more than one applicant for an aircraft dispatcher certificate at a time.

This limitation is intended to establish consistency with the FAA's already established policy for initial pilot certification.

• A DADE will not administer more than two Aircraft Dispatcher Practical Tests in a single day.

This limitation takes in to account the testing of a single applicant at a time, and an overall test time of approximately 6 hours per applicant, not including the time it takes to complete the application paper work. This policy is also consistent with that which is applicable to pilot testing.

While the FAA generally does not request comment on internal orders, the agency has established a docket for public comments regarding this guidance for inspectors in recognition of the interest of current DADEs and applicants for an aircraft dispatcher certificate under part 65. The agency will consider all comments received by December 8, 2011. Comments received after that date may be considered if consideration will not delay agency action on the review. A copy of the proposed order is available for review in the assigned docket for the Order at *http://www.regulations.gov.*

Issued in Washington, DC, on October 26, 2011.

John M. Allen,

Director, Flight Standards Service.

[FR Doc. 2011–28516 Filed 11–7–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–157714–06]

RIN 1545–BG43

Determination of Governmental Plan Status

AGENCY: Internal Revenue Service (IRS), Department of the Treasury.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The Treasury Department and IRS anticipate issuing regulations under section 414(d) of the Internal Revenue Code (Code) to define the term ''governmental plan.'' This document describes the rules that the Treasury Department and IRS are considering proposing relating to the determination of whether a plan is a governmental plan within the meaning of section 414(d) and contains an appendix that includes a draft notice of proposed rulemaking on which the Treasury Department and IRS invite comments from the public. This document applies to sponsors of, and participants and beneficiaries in, employee benefit plans that are determined to be governmental plans.

DATES: Written or electronic comments must be received by February 6, 2012.

ADDRESSES: Send submissions relating to the section 414(d) draft general regulations to: CC:PA:LPD:PR (REG–157714–06), room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington DC, 20044. Submissions may be hand delivered Monday through Friday, between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–157714–06), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC.

Alternately, taxpayers may submit comments relating to the section 414(d) draft general regulations electronically via the Federal eRulemaking Portal at *www.regulations.gov* (IRS–REG–157714–06).

FOR FURTHER INFORMATION CONTACT: Concerning the ANPRM, Pamela R. Kinard, at (202) 622–6060; concerning submission of comments, Richard A. Hurst, at *Richard.A.Hurst@irscounsel.treas.gov* or at (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

This document describes rules that the Treasury Department and IRS are considering proposing and contains a draft notice of proposed rulemaking (in the Appendix to this ANPRM) under section 414(d) of the Internal Revenue Code (Code). Under the draft notice of proposed rulemaking (in the Appendix to this ANPRM), the rules would provide general guidance relating to the determination of whether a retirement plan is a governmental plan within the meaning of section 414(d) (section 414(d) draft general regulations). The principles described in this ANPRM could also apply for purposes of certain parallel terms in sections 403(b) and 457 of the Code.

Section 414(d) of the Code provides that the term ''governmental plan'' generally means a plan established and maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing. See sections 3(32) and 4021(b)(2) of the Employee Retirement Income Security Act of 1974 (ERISA) for definitions of the term ''governmental plan,'' which govern respectively for purposes of title I and title IV of ERISA.[1]

The term ''governmental plan'' also includes any plan to which the Railroad Retirement Act of 1935 or 1937 (49 Stat. 967, as amended by 50 Stat. 307) applies and which is financed by contributions

[1] The three definitions of the term ''governmental plan'' are essentially the same. The only difference is that, in defining the term ''governmental plan,'' section 3(32) of ERISA uses the phrase ''established or maintained,'' whereas section 414(d) of the Code and section 4021(b) of ERISA use the term ''established and maintained.''

required under that Act and any plan of an international organization which is exempt from taxation by reason of the International Organizations Immunities Act (59 Stat. 669). See section 414(d)(2) of the Code.

Section 414(d) was amended by the Pension Protection Act of 2006, Public Law 109–280 (120 Stat. 780) (PPA '06) to include certain plans of Indian tribal governments and related entities.[2] Section 906(a)(1) of PPA '06 provides that the term ''governmental plan'' includes a plan which is established and maintained by an Indian tribal government (as defined in section 7701(a)(40)), a subdivision of an Indian tribal government (determined in accordance with section 7871(d)), or an agency or instrumentality of either (ITG), and all the participants of which are employees of such entity substantially all of whose services as such an employee are in the performance of essential governmental functions but not in the performance of commercial activities (whether or not an essential governmental function).

Neither section 414(d) of the Code, section 3(32) of ERISA, nor section 4021(b)(2) of ERISA define key terms relating to governmental plans, including the terms ''established and maintained,'' ''political subdivision,'' ''agency,'' and ''instrumentality.'' Currently, there are no regulations interpreting section 414(d). Revenue Ruling 89–49 (1989–1 CB 117), see § 601.601(d)(2), sets forth a facts and circumstances analysis for determining whether a retirement plan is a governmental plan within the meaning of section 414(d).[3] This analysis is used by the IRS in issuing letter rulings.

Governmental plans are subject to different rules than retirement plans of nongovernmental employers. Governmental plans are excluded from the provisions of titles I and IV of ERISA. In addition, governmental plans receive special treatment under the Code. These plans are exempt from certain qualification requirements and they are deemed to satisfy certain other qualification requirements under certain conditions. As a result, the principal qualification requirements for a tax-qualified governmental plan[4] are that the plan—

- Be established and maintained by the employer for the exclusive benefit of the employer's employees or their beneficiaries;
- Provide definitely determinable benefits;
- Be operated pursuant to its terms;
- Satisfy the direct rollover rules of section 401(a)(31);
- Satisfy the section 401(a)(17) limitation on compensation;
- Comply with the statutory minimum required distribution rules under section 401(a)(9);
- Satisfy the pre-ERISA vesting requirements under section 411(e)(2);[5]
- Satisfy the section 415 limitations on benefits, as applicable to governmental plans; and
- Satisfy the prohibited transaction rules in section 503.

State and local governments, political subdivisions thereof, and agencies or instrumentalities thereof are generally not permitted to offer cash or deferred arrangements under section 401(k). However, an ITG is permitted to offer a cash or deferred arrangement under section 401(k).

For further background, see the ''Background'' section of the preamble in the section 414(d) draft general regulations in the Appendix to this ANPRM under the headings, ''Exclusion of Governmental Plans from ERISA,'' ''Exemption of Governmental Plans from Certain Qualified Plan Rules,'' and ''Exemption of Governmental Plans from Other Employee Benefit Rules Relating to Retirement Plans.''

Over the past several years, the IRS has been coordinating with the Department of Labor (DOL) and Pension Benefit Guaranty Corporation (PBGC) (the ''Agencies'') on governmental plan determinations. Although the anticipated proposed regulations would only be applicable for purposes of section 414(d), the DOL and PBGC were consulted when drafting this proposal. DOL and PBGC agreed that it would be advantageous for the Agencies and the regulated community for there to be coordinated criteria for determining whether a plan is a governmental plan within the meaning of section 414(d) of the Code, section 3(32) of ERISA, and section 4021(b)(2) of ERISA. See the ''Background'' section of the preamble in the section 414(d) draft general regulations in the Appendix to this ANPRM under the heading, ''Interagency Coordination on Governmental Plan Determinations.''

The Treasury Department and the IRS have determined to seek public comment on the draft proposed regulations in the Appendix to this ANPRM in advance of issuing a notice of proposed rulemaking. In light of the interaction of the governmental plan definitions in the Code and ERISA, a copy of the comments will be forwarded to DOL and PBGC.

Explanation of Provisions

Attached to the Appendix to this ANPRM is a draft notice of proposed rulemaking. The draft regulations include proposed rules, a preamble, and a request for comments. The Treasury Department and IRS invite the public to comment on the rules that the Treasury Department and IRS are considering proposing, which would generally define the term ''governmental plan'' within the meaning of section 414(d), as well as other key related terms, including ''State,'' ''political subdivision of a State,'' and ''agency or instrumentality of a State or political subdivision of a State.''

In determining whether an entity is an agency or instrumentality of the United States or an agency of instrumentality of a State or political subdivision of a State, the anticipated guidance would provide a facts and circumstances analysis. The factors used in these analyses are drawn from the factors historically used in governmental plan determinations, including Rev. Ruls. 57–128 and 89–49. The anticipated guidance would provide several examples illustrating the application of the facts and circumstances tests. See the ''Explanation of Provisions'' section in the section 414(d) draft general regulations in the Appendix to this ANPRM under the headings, ''Definitions of the United States and agency or instrumentality of the United States'' and ''Definition of agency or instrumentality of a State or a political subdivision of a State.'' See § 601.601(d)(2).

The anticipated proposed regulations would include numerous factors for determining whether an entity is an agency or instrumentality of a State or a political subdivision of a State. The section 414(d) draft proposed regulations in the Appendix to this ANPRM would categorize these factors

[2] Section 906(a) of PPA '06 made similar amendments to sections 3(32) and 4021(b)(2) of ERISA.

[3] See also Rev. Rul. 57–128 (1957–1 CB 311), see § 601.601(d)(2), which provides guidance on determining when an entity is a governmental instrumentality for purposes of the exemption from employment taxes under section 3121(b)(7) and 3306(c)(7).

[4] A special rule applies to contributory plans of certain governmental entities. Section 414(h)(2) provides that, for a qualified plan established by a State government or political subdivision thereof, or by any agency or instrumentality of the foregoing, where the contributions of the governmental employer are designated as employee contributions under section 414(h)(1) but the governmental employer picks up the contributions, the contributions picked up will be treated as employer contributions.

[5] Section 411(e)(2) states that a plan described in section 411(e)(1) is treated as meeting the requirements of section 411 if the plan meets the vesting requirements resulting from the application of section 401(a)(4) and (a)(7) as in effect on September 1, 1974.

into major factors and other factors. The section 414(d) draft general regulations would also request comments from the public on whether the final regulations should eliminate the distinction between main and other factors. In addition, the section 414(d) draft general regulations would request comments on the ordering and application of main and other factors; for example, whether, as an alternative to the ranking of major factors and other factors, the regulations could provide a safe harbor standard focusing on control and fiscal responsibility under which the entity would be treated as an agency or instrumentality of a State or a political subdivision of a State. For further explanation of the safe harbor standard, see the ''Comments and Public Hearing'' section in the preamble of the section 414(d) draft general regulations, which is located in the Appendix to this ANPRM.

The anticipated proposed regulations do not address the special rules that apply in determining whether a plan of an Indian tribal government is a governmental plan within the meaning of section 414(d). That topic would be reserved in the proposed regulations and is addressed in an ANPRM (REG–133223–08) that is being published elsewhere in this issue of the **Federal Register**.

The anticipated proposed regulations would provide rules for determining whether a governmental entity has established and maintained a plan for purposes of section 414(d). The anticipated proposed regulations might provide that a plan is established and maintained for the employees of a governmental entity if: (1) The plan is established and maintained by an employer within the meaning of § 1.401–1(a)(2), (2) the employer is a governmental entity, and (3) the only participants covered by the plan are employees of that governmental entity. The anticipated proposed regulations might also provide rules covering circumstances involving a change in status of an entity (that is, when a private entity becomes a governmental entity or when a governmental entity becomes a private entity) due to an acquisition or asset transfer. See the ''Explanation of Provisions'' section in the section 414(d) draft general regulations in the Appendix to this ANPRM under the heading, ''Requirements for establishing and maintaining a section 414(d) governmental plan.''

Recognizing that the guidance might affect numerous governmental plan participants and their beneficiaries, the anticipated proposed regulations request comments on transition rules, including transitional relief for governmental plans that permitted participation of a small number of former employees in their plans. See the ''Comments and Public Hearing'' section in the preamble of the section 414(d) draft general regulations that is located in the Appendix to this ANPRM.

Request for Comments

Before the notice of proposed rulemaking is issued, consideration will be given to any written comments that are submitted timely (preferably a signed original and eight (8) copies) to the IRS. All comments will be available for public inspection and copying. Copies of the comments will be provided to the DOL and PBGC.

The IRS and Department of Treasury plan to schedule a public hearing on the ANPRM. That hearing will be scheduled and announced at a later date. In addition to a public hearing, the Treasury Department and IRS anticipate scheduling ''Town Hall'' meetings in order to obtain comments from the public on the section 414(d) draft general regulations. It is expected that these ''Town Hall'' meetings will take place in different locations across the country. Participants will be encouraged to pre-register for the meetings. Information relating to these ''Town Hall'' meetings, including dates, times, locations, registration, and the procedures for submitting written and oral comments, will be available on the IRS Web site relating to governmental plans at *http://www.irs.gov/retirement/article/0,,id=181779,00.html.*

Drafting Information

The principal author of this advance notice of proposed rulemaking is Pamela R. Kinard, Office of the Chief Counsel (Tax-exempt and Government Entities), however, other personnel from the IRS and Treasury Department participated in its development.

Steven T. Miller,

Deputy Commissioner for Services and Enforcement.

Appendix

The following is draft language for a notice of proposed rulemaking that would set forth rules relating to the determination of whether a plan is a governmental plan within the meaning of section 414(d). The IRS and Treasury release this draft language in order to solicit comments from the governmental plans community:

Background

This document contains proposed regulations under section 414(d) of the Internal Revenue Code (Code). These regulations, when finalized, would provide guidance relating to the determination of whether a retirement plan is a governmental plan within the meaning of section 414(d). The definition of a governmental plan under section 414(d) applies for purposes of part I of subchapter D of chapter 1 of subtitle A (Income Taxes) of the Code (sections 401 through 420) and certain other Code provisions that refer to section 414(d) (such as sections 72(t)(10), 501(c)(25)(C), 4975(g)(2), 4980B(d)(2), 9831(a)(1), and 9832(d)(1)). It is expected that the principles set forth in these regulations would generally also apply for purposes of sections 403(b) and 457.

Statutory Definition of Governmental Plan

Both the Code and the Employee Retirement Income Security Act of 1974 (ERISA) define the term ''governmental plan.'' Section 414(d) of the Code provides that the term ''governmental plan'' generally means a plan established and maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing. See sections 3(32) and 4021(b)(2) of ERISA for parallel definitions of the term *governmental plan,* discussed under the heading, ''Exclusion of Governmental Plans from ERISA.''

The term ''governmental plan'' also includes any plan to which the Railroad Retirement Act of 1935 or 1937 (49 Stat. 967, as amended by 50 Stat. 307) applies and which is financed by contributions required under that Act and any plan of an international organization which is exempt from taxation by reason of the International Organizations Immunities Act, Public Law 79–291 (59 Stat. 669). Section 414(d) was amended by the Pension Protection Act of 2006, Public Law 109–280 (120 Stat. 780) (PPA '06) to include certain plans of Indian tribal governments.[6] See Notice 2006–89 (2006–43 IRB 772), see § 601.601(d)(2), for guidance relating to plans

[6] Section 906(a)(1) of PPA '06 provides that the term ''governmental plan'' includes a plan which is established and maintained by an Indian tribal government (as defined in section 7701(a)(40)), a subdivision of an Indian tribal government (determined in accordance with section 7871(d)), or an agency or instrumentality of either, and all the participants of which are employees of such entity substantially all of whose services as such an employee are in the performance of essential governmental functions but not in the performance of commercial activities (whether or not an essential government function). Section 906(a) of PPA '06 made similar amendments to sections 3(32) and 4021(b) of ERISA.

established and maintained by Indian tribal governments.[7] These proposed regulations do not provide any guidance concerning the special provisions in section 414(d) relating to the Railroad Retirement Act of 1935 or 1937, the International Organizations Immunities Act, or Indian tribal governments.

Application of Section 414(d)

These proposed regulations are only applicable for purposes of section 414(d), and not for any other purpose under the Code.[8] However, the section 414(d) definition of ''governmental plan'' applies for other sections of the Code, including:

- Section 72(t)(10)(A) (exception to the early withdrawal tax for certain distributions from a defined benefit governmental plan);
- Section 457(e)(17) (special rules for: (1) Direct trustee-to-trustee transfers from a section 457 deferred compensation plan to a section 414(d) governmental plan in order to purchase permissive service credit under section 414(n)(3)(A) or (2) the repayments of cashouts under governmental plans);
- Section 501(c)(25)(C)(ii) (exempting section 414(d) governmental plans from taxation);
- Section 503(a)(1) (applying the prohibited transactions rules in section 503 to governmental plans as defined in section 4975(g)(2))
- Section 818(a)(6)(A) (defining the term ''pension plan contract'');
- Section 1400Q(d)(2)(A)(ii) (special timing rule for section 414(d) governmental plans to make certain conforming amendments);
- Section 4972(d)(1)(B) (exempting section 414(d) governmental plans from the excise tax on nondeductible contributions to a qualified employer plan);
- Section 4975(g)(2) (exempting section 414(d) governmental plans from the prohibited transaction rules of section 4975);
- Section 4980(c)(1)(B) (exempting section 414(d) governmental plans from the tax on the reversion of qualified plan assets to an employer under section 4980);
- Section 4980B(d)(2) (exempting section 414(d) governmental plans from the COBRA requirements under section 4980B);
- Section 4980F(f)(2) (exempting section 414(d) governmental plans from the requirement to provide a notice required under section 204(h) of ERISA);
- Section 6057(c)(2) (providing rules relating to the voluntary submission of annual registration statements by section 414(d) governmental plans); and,
- Sections 9831(a)(1) and 9832(d)(2) (exempting section 414(d) governmental plans from the group health plan requirements).

The definitions and rules also apply for purposes of section 101(h)(1)(A) (special rule exempting governmental plan survivor benefits attributable to service of a public safety officer killed in the line of duty).

Currently, there are no regulations interpreting section 414(d). Neither section 414(d) of the Code nor ERISA defines key terms relating to governmental plans, including the terms ''established and maintained,'' ''political subdivision,'' ''agency,'' and ''instrumentality.''

Executive Order 13132

Executive Order 13132 requires that Federal departments and agencies engage in consultation procedures in certain circumstances where regulations are issued which have a substantial direct effect on States. While these regulations when issued as final regulations would not have such a substantial direct effect, the IRS and Treasury Department have followed similar procedures, including issuance not only of these proposed regulations, but also an advance notice of these regulations which was published (date to be provided) in the **Federal Register**.

Judicial Determinations of Governmental Entity Status

Historically, courts have used the test in *NLRB* v. *Natural Gas Utility District of Hawkins County, Tennessee,* 402 U.S. 600 (1971), in determining whether an entity is an agency or instrumentality of a State or a political subdivision of a State. In *Hawkins County,* the Supreme Court interpreted the term ''political subdivision'' for purposes of 29 U.S.C. 152(2) (section 2(2) of the National Labor Relations Act (NLRA), as amended by the Labor-Management Relations Act).[9] Although the Supreme Court in *Hawkins County* analyzed whether the employer at issue was a political subdivision for purposes of the NLRA, courts use the same analysis for determining whether an entity is an agency or instrumentality of a State or a political subdivision of a State for purposes of ERISA.[10] The two-prong test in *Hawkins County* analyzes whether the entity has been ''(1) Created directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate.'' *Hawkins County,* 402 U.S. at 604–05. In addition to this two-prong test, the Supreme Court also analyzed other factors, including: Whether the utility had broad powers to accomplish its public purpose; whether the utility's property and revenue were exempt from state and local taxes (as well as whether its bonds were tax-exempt); whether the utility had the power of eminent domain; whether the utility was required to maintain public records; whether the utility's commissioners were appointed by an elected county judge; and whether the commissioners could be removed by the State of Tennessee pursuant to State procedures for removal of public officials. Many of these factors are similar to the factors used in determining whether an entity is an agency or instrumentality of a State or a political subdivision of a State under these proposed regulations.

In determining whether an entity is an agency or instrumentality of the United States, courts either apply a facts and circumstances analysis or look to the relationship between the entity and its employees. In *Alley* v. *Resolution Trust Corporation,* 984 F.2d 1201 (DCCir. 1993), in analyzing whether the Federal Asset Disposition Association (FADA), a savings and loan association established by the Federal Home Loan Bank Board, was a Federal instrumentality for

[7] See also Notice 2007–67 (2007–35 IRB 467), see § 601.601(d)(2) (extending transitional relief for plans of Indian tribal governments to comply with the requirements of section 906 of PPA '06).

[8] However, as indicated earlier, it is expected that the principles set forth in these regulations would also be taken into account for purposes of sections 403(b) and 457.

[9] 29 U.S.C. 152(2) provides that the term ''employer'' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

[10] ''The NLRB guidelines are a useful aid in interpreting ERISA's governmental exemption, because ERISA, like the National Labor Relations Act, 'represent[s] an effort to strike an appropriate balance between the interests of employers and labor organizations.' '' *Rose* v. *Long Island Railroad Pension Plan,* 828 F.2d 910, 916 (2nd Cir. 1987), *cert. denied,* 485 U.S. 936 (1988) (quoting H.R. Rep. No. 533, reprinted in 1974 USCCAN at 4647). *See also, Shannon* v. *Shannon,* 965 F.2d 542, 547 (7th Cir. 1992), *cert. denied,* 506 U.S. 1028 (1992) (stating that the proper test for determining whether an entity is an agency or instrumentality of a State or political subdivision for purposes of ERISA is the *Hawkins* test), *Koval* v. *Washington County Redevelopment Authority,* 574 F.3d 238, 242 (3rd Cir. 2009) (stating that the *Hawkins* test is the most fitting analysis for determining whether an entity is a political subdivision), and *Brooks* v. *Chicago Housing Authority,* No. 89–C–9304, 1990 WL 103572 at 1, 1990 U.S. Dist. LEXIS 8233 at 3 (N.D. Ill. July 5, 1990) (applying the *Hawkins* test).

governmental plan purposes, the court focused on the employment relationship between the entity and its employees.[11] In looking at the employer-employee relationship, the *Alley* court concluded that FADA functioned more like a private enterprise than a governmental agency in the area of its employment relations. ''Measured by the terms and conditions of their employment, FADA personnel far more closely resembled private sector employees than they did government workers. Like employees of 'ordinary' Federally chartered S&Ls, FADA's employees were outside the civil service system, and were not subject to the personnel rules or restrictions on salaries and benefits imposed generally on Federal employees.'' [12]

However, in *Berini* v. *Federal Reserve Bank of St. Louis, Eighth District,* 420 F.Supp.2d 1021 (E.D. Mo. 2005), the court reviewed administrative and judicial authority in determining whether an entity is a Federal agency or instrumentality and applied a multi-factor test in determining whether the employee benefit plans maintained by the Federal Reserve System are governmental plans within the meaning of section 3(32) of ERISA. The *Berini* test was based on the six factors in Rev. Rul. 57–128 (1957–1 CB 311), see § 601.601(d)(2), which was also the test applied by the court in *Rose* v. *Long Island Railroad Pension Plan,* 828 F.2d 910, 918 (2nd Cir. 1987), *cert. denied,* 485 U.S. 936 (1988). Factors weighed by the *Berini* court included that the Federal reserve banks were established directly by Congressional legislation to perform an important governmental function (to increase control of the nation's currency and banking system), the banks exist only by an enabling statute, they possess only the powers granted by the legislation, the private interests involved do not have the typical interests of an owner, and the banks are controlled by the Federal Reserve Board of Governors, which is a governmental agency.[13]

Agency Guidance Regarding Governmental Entity Status

Revenue Ruling 57–128 provides guidance on when an entity is a governmental instrumentality for purposes of the exemption from employment taxes under sections 3121(b)(7) and 3306(c)(7). The revenue ruling lists the following factors to be considered in determining whether an organization is an instrumentality of one or more States or political subdivisions thereof: (1) Whether the organization is used for a governmental purpose and performs a governmental function; (2) whether performance of its function is on behalf of one or more States or political subdivisions; (3) whether there are any private interests involved, or whether the States or political subdivisions involved have the powers and interests of an owner; (4) whether control and supervision of the organization is vested in public authority or authorities; (5) whether express or implied statutory authority or other authority is necessary for the creation and/or use of such an instrumentality, and whether such authority exists; and (6) the degree of the organization's financial autonomy and the source of its operating expenses.

Revenue Ruling 89–49 (1989–1 CB 117), see § 601.601(d)(2), provides guidance for determining whether a retirement plan maintained by an organization is a governmental plan within the meaning of section 414(d). The revenue ruling lists several factors for determining whether a sponsoring organization is an agency or instrumentality of the United States or any State or political subdivision thereof. While the factors in Rev. Rul. 89–49 are similar to the factors listed in Rev. Rul. 57–128, Rev. Rul. 89–49 focuses more on the degree of control that the Federal or State government has over the organization's everyday operations. Other factors considered include: whether there is specific legislation creating the organization; the source of funds for the organization; the manner in which the organization's trustees or operating board are selected; and whether the applicable government unit considers the employees of the organization to be employees of the applicable government unit. Rev. Rul. 89–49 provides that satisfaction of one or all of the factors is not necessarily determinative of whether an organization is a governmental entity. See § 601.601(d)(2)(ii)(*b*).

In Rev. Rul. 89–49, citizens of a municipality organized a volunteer fire company. The company was incorporated under its State laws as a nonprofit corporation, and the company was managed under the exclusive control of a board of trustees elected by the volunteer firefighters. Area municipalities, including the municipality that created the company, entered into contracts with the company to receive fire protection services. Under the contracts, it was agreed that the operations of the volunteer fire company would be under the exclusive control of the board of trustees. While the municipalities made payments for fire protection services to the volunteer fire company pursuant to these contracts, the municipalities did not contribute to the company's retirement plan, and the employees of the company were not considered employees of the State or any of the participating municipalities. The ruling concludes that the retirement plan established and maintained by the volunteer fire company is not a governmental plan within the meaning of section 414(d) because the degree of control that the participating municipalities exert over the volunteer fire company is minimal.

Exclusion of Governmental Plans From ERISA

Section 4(b)(1) of ERISA provides that title I of ERISA does not apply to an employee benefit plan that is a governmental plan as defined in section 3(32) of ERISA. Section 3(32) of ERISA generally provides that the term ''governmental plan'' means a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing.[14] The ERISA section 3(32) definition of a governmental plan also includes any plan to which the Railroad Retirement Act of 1935 or 1937 applies, and which is financed by contributions required under that Act and any plan of an international organization which is exempt from taxation under the provisions of the International Organizations Immunities Act. Section 906 of PPA '06 amended section 3(32) of ERISA to include in the definition of governmental plan a plan which is established and maintained by an Indian tribal government (as defined in section 7701(a)(40)), a subdivision of an Indian tribal government (determined in accordance with section 7871(d)), or an agency or instrumentality of either. Under this definition, all of the participants of which are employees of such entity substantially all of whose services as such an employee are in the

[11] ''We focus our attention * * * on what should be the core concern for ERISA purposes—the nature of an entity's relationship to and governance of its employees.'' *Alley* v. *Resolution Trust Corporation,* 984 F.2d at 1206, n. 11.

[12] *Alley* v. *Resolution Trust Corporation,* 984 F.2d at 1206.

[13] *Berini* v. *Federal Reserve Bank of St. Louis,* 420 F.Supp.2d at 1026–29.

[14] In defining the term ''governmental plan,'' section 3(32) of ERISA uses the phrase ''established or maintained,'' whereas section 414(d) of the Code and section 4021(b) of ERISA use the term ''established and maintained.'' For further discussion, see the Explanation of Provisions section of the preamble under the heading, ''Requirements for establishing and maintaining a section 414(d) governmental plan.''

performance of essential governmental functions but not in the performance of commercial activities (whether or not an essential government function).

Section 4021(b)(2) of ERISA provides that title IV of ERISA does not apply to any plan established and maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing, or to which the Railroad Retirement Act of 1935 or 1937 applies and which is financed by contributions required under that Act. Similar to section 3(32) of ERISA, section 4021(b) of ERISA was amended by section 906 of PPA '06 to include certain plans of Indian tribal governments in the definition of governmental plan for purposes of section 4021(b) of ERISA.

Neither the DOL nor the PBGC has issued regulations interpreting the terms of sections 3(32) and 4021(b) of ERISA. Both agencies have, however, provided guidance for specific entities in the form of administrative determinations, and advisory opinions or other opinion letters. The IRS, the Department of Labor (DOL), and the Pension Benefit Guaranty Corporation (PBGC) have generally applied a facts and circumstances approach in providing governmental plan determinations.[15] For example, the IRS issues private letter rulings relating to governmental plan status using a facts and circumstances analysis.

Exemption of Governmental Plans From Certain Qualified Plan Rules

Governmental plans under Code section 414(d) are exempt from certain qualification requirements and are deemed to satisfy certain other qualification requirements under certain conditions. For example, the nondiscrimination and minimum participation rules do not apply to governmental plans. Section 1505 of the Taxpayer Relief Act of 1997, Public Law 105–34 (111 Stat. 788, 1063) (TRA '97), amended sections 401(a)(5)(G) and 401(a)(26)(G) of the Code to provide that the minimum participation standards and nondiscrimination requirements of section 410 and the additional participation requirements under section 401(a)(26)(G) do not apply to State or local governmental plans.[16] Section 1505 of TRA '97 also amended section 401(k)(3)(G) of the Code to provide that certain State and local governmental plans are treated as meeting the requirements of the average deferral percentage test of section 401(k)(3) and the average contribution percentage test of section 401(m)(2).[17]

Section 861 of PPA '06 exempts all governmental plans (as defined in section 414(d)) from the nondiscrimination and minimum participation requirements of sections 401(a)(5)(G) and 401(a)(26)(G) of the Code, as well as the nondiscrimination and participation requirements applicable to qualified cash or deferred arrangements under section 401(k)(3)(G) of the Code.

In addition to the nondiscrimination requirements, the Code provides other exemptions for governmental plans:

- Section 401(a)(10)(B)(iii), which provides that the top heavy requirements of section 416 do not apply to a governmental plan.
- Section 410(c)(1)(A), which provides that the minimum participation provisions of section 410 do not apply to a governmental plan.
- Section 411(e), which provides that a governmental plan is treated as satisfying the requirements of section 411 if the plan meets the pre-ERISA vesting requirements.
- Section 412(e)(2)(C), which provides that the minimum funding standards of section 412 do not apply to a governmental plan.
- Section 417, which provides rules relating to qualified joint and survivor annuities and qualified preretirement survivor annuities.

Section 415 also provides a number of special rules for governmental plans. The special rules include section 415(b)(11) (the 100 percent of a participant's average high 3 compensation limitation does not apply), section 415(b)(2)(C) (the reduced limitation to the annual benefit payable beginning before age 62 and the reduction in the dollar limitation to the annual benefit payable for participation or services of less than 10 years do not apply to disability or survivor benefits received from a governmental plan), section 415(m) (benefits provided under a qualified governmental excess benefit arrangement are not taken into account in determining the section 415 benefit limitations under a section 414(d) governmental plan), and section 415(n) (permissive service credit).[18]

As a result, the principal qualification requirements for a tax-qualified governmental plan[19] are the requirements that the plan—

- Be established and maintained by the employer for the exclusive benefit of the employer's employees or their beneficiaries,
- Provide definitely determinable benefits,
- Satisfy the direct rollover rules of sections 401(a)(31) and 402(f),
- Be operated pursuant to its terms,
- Satisfy the section 401(a)(17) limitation on compensation,
- Comply with the statutory minimum required distribution rules under section 401(a)(9),
- Satisfy the pre-ERISA vesting requirements under section 411(e)(2),
- Satisfy the section 415 limitations on benefits, as applicable to governmental plans, and
- Satisfy the prohibited transaction rules in section 503.

State and local governments, political subdivisions thereof, and agencies or instrumentalities thereof are generally not permitted to offer cash or deferred arrangements under section 401(k). Instead, they can offer a somewhat similar elective contribution program through an eligible governmental section 457(b) plan to which section 457(g) applies. In addition, section 403(b) includes special rules for plans covering public school teachers, including rules under which, in conjunction with an eligible governmental section 457(b) plan, the maximum dollar amount of the elective contribution for a public school teacher is in effect double the maximum for other public or private employees.

[15] The DOL issues advisory opinions. The PBGC issues administrative determinations and opinion letters. The IRS issues letter rulings relating to section 414(d) governmental plans. For this purpose, a letter ruling is a written statement issued to a taxpayer by the IRS that interprets and applies tax laws or any nontax laws applicable to employee benefit plans to the taxpayer's specific set of facts. *See* section 3.02 of Rev. Proc. 2011–4 (2011–1 IRB 123, 127), see § 601.601(d)(2).

[16] In addition, section 1505(a)(3) of TRA '97 amended section 410(c)(2) to provide that all governmental plans within the meaning of section 414(d) are treated as satisfying the nondiscrimination requirements of section 410.

[17] A State or local government, political subdivision, or agency or instrumentality thereof, is not permitted to establish and maintain a section 401(k) plan. See section 401(K)(4)(B)(ii). There is an exception for a grandfathered section 401(k) plan, which is generally a plan established by a governmental unit (a State or local government or political subdivision thereof) before May 7, 1986. See § 1.401(k)–1(e)(4).

[18] See also Notice 89–23 (1989–1 CB 654), and Notice 96–64 (1996–2 CB 229), see § 601.601(d)(2), for guidance relating to the nondiscrimination rules that apply to qualified plans maintained by governments.

[19] A special rule applies to contributory plans of certain governmental entities. Section 414(h)(2) provides that, for a qualified plan established by a State government or political subdivision thereof, or by any agency or instrumentality of the foregoing, where the contributions of the governmental employer are designated as employee contributions under section 414(h)(1) but the governmental employer picks up the contributions, the contributions picked up will be treated as employer contributions.

Exemption of Governmental Plans From Other Employee Benefit Rules Relating to Retirement Plans

The Code and regulations also provide that plans of governmental entities are treated differently than plans of non-governmental entities with respect to certain requirements for section 403(b) plans and eligible section 457(b) plans, including:

- Section 403(b)(1)(A)(ii), which provides that the exclusion allowance under section 403(b)(1) applies to employees who perform services for a public school of a State, a political subdivision of a State, or an agency or instrumentality of any one or more of the foregoing.
- Section 403(b)(12)(C), which provides that the nondiscrimination requirements of section 403(b)(12) (other than the compensation limitations of section 401(a)(17)) do not apply to a State or local governmental plan within the meaning of section 414(d).
- Section 457(f)(2)(E), under which section 457(f) (relating to nonqualified deferred compensation) does not apply to a qualified governmental excess benefit arrangement under section 415(m).
- Section 457(e)(1)(B), which includes as an eligible employer a State, political subdivision, or agency or instrumentality thereof and any tax-exempt organization other than a governmental unit.
- Section 457(g), which provides that a deferred compensation plan maintained by a State, political subdivision of a State, or any agency or instrumentality thereof is not treated as an eligible section 457(b) plan unless the assets and income of the plan are held in trust for the exclusive benefit of plan participants and beneficiaries.
- Section 402(c)(8)(B)(v), which provides that an eligible section 457(b) governmental plan is an eligible retirement plan for purposes of the rollover rules under section 402(c), so that payments from an eligible section 457(b) governmental plan can be rolled over to another eligible retirement plan, such as a qualified plan or an IRA, and payments from an eligible retirement plan can be rolled over into an eligible section 457(b) governmental plan.[20] An eligible section 457(b) plan of a nongovernmental tax-exempt entity is not eligible for this rollover treatment.

Legislative History of ERISA

The legislative history of ERISA and its predecessor bills indicate that there were two reasons for the governmental plan exemption: (1) Federalism concerns; and (2) the taxing power of State and local governments was thought to offer sufficient protection for participants in public plans.[21] In a summary of ERISA's predecessor bill, Senator Lloyd Bentsen commented that ''State and local governments must be allowed to make their own determination of the best method to protect the pension rights of municipal and state employees. These are questions of state and local sovereignty and the Federal Government should not interfere.'' [22]

While Congress was concerned about pension protection for public as well as private employees, governmental plans have been excluded from many of the qualification requirements because, in addition to federalism concerns, Congress believed that ''the ability of governmental bodies to fulfill their obligations to employees through their taxing powers is an adequate substitute for termination insurance.'' [23] As a result, ERISA includes exclusions for governmental plans under titles I and IV of ERISA and an exemption for governmental plans from most of the qualification requirements under the Code that were added under title II of ERISA (as described in this preamble under the heading, ''Exemption of Governmental Plans from Certain Qualified Plan Rules'').

Interagency Coordination on Governmental Plan Determinations

Historically, the IRS, DOL, and PBGC (the Agencies) have informally conferred prior to making determinations on governmental plan status in individual cases. In Notice 2005–58 (2005–2 CB 295), see § 601.601(d)(2), the Treasury Department and the IRS stated their intention of publishing guidance regarding governmental plans under section 414(d). The Agencies have become increasingly concerned with the growing number of requests for governmental plan determinations from plan sponsors whose relationships to States or political subdivisions thereof are increasingly remote and whose arguments for concluding that their plans are governmental plans raise novel issues. The use of differing approaches by the courts and the Agencies has resulted in uncertainty as entities with organizational, regulatory, and contractual connections with States or political subdivisions of States try to ascertain which statutory and regulatory requirements apply to their retirement plans. These proposed regulations are intended to address this issue by establishing coordinated criteria for determining whether a plan is a governmental plan within the meaning of section 414(d) of the Code. Although these proposed regulations are only applicable for purposes of section 414(d), the DOL and the PBGC were consulted in developing this proposal. The DOL and the PBGC agreed that it would be advantageous for the Agencies and other affected parties to have coordinated criteria for determining whether a plan is a governmental plan within the meaning of section 414(d) of the Code, section 3(32) of title I of ERISA, and section 4021(b) of title IV of ERISA. In that regard, comments are requested on any issues arising from these proposed regulations in light of the interaction of the governmental plan definition in the Code with the governmental plan definitions in section 3(32) of title I of ERISA and section 4021(b) of title IV of ERISA. Copies of the comments on these regulations will be forwarded to the DOL and the PBGC.

Explanation of Provisions

I. Overview

A. In General

These proposed regulations would generally define the term ''governmental plan'' within the meaning of section 414(d) of the Code. These proposed regulations would also define other key terms relating to the general definition of ''governmental plan,'' including the definitions of ''State,'' ''political subdivision of a State,'' and ''agency or instrumentality of a State or political subdivision of a State.'' While these terms are commonly used in other Code sections, the definitions in these proposed regulations are only

[20] Section 402(c)(8)(B) defines an eligible retirement plan as an individual retirement account under section 408(a), an individual retirement annuity under section 408(b), a qualified plan, a section 403(a) annuity, a section 403(b) plan, and an eligible section 457(b) governmental plan.

[21] ERISA included a directive for the Committee on Education and Labor and the Committee on Ways and Means of the House of Representatives and the Committees on Finance and on Labor and Public Welfare of the Senate to study pension retirement plans sponsored by Federal, State, and local governments and analyze: (1) The adequacy of existing levels of participation, vesting and financing arrangements; (2) existing fiduciary standards; and (3) the necessity for Federal legislation and standards with respect to such plans. See Staff of House Comm. On Education and Labor, 95th Cong., 2d Sess., *Pension Task Force Report on Public Employee Retirement Systems* (Comm. Print 1978).

[22] Staff of the Senate Comm. on Labor and Public Welfare, 94th Cong., Legislative History of the Employee Retirement Income Security Act of 1974, Vol. I 220 (Comm. Print 1976).

[23] S. Rep. No. 93–383, at 81 (1973). See also H.R. Rep. No. 93–807, at 164–5 (1974).

applicable for purposes of section 414(d), and not for any other purpose under the Code. For example, the definition of the term ''instrumentality'' under these proposed regulations may be different for other purposes under the Code.

As stated, the regulations under section 414(d) would only define the term ''agency or instrumentality of the United States'' and ''agency or instrumentality of a State or political subdivision of a State'' for purposes of determining whether a plan is a governmental plan under section 414(d). Thus, the rules in these proposed regulations would not apply for purposes of defining the term ''instrumentality,'' under any other provisions of the Code.

In addition, these regulations do not address certain issues relating to governmental entities, including when an entity is so closely related to a State that it constitutes an ''integral part'' of a State.[24] The criteria for treating an entity as an ''integral part'' of a State will be the subject of a separate guidance project. Such guidance defining ''integral part'' may include stricter criteria than would apply under these proposed regulations for determining whether an entity is an agency or instrumentality of a State.

B. Definition of Governmental Plan

These proposed regulations reflect the statutory definition of the term ''governmental plan'' as a plan established and maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of the foregoing. Within this definition, there are several key terms relating to governmental plans, the definitions of which are set forth in these proposed regulations. As mentioned in the ''Background'' section of this preamble, section 414(d) also includes special rules relating to the Railroad Retirement Act of 1935 or 1937, the International Organizations Immunities Act, and plans of Indian tribal governments. These proposed regulations do not address the term ''governmental plan'' as it relates to the special provisions in section 414(d) relating to the Railroad Retirement Act of 1935 or 1937, or the International Organizations Immunities Act. The special rules for Indian tribal governments are reserved in these proposed regulations and are in a separate notice of proposed rulemaking, which is being published elsewhere in the Rules and Regulations portion of this issue in the **Federal Register**.

C. Definitions of the United States and Agency or Instrumentality of the United States

These proposed regulations would define the term ''United States,'' for purposes of the governmental plan definition under section 414(d), as having the same meaning set forth in section 7701(a)(9). Section 7701(a)(9) provides that the term ''United States,'' when used in a geographical sense, includes only the States and the District of Columbia.

Whether an entity is an ''agency or instrumentality of the United States'' is determined based on the specific purpose for which the designation is sought and is decided by determining if Congress intended the entity to be treated as a Federal entity for the specific purpose.[25] The proposed regulations would define the term ''agency or instrumentality of the United States'' as an entity that satisfies the facts and circumstances test as set forth in these regulations. The facts and circumstances test, similar to the factors weighed by the *Berini* court, focuses on the ''degree to which the entity is connected with the * * * federal government.''[26] The factors in this test are a compilation of various different tests used for governmental plan determinations, including factors in the *Berini* and *Rose* cases, as well as Rev. Ruls. 57–128 and 89–49. The facts and circumstances test is similar to that proposed for agencies and instrumentalities of a State or political subdivision thereof, (which is described in this preamble under the heading, ''Definition of agency or instrumentality of a State or political subdivision of a State'') but modified to reflect that this definition does not implicate the federalism concerns present in making determinations relating to agencies and instrumentalities of a State or political subdivision thereof.

The proposed regulations provide that, in making a determination of whether an entity is an ''agency or instrumentality of the United States,'' the factors to be considered include whether:

- The entity performs or assists in the performance of a governmental function.
- There are no private interests involved, or the Government of the United States has all of the powers and interests of an owner. In determining whether an entity that holds stock has a private interest, stock will not be considered a private interest if the stock of the corporation is not acquired for investment purposes or for purposes of control.[27]
- The control and supervision of the entity is vested in the Government of the United States. Control must be more than the government's extensive Federal regulation of an industry.
- The entity is exempt from Federal, State, and local tax by an Act of Congress.
- The entity is created by the United States Government pursuant to a specific enabling statute that prescribes the purposes, powers, and manner in which the entity is to be established and operated.
- The entity receives financial assistance from the Government of the United States. However, an entity is not a governmental entity merely because it receives funds from the Government of the United States under a contract to provide a governmental service.
- The entity is determined to be an agency or instrumentality of the United States by a Federal court.
- Other governmental entities recognize and rely on the entity as an arm of the Government of the United States.
- The entity's employees are treated in the same manner as Federal employees for purposes other than providing employee benefits (for example, the entity's employees are granted civil service protection).

These proposed regulations also provide an example, illustrating the application of the facts and circumstances test to a particular entity—a Federal credit union. As announced in previous guidance, one purpose of these regulations is to address whether a Federal credit union is a governmental entity for purposes of determining whether the Federal credit union can maintain an eligible nonqualified deferred compensation plan. Notice 2005–58 addresses certain income tax issues with respect to

[24] Over the years, the IRS has extended the income tax exemption it provides to states and political subdivisions to entities it regards as their ''integral parts.'' *See* Rev. Rul. 87–2, 1987–1 C.B. 18; *see also* Treas. Reg. § 301.7701–1(a)(3).

[25] See *Berini* v. *Federal Reserve Bank of St. Louis,* 420 F. Supp.2d at 1025.

[26] *Id.*

[27] The Department of Treasury and the IRS recognize that an entity may hold stock for purposes other than investment and control. For example, the federal reserve banks are required to hold stock in the Federal Reserve Bank of its district because ownership is a condition of being a member in the Federal Reserve System. Unlike stock in a private corporation, this stock is not acquired for investment purposes or for purposes of control. See *Berini* v. *Federal Reserve Bank of St. Louis,* 420 F. Supp.2 at 1024, citing *Lee Const. Co., Inc.* v. *Federal Reserve Bank of Richmond,* 558 F. Supp. 165, 177 n.17 (D.Mich. 1982), citing 4 F. Solomon, W. Schlicting, T. Rice & J. Cooper, *Banking Law,* § 77.02, at 77–6 to 77–7 (1982).

nonqualified deferred compensation plans maintained by Federal credit unions, including whether a Federal credit union can maintain an eligible nonqualified deferred compensation plan described in section 457(b). Under Notice 2005–58, a plan in effect on August 15, 2005, that is maintained by a Federal credit union and that is intended to be an eligible nonqualified deferred compensation plan of a non-governmental tax-exempt employer would not fail to be an eligible plan under section 457(b) solely because the employer is a Federal credit union, provided that certain conditions are satisfied (including the condition that the plan of the Federal credit union not have claimed to be a governmental plan for purposes of section 414(d) of the Code and section 3(32) of ERISA). The rule in Notice 2005–58 only applies pending the issuance of future guidance regarding section 414(d). See § 601.601(d)(2)(ii)(*b*). Accordingly, upon adoption of these regulations as final regulations, the special treatment provided in Notice 2005–58 for Federal credit unions will no longer apply. However, after issuance of these regulations as final regulations, a Federal credit union can be an eligible employer within the meaning of section 457(e)(1)(B) on the basis that Federal credit unions are non-governmental tax-exempt organizations.

D. Definitions of State and Political Subdivision of a State

The proposed regulations define the term ''State'' as any State of the United States and the District of Columbia. This definition, which is based on the definition of ''State'' in section 7701(a)(10), is different from the definition of ''State'' under section 3(10) of ERISA, which defines, in relevant part, the term ''State'' as any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, America Samoa, Guam, and Wake Island.

The term ''political subdivision of a State'' is defined in these proposed regulations as a regional, territorial, or local authority, such as a county or municipality (including a municipal corporation), that is created or recognized by State statute to exercise sovereign powers.[28] Examples of sovereign powers include the power of taxation, the power of eminent domain, and the police power. The definition of ''political subdivision of a State'' also provides that the governing officers of the authority must be appointed by State officials or publicly elected.

The term ''political subdivision of a State'' has been used for purposes other than section 414(d), including the NLRA and section 103.[29] The definition in these proposed regulations of the term ''political subdivision of a State'' applies only for purposes of section 414(d), and not for any other purposes under the Code or any other statute, including whether an entity is treated as a political subdivision for purposes of the NLRA or section 103 of the Code.

E. Definition of Agency or Instrumentality of a State or a Political Subdivision of a State

These proposed regulations would provide guidance on determining whether an entity is an ''agency or instrumentality of a State or a political subdivision of a State.'' These regulations would provide that the determination is based on a facts and circumstances test. The proposed regulations provide that numerous factors have been applied by the IRS in determining whether an entity is an agency or instrumentality of a State or a political subdivision of a State. Satisfaction of one or more of the factors is not necessarily determinative of whether an organization is a governmental entity. One factor that is not weighed by the IRS is the way the entity refers to itself. For example, the mere fact that an entity is called the ''Educational Service Agency of City A'' would not be a factor in determining whether the entity is an agency or instrumentality of City A.

Major factors for determining whether an entity is an agency or instrumentality of a State or political subdivision of a State are whether:

- The entity's governing board or body is controlled by a State or political subdivision.
- The members of the governing board or body are publicly nominated and elected.
- The entity's employees are treated in the same manner as employees of the State (or political subdivision thereof) for purposes other than providing employee benefits (for example, the entity's employees are granted civil service protection).
- A State (or political subdivision thereof) has fiscal responsibility for the general debts and other liabilities of the entity (including funding responsibility for the employee benefits under the entity's plans).
- In the case of an entity that is not a political subdivision, the entity is delegated, pursuant to a statute of a State or political subdivision, the authority to exercise sovereign powers of the State or political subdivision (such as, the power of taxation, the power of eminent domain, and the police power).

It is expected that, in applying the factor relating to whether the entity's governing board or body is controlled by a State or political subdivision, the control cannot be a mere legal possibility. Examples of situations in which the control factor might be a mere legal possibility are cases in which there are a number of tiers of intervening corporations between the entity and the State, and cases in which the legal power to control is shared among so many governing entities that none of them can be said to be responsible in the event of a failure to exercise control. In addition, since these two factors are interrelated, an entity that would satisfy the control factor would not be expected to satisfy the factor relating to whether members of the governing board or body are publicly elected or nominated. Alternatively, an entity that would satisfy the factor relating to whether members of the governing board or body are publicly elected or nominated would not be expected to satisfy the control factor.

Other factors for determining whether an entity is an agency or instrumentality of a State or political subdivision of a State are whether:

- The entity is created by a State government or political subdivision pursuant to a specific enabling statute that prescribes the purposes and powers of the entity, and the manner in which the entity is to be established and operated.
- The entity is directly funded through tax revenues or other public sources.
- The entity is treated as a governmental entity for Federal employment tax or income tax purposes (for example, whether the entity has the authority to issue tax-exempt bonds under section 103(a) of the Code) or under other Federal laws.

[28] For certain purposes, the effect of an entity being determined to be a political subdivision of a State may be similar to the entity being determined to be an agency or instrumentality of a State or political subdivision and for other purposes the effects may be different. Examples in which it is relevant whether an entity is a political subdivision in contrast to an agency or instrumentality of a State or political subdivision include the exclusion provided under section 402(l), the excise tax under section 4965, and the exception to the 10 percent additional tax under section 72(t)(10).

[29] Two court cases that have analyzed whether an entity is a ''political subdivision of a State'' for purposes of section 103 of the Code are *Commissioner of Internal Revenue* v. *Shamberg's Estate,* 144 F.2d 998 (2nd Cir. 1944), *cert. denied,* 323 U.S. 792 (1945), and *Commissioner of Internal* Revenue v. *White's Estate,* 144 F.2d 1019 (2nd Cir. 1944), *cert. denied,* 323 U.S. 792 (1945).

• The entity's operations are controlled by a State or political subdivision.

• The entity is determined to be an agency or instrumentality of a State or political subdivision thereof for purposes of State law. For example, the entity is subject to open meetings laws or the requirement to maintain public records that apply only to governmental entities, or the State attorney general represents the entity in court under a State statute that only permits representation of State entities.

• The entity is determined to be an agency or instrumentality of a State or political subdivision thereof by a State or Federal court for purposes other than section 414(d).

There are two additional factors to be considered. First, if a party other than a State (or political subdivision, agency, or instrumentality thereof) has an ownership interest, or other similar interests, in the entity, this factor would indicate that the entity is not an agency or instrumentality of a State or political subdivision thereof (however, an entity would not necessarily be considered an agency or instrumentality of a State or political subdivision thereof merely because there is no private ownership in the entity or the entity serves a governmental purpose). Second, if an entity does not serve a governmental purpose, this factor would indicate that it is not an agency or instrumentality of a State (or political subdivision thereof).

The proposed regulations include a variety of examples to illustrate whether an entity is an agency or instrumentality of a State or political subdivision thereof. Many of these examples are drawn from prior judicial opinions, as well as the Agencies' determinations.[30] Within the description of particular factors, there are some examples that illustrate whether a particular factor is satisfied. However, the mere satisfaction of a particular factor is not conclusive in determining whether an entity is an agency or instrumentality within the meaning of these regulations.

F. Requirements for Establishing and Maintaining a Section 414(d) Governmental Plan

The proposed regulations would provide that a plan is established and maintained for the employees of a governmental entity if the following requirements are satisfied: (1) The plan is established and maintained by an employer within the meaning of § 1.401–1(a)(2) of the Income Tax Regulations;[31] (2) the employer is a governmental entity; and (3) the only participants covered by the plan are employees of the governmental entity. For purposes of determining whether employees covered by a plan are employees of a governmental entity, employee representatives described in section 413(b)(8) (including individuals who are employed by the plan) would be treated as employees of the plan sponsor.[32]

The proposed regulations would provide rules for changes in status of an entity from a private entity to a governmental entity and from a governmental entity to a private entity. As mentioned in the ''Background'' section of this preamble, the qualification requirements for a private qualified plan differ substantially from those of a governmental qualified plan. The issue of whether a plan of a private employer that later becomes a governmental entity can be a governmental plan raises a question regarding the interaction among the three definitions of the term ''governmental plan'' in ERISA. Section 414(d) of the Code defines the term ''governmental plan'' as ''a plan established and maintained by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of the foregoing.'' In title IV of ERISA, section 4021(b)(2) provides that any plan ''established and maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of the foregoing'' is exempt from coverage by ERISA. In title I of ERISA, section 3(32) defines a governmental plan as ''a plan established or maintained by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of the foregoing.'' While the definitions in title II of ERISA (Code) and title IV of ERISA (PBGC provisions) use the language ''established and maintained'' by a governmental employer, the title I definition uses the language ''established or maintained.''

This difference in statutory language was addressed in *Rose* v. *Long Island Railroad Pension Plan,* 828 F.2d 910 (2nd Cir. 1987), *cert. denied,* 485 U.S. 936 (1988). In *Rose,* the State of New York, through the Metropolitan Transportation Authority (MTA), acquired the Long Island Railroad Company in 1966 (LIRR). The LIRR had originally been chartered as a private stock corporation. As part of the acquisition, the State also assumed sponsorship of the Long Island Railroad Pension Plan (LIRR Pension Plan). After ERISA was enacted in 1974, the widow of a participant who died in 1976 in the LIRR Pension Plan sued the plan under title I of ERISA after being denied survivorship benefits. The *Rose* court concluded that the LIRR Pension Plan was a governmental plan within the meaning of section 3(32) of ERISA because the LIRR was an agency or instrumentality of a political subdivision, the MTA.

The *Rose* court took the position that if a private entity is acquired by a governmental entity which becomes the plan sponsor, the plan can be established by the governmental entity and, thus, be a governmental plan. The court interpreted the ''established or maintained'' language in section 3(32) literally, but also noted the discrepancy between the ''established *or* maintained'' language in ERISA section 3(32) and the ''established *and* maintained'' language in Code section 414(d) and ERISA section 4021(b)(2) (emphasis added). Despite this difference in the three statutory definitions, Congress intended all three definitions to be interpreted in a similar manner. The *Rose* court reasoned that:

> ''If a plan is required to have been both established and maintained by a governmental entity in order to qualify for exemption, then a plan which was established by a private entity but subsequently taken over by a governmental body would continue to be subject to ERISA. This outcome conflicts with the federalism-based concerns which led Congress to exempt governmental plans in the first place.'' *Rose* v. *Long Island Railroad Pension Plan,* 828 F.2d at 920.

The *Rose* court stated that courts have interpreted the word ''and'' as meaning ''or'' if such interpretation would reflect the legislative intent of the statute.[33] The *Rose* court noted that its conclusion was consistent with the approach taken by the PBGC in a similar matter involving an entity's change to governmental status prior to the enactment of ERISA where the PBGC stated that it would not impose the ''established'' requirement when doing

[30] *See, for example, Brock* v. *Chicago Zoological Society,* 820 F.2d 909 (7th Cir. 1987) and *NLRB* v. *Parents & Friends of the Specialized Living Center,* 879 F.2d 1442 (7th Cir. 1989).

[31] Section 1.401–1(a)(2) generally provides that a qualified pension, profit-sharing, or stock bonus plan is a definite written program and arrangement which is communicated to the employees and which is established and maintained by an employer.

[32] See § 1.413–1(i)(1) for rules for when an employee is an employee representative.

[33] *See Rose* v. *Long Island Railroad Pension Plan,* 828 F.2d at 919.

so would frustrate the congressional intent of section 4021(b)(2) of ERISA.[34]

The *Rose* court also noted that the LIRR Pension Plan had been rewritten and substantially funded by the State since its acquisition of the LIRR in 1966, and stated that it would have reached the same conclusion regarding the plan's governmental status even if the definition under section 3(32) of ERISA used the phrase ''established and maintained.''

> ''In any event, even if we agreed with Rose that the correct interpretation of [section 3(32) of ERISA] was established and maintained, we would still not conclude that the LIRR Plan was covered by ERISA, because the Plan was in fact established and maintained by the LIRR.''

Rose v. *Long Island Railroad Pension Plan,* 828 F.2d at 920. *See also Roy* v. *Teachers Insurance and Annuity Association,* 878 F.2d 47 (2nd Cir. 1989).

The court concluded that a broad reading of the term ''established''—whereby a plan not previously established under ERISA may become a plan established under ERISA without the preexisting one having been formally ''terminated''—is more consistent with the legislative intent behind the governmental plan exemption.[35]

For reasons similar to those presented by the *Rose* court, but consistent with the ''established and maintained'' language in section 414(d), the proposed regulations would set forth rules for employers changing status from private to governmental that are consistent with the legislative intent of the exemption of governmental plans. The proposed regulations would provide that if an employer becomes a governmental entity or a governmental entity becomes the employer under the plan (for example, in connection with an asset transfer), the plan will be treated as a governmental plan established by a governmental employer on the date of the change (including all of the plan's assets and liabilities attributable to service before and after the date of the change). Thus, in such a case, under the proposed regulations, the plan would have to comply with all the requirements for a private plan up to the date of the change and then comply with the requirements for a governmental plan after the date of the change. These same rules would also apply if a portion of a private plan was spun off to a plan maintained by a governmental employer: that portion of the plan would cease to be subject to Code rules applicable to nongovernmental employers, and instead would become part of a governmental plan, while the remaining portion of the private plan that was not spun off would continue to be subject to the protection and other rules applicable to private plans. These rules would provide standards for determining when the Code protections and other rules for a private plan cease to apply (and when the substantially different rules for a governmental plan begin to apply).

In the case of a change in status from a private plan to a governmental plan, comments are requested on whether, and if so how, these regulations should address rights and obligations that accrued prior to the conversion to a governmental plan, including the responsibility of the former private plan sponsor (or former private plan) for benefits that accrued prior to the conversion. Any comments that address the potential impact of the proposed regulation's approach on rights and responsibilities under title I and title IV of ERISA will be forwarded to the DOL and the PBGC.

Similarly, the regulations would provide that if a governmental employer ceases to be a governmental entity, the plan will be treated as being established by a private employer thereafter (including all of the plan's assets and liabilities attributable to service before and after the date of the change). Such a change would occur either where the employer entity ceases to be a governmental entity (such as a spin-off of a corporation) or where the employees become employees of a different entity (such as in an asset transfer). Thus, for example, the entity in either case would no longer satisfy the requirement that the employer be a governmental entity. If such a change occurs, the plan must comply with the requirements for a governmental plan up to the change and then comply with all the requirements for a private plan for periods after the date of the change. (See also the related discussion under the heading, ''Comments and Public Hearing.'')

In the case of a formerly governmental plan becoming a private plan, the plan and plan sponsor may secure certain advantages, such as PBGC coverage or ERISA preemption, not available to governmental plans and governmental sponsors. However, nothing in these proposed income tax regulations should be construed to mean that, with respect to a transaction such as an asset sale, in which assets and liabilities of a governmental plan are transferred to a private plan, the assumption of benefit liabilities accrued prior to the transfer to the private plan relieves the former governmental employer (or former governmental plan) from responsibility for those benefits.

As previously stated, the proposed regulations would provide that if a governmental employer ceases to be a governmental entity, the plan will be treated as being established by a private employer on the date of the change. The proposed regulations would provide an exception to this general rule when there is a change in status from a governmental entity to a private entity under certain circumstances. Specifically, if a governmental plan ceases to be maintained by a governmental employer, the plan will nevertheless be treated as continuing to be a governmental plan if the benefits held under the governmental plan are frozen and a governmental entity assumes responsibility for the plan. While the frozen plan would continue to be treated as a governmental plan, the plan would be permitted (but not required) to provide participating employees with credit for service with the new employer for purposes of vesting, final pay adjustments, entitlements to benefits such as early retirement benefits, and similar service credit other than benefit accrual credit.

Further, certain types of plans are limited under the Code to specific types of employers, including limitations that apply differently depending on whether or not the employer is or is not a governmental entity. These limitations on employer eligibility raise special problems for cases in which an entity becomes or ceases to be a governmental employer. For example, because a qualified cash or deferred arrangement under section 401(k) generally cannot be maintained by a State or local government or political subdivision, or any agency or instrumentality thereof,

[34] The *Rose* court said that: ''We find the PBGC's approach to be a sensible one; the status of the entity which currently maintains a particular pension plan bears more relation to Congress' goals in enacting ERISA and its various exemptions, than does the status of the entity which established the plan.'' *Rose* v. *Long Island Railroad Pension Plan,* 828 F.2d at 920. See PBGC Opinion Letter 75–44 (December 9, 1975).

[35] *But see Hightower* v. *Texas Hospital Association,* 65 F.3d 443, 448 (5th Cir. 1995), in which the Fifth Circuit held that if the plan was ''established or maintained'' for its employees by a governmental employer, the plan was exempt from coverage under title I of ERISA, even if it was not exempt from coverage under the title IV ''established and maintained'' test. The Court of Appeals held that the difference in statutory language between ''established or maintained'' and ''established and maintained'' had to be given some meaning, and held that for a plan to be a governmental plan under ERISA section 4021(b)(2), the plan had to be both established and maintained by the government. *Id.* at 450–51. The court did not discuss what, if any, actions would be sufficient for an employer assuming sponsorship of an existing plan to be treated as having ''established'' the plan.

such a plan maintained by a private employer cannot be continued if the employer later becomes part of a State. Other special problems arise if a governmental employer that is not a tax-exempt organization under section 501(c)(3) and that is not a public school attempts to become a sponsoring employer of a section 403(b) plan of a tax-exempt organization under section 501(c)(3). Likewise, a State entity cannot maintain an unfunded section 457(b) plan of a tax-exempt organization described in section 457(e)(1)(B). These proposed regulations would not alter rules relating to the eligibility of an employer to establish or maintain a particular type of retirement plan. An employer that is considering a change in its status should evaluate whether it is eligible to sponsor any plan that it assumes, taking into account the employer eligibility rules. Therefore, sponsors should not assume from these proposed regulations that a change of sponsorship from a private to governmental employer, or vice versa, will not result in any adverse tax consequences. As emphasized elsewhere in this preamble, the proposed regulations would provide that the established and maintained rules apply only for purposes of section 414(d).

Proposed Effective Date

It is expected that these proposed regulations would not be applicable earlier than for plan years beginning after the date of the publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**. Generally, amendment of a State or local retirement plan requires enactment of State legislation. The Department of Treasury and IRS intends to take into consideration the time required to complete the State legislative process when determining an effective date for these 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. In addition, because no collection of information is imposed on small entities, the provisions of the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply, and therefore, a Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking will be submitted to the Small Business Administration for comment on its impact on small business.

Comments and 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. The Treasury Department and the IRS specifically request comments on the clarity of the proposed rules and how they can be made easier to understand. All comments will be available for public inspection and copying.

These proposed regulations would provide that a determination of whether an entity is an agency or instrumentality of a State or a political subdivision thereof is based on a facts and circumstances analysis. Under the proposed regulations, the factors to be applied would be ranked into main factors and other factors.[36] Comments are requested on whether the final regulations should eliminate the distinction between main and other factors. Comments are also requested on the ordering and the application of the main and other factors; for example, whether the final regulations should provide a list of factors with a safe harbor standard under which, if an entity satisfies identified factors, the entity will be treated as an agency or instrumentality of a State or political subdivision thereof, for purposes of section 414(d). Comments are also requested on whether the distinction between main and other factors should be retained, in addition to providing a safe harbor standard.

The factors identified in this bright line test might be whether: (1) A majority of the entity's governing board or body are either controlled by a State or political subdivision thereof or elected through periodic, publicly held elections (with the nominees elected by the voters); and (2) a State or political subdivision thereof has the fiscal responsibility for the general debts and other liabilities of the entity, including the entity's employee benefit plans. This standard might be available only if the entity was created by a State government or political subdivision pursuant to a specific enabling statute that prescribes the purposes, powers, and manner in which the entity is to be established and operated.

Apart from the special rules relating to plan coverage for employees of a labor union or plan under section 413(b)(8), these proposed regulations do not include special rules addressing existing practices under which a small number of private employees participate in a plan that would otherwise constitute a governmental plan under section 414(d). Comments are requested on whether an exception should be provided in such cases. Parameters that could be taken into account for such a special rule include the following: (1) Whether the private employees were previously employees of the sponsoring governmental entity; (2) whether the private employees were previously participants in the governmental plan; (3) whether the number or percentage of such former employees who participate in the governmental plan is de minimis (and, if so, what constitutes a de minimis number or percentage); (4) whether the coverage is pursuant to pre-existing plan provisions; (5) whether the private employer performs a governmental function and has been officially designated as a State entity for plan participation purposes; and (6) whether the employer is ineligible to sponsor the particular type of governmental plan (for example, whether a private employer is a tax-exempt organization under section 501(c)(3) that can sponsor a section 403(b) plan, and whether the private employer sponsors or has sponsored plans that cannot be sponsored by a State governmental entity, such as a cash or deferred arrangement under section 401(k) or an unfunded section 457(b) plan of a tax-exempt entity (described in section 457(e)(1)(B)).

If any special rule for such circumstances were to be included in the final regulation, there would be a number of related issues. These issues would include how to address the status of such a plan as a governmental multiple employer plan. Other issues might include how section 414(h) governmental pick-up plans should be treated, differences resulting from the application of federal employment taxes to a private employer participating in a governmental multiple employer plan, the application of the minimum funding rules with respect to a private employer participating in a governmental multiple employer plan, how the prohibited transaction rules of section 4975 would apply with respect to a private employer participating in a governmental multiple employer plan, how the special benefit limitation rules of section 415 would apply to private plan participants in the governmental plan; and what treatment should apply where the plan was

[36] For a list of the factors, see discussion under the heading *Definition of Agency or Instrumentality of a State or a Political Subdivision of a State* in the Explanation of Provisions of this preamble.

previously a funded section 457(b) plan of a State or local government.

If the final regulations do not provide any special rule for cases in which a governmental plan continues to cover private employees who were formerly governmental employees, it is expected that a reasonable transition period following publication of the final regulations will be provided. Comments are requested on what transitional relief should be provided to a governmental plan that covers private employees who were formerly governmental employees and continue to participate in the plan that would otherwise constitute a governmental plan under section 414(d) (such as the governmental plan spinning off a portion of the assets and liabilities of the plan with respect to the former employees as a separate non-governmental plan). Comments are also requested on whether this method of correction might also be appropriate in situations such as described in *Example 5* in paragraph (k)(4) of the proposed regulations.

The final regulations may also provide transitional relief for entities that previously operated as if they were governmental entities eligible to participate or sponsor governmental plans but later were determined to be private entities under the regulations. Comments are requested on what transitional relief should be provided to an entity that is later determined to be a private entity. The Treasury Department and the IRS anticipate that there will be a reasonable transition period following the final regulations for a plan to revise its arrangements in order to avoid the adverse tax consequences of failing to comply with all the requirements of a private retirement plan.

A public hearing has been scheduled for (date to be provided when proposed regulations are published), beginning at 10 a.m. in the Auditorium, Internal Revenue Building, 1111 Constitution Avenue NW., Washington DC. Due to building security procedures, visitors must enter at the main entrance located at 1111 Constitution Avenue NW. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted 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** portion of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments must submit written or electronic comments and an outline of the topics to be discussed and time to be devoted to each topic (signed original and eight (8) copies) by (date to be provided when proposed regulations are published). A period of 10 minutes will be allotted to each person for making comments. An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving comments has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal author of these proposed regulations is Pamela R. Kinard, Office of Division Counsel/ Associate Chief Counsel (Tax Exempt and Government Entities), Internal Revenue Service. However, personnel from other offices of the IRS and Treasury participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read in part as follows:

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

Par. 2. Section 1.414(d)–1 is added to read as follows:

§ 1.414(d)–1 Definition of governmental plan.

(a) *Definition of governmental plan*—(1) *In general.* In accordance with section 414(d), for purposes of part I of subchapter D of chapter 1 of the Internal Revenue Code and the regulations, the term *governmental plan* means a plan established and maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of the foregoing, as determined pursuant to the requirements of this section. The definitions set forth in this section only apply for purposes of section 414(d) and this section.

(2) *Definition for plans subject to certain statutes.* For purposes of part I of subchapter D of chapter 1 of the Internal Revenue Code and the regulations, the term ''governmental plan'' also includes any plan to which the Railroad Retirement Act of 1935 or 1937 applies and which is financed by contributions required under that Act and any plan of an international organization which is exempt from taxation by reason of the International Organizations Immunities Act (59 Stat. 669).

(3) *Definition for certain plans of Indian tribal governments.* For purposes of part I of subchapter D of chapter 1 of the Internal Revenue Code and the regulations, the term ''governmental plan'' also includes a plan which is established and maintained by an Indian tribal government (as defined in section 7701(a)(40)), a subdivision of an Indian tribal government (determined in accordance with section 7871(d)), or an agency or instrumentality of either, and all of the participants of which are employees of such entity substantially all of whose services as such an employee are in the performance of essential governmental functions but not in the performance of commercial activities (whether or not an essential governmental function).

(b) *Definition of United States.* The term *United States* has the meaning set forth in section 7701(a)(9).

(c) *Definition of agency or instrumentality of the United States*—(1) *Agency or instrumentality of the United States.* For purposes of the definition of ''governmental plan'' in paragraph (a)(3) of this section, the term *agency or instrumentality of the United States* means an entity that satisfies the facts and circumstances test in paragraph (c)(2) of this section.

(2) *Facts and circumstances test.* Whether an entity is an agency or instrumentality of the United States is based on facts and circumstances. In making this determination, the facts to be considered include the following:

(i) The entity performs or assists in the performance of a governmental function.

(ii) There are no private interests involved, or the Government of the United States has all of the powers and interests of an owner. In determining whether an entity that holds stock has a private interest, stock will not be considered a private interest if the stock of the corporation is not acquired for investment purposes or for purposes of control.

(iii) The control and supervision of the entity is vested in the Government of the United States. Control must be more than the government's extensive Federal regulation of an industry.

(iv) The entity is exempt from Federal, State, and Local tax by an Act of Congress.

(v) The entity is created by the United States Government pursuant to a specific enabling statute that prescribes

the purposes, powers, and manner in which the entity is to be established and operated.

(vi) The entity receives financial assistance from the Government of the United States. However, an entity is not a governmental entity merely because it receives funds from the Government of the United States under a contract to provide a governmental service.

(vii) The entity is determined to be an agency or instrumentality of the United States by a Federal court.

(viii) Other governmental entities recognize and rely on the entity as an arm of the Government of the United States.

(ix) The entity's employees are treated in the same manner as Federal employees for purposes other than providing employee benefits (for example, the entity's employees are granted civil service protection).

(3) *Example.* The following example illustrates the application of this paragraph (c):

Example. (i) *Facts.* Entity A is a Federal credit union, which is created pursuant to the Federal Credit Union Act, and is a tax-exempt organization under section 501(c)(1)(A)(i). Membership in the Federal credit union is not open to the general public but to individuals who share a common bond, current or former employees of specified employers. Entity A is member-owned and is controlled by a board of directors that is elected by its membership. Entity A, along with other Federal credit unions, is subject to regulation by the National Credit Union Administration (NCUA), which is a Federal agency that charters and regulates Federal credit unions.

(ii) *Conclusion.* Based on the facts and circumstances and the factors in paragraph (c)(2) of this section, Entity A is not an agency or instrumentality of the United States because its board of directors is elected by its own members and the directors are not responsible to the United States, except to the limited extent set forth in the Federal Credit Union Act and regulated by the NCUA. Thus, Entity A is not a governmental entity within the meaning of paragraph (c) of this section.

(d) *Definition of State.* The term *State* means any State of the United States and the District of Columbia.

(e) *Definition of political subdivision of a State.* The term *political subdivision of a State* means—

(1) A regional, territorial, or local authority, such as a county or municipality (such as, a municipal corporation), that is created or recognized by State statute to exercise sovereign powers (which generally means the power of taxation, the power of eminent domain, and the police power); and

(2) The governing officers either are appointed by State officials or publicly elected.

(f) *Definition of agency or instrumentality of a State or political subdivision of a State*—(1) *Agency or instrumentality of a State or political subdivision of a State.* The term *agency or instrumentality of a State or political subdivision of a State* means an entity that satisfies the facts and circumstances test in paragraph (f)(2) of this section.

(2) *Facts and circumstances test*—(i) *Factors to be considered.* In making the determination of whether an entity is an agency or instrumentality of a State or political subdivision of a State, the main factors to be considered are—

(A) The entity's governing board or body is controlled by a State (or political subdivision thereof). For example, an entity's governing board or body is controlled by a State (or political subdivision thereof) if the public officials of the State (or political subdivision thereof) have the power to appoint, and to remove and replace, a majority of the entity's governing board or body. This factor is not satisfied if the power to control is materially restricted (for example, if any board member of the entity can be replaced only with an individual chosen from a list of designees selected by the other members of the governing board or body);

(B) The members of the governing board or body are publicly nominated and elected;

(C) A State (or political subdivision thereof) has fiscal responsibility for the general debts and other liabilities of the entity, including responsibility for the funding of benefits under the entity's employee benefit plans;

(D) The entity's employees are treated in the same manner as employees of the State (or political subdivision thereof) for purposes other than providing employee benefits (for example, the entity's employees are granted civil service protection); and

(E) In the case of an entity that is not a political subdivision, the entity is delegated the authority to exercise sovereign powers (which generally means the power of taxation, the power of eminent domain, and police powers) of the State (or political subdivision thereof) and the delegation of authority is pursuant to a statute of a State (or political subdivision thereof).

(ii) *Other factors to be considered.* In making the determination of whether an entity is an agency or instrumentality of a State or a political subdivision of a State, other factors include—

(A) The entity's operations are controlled by a State (or political subdivision thereof);

(B) The entity is directly funded through tax revenues or other public sources. However, this factor is not satisfied if an entity that is not otherwise an agency or instrumentality is paid from public funds under a contract to provide a governmental service or is funded through grants by the State or Federal government;

(C) The entity is created by a State government or political subdivision of a State pursuant to a specific enabling statute that prescribes the purposes, powers, and manners in which the entity is to be established and operated. However, a nonprofit corporation that is incorporated under a State's general corporation laws is not created under a specific enabling statute;

(D) The entity is treated as a governmental entity for Federal employment tax or income tax purposes (such as, the authority to issue tax-exempt bonds under section 103(a)) or under other Federal laws;

(E) The entity is determined to be an agency or instrumentality of a State (or political subdivision thereof) for purposes of State laws. For example, the entity is subject to open meetings laws or the requirement to maintain public records that apply only to governmental entities, or the State attorney general represents the entity in court under a State statute that only permits representation of State entities;

(F) The entity is determined to be an agency or instrumentality of a State (or political subdivision thereof) by a State or Federal court;

(G) A State (or political subdivision thereof) has the ownership interest in the entity and no private interests are involved; and

(H) The entity serves a governmental purpose.

(3) *Examples.* The following examples illustrate the application of this paragraph (f). In each of these examples, unless otherwise stated, only facts that are relevant to the examples are included and it is assumed that no party other than a State or political subdivision thereof has an ownership interest in the entity and that the entity serves a governmental purpose. The examples are as follows:

Example 1. (i) *Facts.* Entity C is a utility company located in County B of State A. Entity C is created pursuant to a State A statute by a petition of 25 private citizens who are landowners, and approved by an order of a judge in County B. Entity C is administered by a board of commissioners named in the original petition, with vacancies to be filled by the incumbents, but with State A having the right to remove a board member for malfeasance. Entity C has the power of eminent domain. In addition, the records of Entity C are public records.

(ii) *Conclusion.* Based on the facts and circumstances, Entity C is not an agency or instrumentality of County B within the meaning of paragraph (f) of this section because it does not satisfy the control factors described in paragraphs (f)(2)(i)(A) and (ii)(A) of this section because Entity C is under the control of a self-perpetuating board of directors and because State A or its officials do not exercise control over the directors.

Example 2. (i) *Facts.* The facts are the same as in *Example 1,* except that Entity C is administered by a board of commissioners which is appointed by the Governor of State A and is subject to removal proceedings by the Governor of State A, the County B prosecutor, or the general public in County B. Vacancies on Entity C's district board are filled by popular election or by appointment of the Governor of State A. Entity C has the power of eminent domain. In addition, the records of Entity C are public records.

(ii) *Conclusion.* Based on the facts and circumstances, Entity C is an agency or instrumentality of County B within the meaning of paragraph (f) of this section.

Example 3. (i) *Facts.* Entity K is a non-profit corporation that operates a zoo in County J. Entity K is organized under the laws of State L. Although Entity K was not created by State law, the legislature of State L authorized the State's forest districts to contract with zoological societies for the creation, operation, and maintenance of zoological parks. County J entered into a contract with Entity K, giving Entity K exclusive control and management authority over the zoo in County J. Entity K, through government contracts, receives over half of its revenues from taxes raised by County J. The remaining revenues are from admission and parking fees, concessions, souvenirs, and private donations. County J maintains a significant amount of control over the budget of Entity K, including overseeing the expenditures of nontax revenues generated by Entity K. The zoo is located on land owned by County J, and vehicles used at the zoo are owned by County J and licensed as municipal vehicles. Entity K is managed by a 35-member board of trustees. Only one member of the board of trustees is a public official. Of the 240 members of Entity K who elect the board of trustees, only 4 members are County J public officials. In addition, County J has no direct role in Entity K's operation and maintenance of the zoo. Employees of Entity K are not treated in the same manner as public employees and, thus, are not covered under the civil service rules, pension plan, or workers' compensation funds of County J or State L.

(ii) *Conclusion.* Based on the facts and circumstances, Entity K is not an agency or instrumentality of County J or State L within the meaning of paragraph (f) of this section. Although Entity K is partly funded by County J, it receives those funds under a contract to provide governmental service and very few members of both the board of trustees and the governing members of Entity K are public officials.

Example 4. (i) *Facts.* Entity P is a non-profit corporation that operates a 24-hour intermediate care facility for mentally challenged adults located in State O. Entity P is licensed and regulated by State O. While not created by statute, Entity P's facility was built pursuant to statutory directives. Entity P is managed by a 9-member board of directors, which consists of parents of the patients at the facility and other volunteers. The directors are elected by Entity P's corporate members. State O has no authority to appoint or remove directors. The facility is managed by an executive director who is hired by the board without State approval. Pursuant to regulations, State O mandates certain personnel requirements, including staffing levels and minimum qualification requirements for staff members at the facility. However, Entity P is responsible for hiring, firing, and other disciplinary decisions. State O prescribes an hourly mean wage for the employees of Entity P, which limits the total amount that Entity P can pay its employees. In addition, State O imposes a ceiling on fringe benefits available to employees of Entity P, but Entity P is responsible for allocating the funds to pay for the fringe benefits.

(ii) *Conclusion.* Based on the facts and circumstances, Entity P is not an agency or instrumentality of State O within the meaning of paragraph (f) of this section. Although Entity P is directly funded by State O, it receives those funds under a contract to provide services to State O. Entity P does not satisfy the control factors described in paragraphs (f)(2)(i)(A) and (ii)(A) of this section because Entity P is controlled by directors who are chosen by Entity P's corporate members. While State O has some oversight control over Entity P's employees, through certification requirements and the imposition of limitations on pay and fringe benefits, Entity P has control over most employment decisions, as well as setting policies for holidays, vacations, insurance, and retirement benefits.

Example 5. (i) *Facts relating to University U.* University U was created by the legislature of State A and is an agency or instrumentality of State A under this paragraph (f). The board of trustees of University U appoints the president of University U. The president of University U appoints the chancellor of the medical school of University U. The chancellor of the medical school is also a vice-president of University U. The chancellor of the medical school appoints the various chairs of the clinical departments of the medical school.

(ii) *Facts relating to the corporate structure of Employer M.* The chairs of the clinical departments of the medical school have incorporated a separate entity, Employer M, under State A's not-for-profit law. Employer M is an integrated group practice for managing the clinical practice activities of the medical school faculty and was established in order to advance the purposes of the medical educational program and related activities of the medical school of University U. Under the by-laws of Employer M, any physician employee of Employer M must be a faculty member of the medical school (and if any physician employee of Employer M leaves the faculty of the medical school, his or her employment with Employer M terminates automatically).

(iii) *Facts relating to the control of Employer M.* Employer M is governed by a board of trustees consisting of the chancellor of the medical school, the clinical department chairs, and full-time faculty members appointed by two-thirds of the clinical department chairs. Performance of services as an employee of Employer M is a condition of employment for all full-time faculty members of the medical school. The faculty members are employees of University U and, in the capacity of their employment at University U, participate in the State A public employees' pension plan. Employer M also employs administrative and non-faculty employees who are not treated in the same manner as employees of State A (or University U). Employer M charges patients for the services provided by Employer M, and a portion of the fees collected are paid to University U. The compensation levels for employees of Employer M are set by faculty members who serve on the board of trustees of Employer M. The compensation paid to faculty members by Employer M is a substantial portion of the total compensation paid to them by University U and Employer M. Audited financial records of Employer M are submitted annually to the president of University U.

(iv) *Conclusion.* Employer M does not satisfy any of the factors listed in paragraphs (f)(2)(i)(B) through (E) of this section (that is, its trustees are not publicly nominated and elected, State A has no fiscal responsibility for Employer M, administrative and non-faculty employees of Employer M are not treated in the same manner as employees of State A, and Employer M has no sovereign powers). Employer M also does not satisfy any of the additional factors listed in paragraphs (f)(2)(ii)(B) through (G) of this section, but does satisfy the governmental purpose factor in paragraph (f)(2)(ii)(H) of this section. With respect to the control factors in paragraphs (f)(2)(i)(A) and (ii)(A) of this section, while all of Employer M's trustees are employees of University U, the majority of the board of trustees is not controlled by University U but by clinical department chairs and full-time faculty members of University U. Their service on the board of trustees of Employer M is in their capacity as representatives of Employer M, not as representatives of University U or State A. Accordingly, based on the facts and circumstances, including the lack of involvement of University U in overseeing the conduct of the board of trustees and the operations of Employer M beyond review of its audited financials, Employer M is not an agency or instrumentality of State A within the meaning of paragraph (f) of this section.

Example 6. (i) *Facts.* Entity W, a private foundation, provides public assistance to the indigent elderly in a residence hall built on land privately donated to Entity W, located in City V. City V contracts with Entity W to provide elder care to residents of City V. Over the years, City V has regularly budgeted for services provided by Entity W to its residents, including maintenance and upkeep of its facilities, and salaries of employees. In 1970, Entity W and City V together incorporated a non-profit organization, Entity X, called ''City V Eldercare Residence,'' through which Entity W would provide its services to the residents of City V. Under

Entity X's bylaws, Entity X is governed by a board of directors, six of whom are appointed by the Mayor of City V, and six of whom are appointed by Entity W. Entity X's employees are considered employees of Entity X and are not treated in the same manner as municipal employees of City V.

(ii) *Conclusion.* Although City V is a political subdivision of a State within the meaning of paragraph (e)(1) of this section, Entity X is not an agency or instrumentality of City V within the meaning of paragraph (f) of this section. While Entity X satisfies the governmental purpose factor described in paragraph (f)(2)(ii)(H) of this section, it does not satisfy any other factor, including the control factors described in paragraphs (f)(2)(i)(A) and (ii)(A) of this section or the employee factor described in paragraph (f)(2)(i)(D) of this section (because a majority of the board is not appointed by City V and Entity X's employees are not treated in the same manner as employees of City V).

Example 7. (i) *Facts.* Five States created Commission D as a body corporate of each compacting State and territory. Commission D was created to provide services to the States on issues relating to higher education. Each governor of the five States appoints three persons to the governing board of Commission D, which is subject to the joint control of the five States. Commission D submits yearly reports and budgets to the governors of each of the five States. Commission D's operating costs are apportioned equally among the States. The IRS determined in a ruling that Commission D was exempt from gross income under section 115. The IRS also determined that Commission D was an instrumentality of each of the five States for employment tax purposes.

(ii) *Conclusion.* Based on the facts and circumstances, Commission D is an agency or instrumentality of each of the five States within the meaning of paragraph (f) of this section.

Example 8. (i) *Facts.* Entity S, incorporated under the laws of State T as a non-profit corporation, operates a hospital in City R. City R leases the hospital and its entire operation to Entity S. The lease between City R and Entity S requires Entity S to transfer its assets and liabilities back to the City upon expiration of the lease. City R created the first board of directors for the hospital, but it does not have the power to remove or replace any board member. Only one of the 13 board members of Entity S is a public official, an *ex officio* voting member. In addition, the board of directors is not elected by the general public of City R. To fund a subsequent expansion of the hospital facility, City R issued tax-exempt bonds. Entity S does not have the authority to issue tax-exempt bonds. Entity S does not exercise any sovereign powers. Employees of Entity S are not treated in the same manner as employees of City R. For example, Entity S and City R maintain separate payrolls, health insurance plans, and pension plans.

(ii) *Conclusion.* Based on the facts and circumstances, Entity S is not an agency or instrumentality of City R within the meaning of paragraph (f) of this section. Although City R had the power of the initial appointment of the board members, it cannot subsequently appoint or remove any directors of Entity S, therefore, Entity S does not satisfy the control factor described in paragraph (f)(2)(i)(A) of this section.

(g) *Special rules for plans of Indian tribal governments.* [Reserved].

(h) *Special rules for plans subject to the Railroad Retirement Act of 1935 or 1937.* [Reserved].

(i) [Reserved].

(j) *Special rules for plans subject to the International Organizations Immunities Act.* [Reserved].

(k) *Established and maintained*—(1) *In general.* For purposes of applying this section (and not for any other purpose) with respect to a governmental entity (which is an entity defined in paragraph (b), (c), (d), (e), or (f) of this section), a plan is established and maintained for the employees of a governmental entity if—

(i) The plan is established and maintained for employees by an employer, within the meaning of § 1.401–1(a)(2);

(ii) The employer is a governmental entity; and

(iii) The participants covered by the plan are employees of that governmental entity.

(2) *Changes in status*—(i) *Ceasing to be a private entity.* If an employer becomes a governmental entity (for example, as a result of a stock acquisition) or a governmental entity becomes the employer under the plan (for example, in connection with an asset transfer), the plan (including all of the plan's assets and liabilities attributable to service before and after the date of the change) will be treated, for purposes of paragraph (k)(1)(i) of this section, as being established by that governmental entity on the date of that change.

(ii) *Ceasing to be a governmental entity*—(A) *General rule.* Except as provided in paragraph (k)(2)(ii)(B) of this section, if an employer that is a governmental entity ceases to be a governmental entity (for example, as a result of a stock acquisition) or a private entity becomes the employer under the plan (for example, in connection with an asset transfer), the plan (including all of the plan's assets and liabilities attributable to service before and after the date of the change) is treated, for purposes of paragraph (k)(1)(ii) of this section, as being established by the non-governmental employer on the date of that change.

(B) *Exception.* If a plan is established and maintained for the employees of a governmental entity in accordance with paragraph (k)(1) of this section (without regard to this paragraph (k)(2)(ii)) and, at a subsequent date, the employer ceases to be a governmental entity (for example, as a result of an assets transfer), the plan is treated as continuing to be a governmental plan if—

(*1*) A governmental entity continues to be the plan sponsor after the change (for example, a governmental entity assumes the plan on or before the date on which the private entity becomes the employer (including becoming responsible for the employer obligations with respect to the payment of benefits under the plan)); and

(*2*) Benefits under the plan are frozen (with, if provided under the plan, participating employees to receive credit for service with the new employer for purposes of vesting, final pay adjustments, entitlement to benefits such as early retirement benefits, and similar service credit other than benefit accrual credit).

(C) *Governmental liability for spun-off benefits.* In the case of a transaction such as an asset sale in which assets and liabilities of a governmental plan are transferred to a private plan, the private employer would be responsible for satisfying the minimum funding standards of section 412 (including with respect to benefits attributable to service performed before the date of the change). However, nothing in this paragraph (k)(2)(ii) should be construed to mean that, with respect to such a transaction, the assumption of benefit liabilities accrued prior to the transfer to the private plan would relieve the former governmental employer (or former governmental plan) from responsibilities for those benefits.

(3) *Plan coverage for employees of a labor union or plan.* For purposes of paragraph (k)(1)(iii) of this section, employees of employee representatives described in section 413(b)(8) (including employees of a plan) are treated as employees of the plan sponsor. See § 1.413–1(i).

(4) *Examples.* The following examples illustrate the application of this paragraph (k):

Example 1. (i) *Facts.* Employer C, a non-profit corporation whose principal place of business is located in City F, is not a governmental entity. Plan B, a retirement plan, is established and maintained by Employer C. In a stock acquisition, City F acquires all the shares of stock of Employer C and, as a result, Employer C becomes a governmental entity.

(ii) *Conclusion.* After the acquisition, Plan B is established and maintained by a governmental entity. In addition, the employees covered by Plan B are employees of a governmental entity. Thus, Plan B, including the assets and liabilities attributable to benefits accrued in Plan B

prior to the date of the acquisition, is a governmental plan within the meaning of section 414(d) and this section.

Example 2. (i) *Facts.* Employer G is a hospital that is an agency or instrumentality of State A. Plan J, a retirement plan, is established and maintained by Employer G. Plan J satisfies the requirements of this paragraph (k) and is a governmental plan within the meaning of section 414(d). The assets of Employer G are transferred to a non-profit corporation, Employer M, which is not a governmental entity. All employees of Employer G become employees of Employer M. As part of the transaction, Employer M assumes Plan J, with respect to benefits accrued for service both before and after the transaction.

(ii) *Conclusion.* Plan J is no longer maintained by a governmental entity. In addition, the employees covered by Plan J are no longer employees of a governmental entity. Therefore, Plan J no longer constitutes a governmental plan within the meaning of section 414(d) and this section. In order for Plan J to continue to be a qualified plan, Plan J must satisfy the qualification requirements relating to non-governmental plans, including with respect to the assets and liabilities attributable to benefits accrued in Plan J prior to the date of the sale. The same conclusion would apply if the transfer were a stock transaction.

Example 3. (i) *Facts.* Same facts as in *Example 2,* except that, on the date of the sale, Employer G freezes Plan J, so that participants in Plan J are no longer accruing benefits under the plan and all accrued benefits are limited to service before the sale. In addition, on the date of the acquisition, State A assumes Plan J, including responsibility for the payment of benefits previously accrued to participants in Plan J.

(ii) *Conclusion.* In accordance with paragraph (k)(2)(ii)(B) of this section, Plan J continues to be a governmental plan within the meaning of section 414(d) and this section.

Example 4. (i) *Facts.* Pursuant to a State statute, State L permits local towns and villages to establish recreational facility authorities to build and promote recreational activities. Under Statute K, unincorporated Townships M, N, and O (which are political subdivisions of State L, within the meaning of paragraph (d) of this section) jointly establish a recreational facility authority, Authority R. Financing for Authority F is through local taxes and fees. Authority R operates under a three-person board of directors, one each appointed by townships M, N, and O. Authority R built and operates a skating rink, Facility S, which is located in Township O, but is open to the residents of Townships M, N, and O. Facility S is wholly owned and controlled by Townships M, N, and O. Township O maintains Pension Plan P for its seven employees, which is a governmental plan under section 414(d). Township O amends its plan to permit the three employees of Facility S to participate. The employees of Facility S are not employees of Township O and are not employees of a labor union described in section 413(b)(8).

(ii) *Conclusion.* The governmental plan status of Pension Plan P is not affected by the participation of Facility S's employees because Facility S is a governmental entity within the meaning of section 414(d) and this section.

Example 5. (i) *Facts.* Same facts as *Example 4,* except that Township O amends Plan P to permit participation by 10 employees of candy and soft drink Vendor T, a supplier for Facility S. Vendor T is not a governmental entity.

(ii) *Conclusion.* Plan P is no longer a governmental plan within the meaning of section 414(d) because it provides benefits to employees of a non-governmental employer, Vendor T.

(l) *Employee.* For purposes of this section, the term *employee* means a common law employee of the employer (and the rules in section 401(c) do not apply).

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–133223–08]

RIN 1545–BI19

Indian Tribal Governmental Plans

AGENCY: Internal Revenue Service (IRS), Department of the Treasury.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The Treasury Department and IRS anticipate issuing regulations under section 414(d) of the Internal Revenue Code (Code) to define the term ''governmental plan.'' This document describes the rules the Treasury Department and IRS are considering proposing relating to the determination of whether a plan of an Indian tribal government is a governmental plan within the meaning of section 414(d) and contains an appendix that includes a draft notice of proposed rulemaking on which the Treasury Department and IRS invite comments from the public. This document applies to sponsors of, and participants and beneficiaries in, employee benefit plans of Indian tribal governments.

DATES: Written or electronic comments must be received by February 6, 2012.

ADDRESSES: Send submissions relating to the section 414(d) draft ITG regulations to: CC:PA:LPD:PR (REG–133223–08), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington DC 20044. Submissions may be hand delivered Monday through Friday, between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–133223–08), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC.

Alternately, taxpayers may submit comments relating to the section 414(d) draft ITG regulations located in the Appendix to this ANPRM electronically via the Federal eRulemaking Portal at *http://www.regulations.gov* (IRS–REG–133223–08).

FOR FURTHER INFORMATION CONTACT: Concerning the ANPRM, Pamela R. Kinard, at (202) 622–6060; concerning submission of comments, Richard Hurst, at (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

This document describes rules that the Treasury Department and IRS are considering proposing and contains a draft notice of proposed rulemaking (in the Appendix to this ANPRM) under section 414(d) of the Internal Revenue Code (Code). Under the draft notice of proposed rulemaking (in the Appendix to this ANPRM), the rules would provide guidance relating to the determination of whether a plan of an Indian tribal government, a subdivision of an Indian tribal government, or an agency or instrumentality of either (ITG) is a governmental plan within the meaning of section 414(d) of the Code (section 414(d) draft ITG regulations).

Section 414(d) of the Code provides that the term ''governmental plan'' generally means a plan established and maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing. See sections 3(32) and 4021(b)(2) of the Employee Retirement Income Security Act of 1974 (ERISA) for definitions of the term ''governmental plan,'' which govern respectively for purposes of title I and title IV of ERISA.[1]

The term ''governmental plan'' also includes any plan to which the Railroad Retirement Act of 1935 or 1937 (49 Stat. 967, as amended by 50 Stat. 307) applies and which is financed by contributions required under that Act and any plan of an international organization which is exempt from taxation by reason of the International Organizations Immunities Act (59 Stat. 669). See section 414(d)(2) of the Code.

[1] The three definitions of the term ''governmental plan'' are essentially the same. The only difference is that, in defining the term ''governmental plan,'' section 3(32) of ERISA uses the phrase ''established or maintained,'' whereas section 414(d) of the Code and section 4021(b) of ERISA use the term ''established and maintained.''

Section 414(d) was amended by the Pension Protection Act of 2006, Public Law 109–280 (120 Stat. 780) (PPA '06) to include certain plans of Indian tribal governments and related entities.[2] Section 906(a)(1) of PPA '06 provides that the term ''governmental plan'' includes a plan which is established and maintained by an Indian tribal government (as defined in section 7701(a)(40)), a subdivision of an Indian tribal government (determined in accordance with section 7871(d)), or an agency or instrumentality of either (ITG), and all the participants of which are employees of such entity substantially all of whose services as such an employee are in the performance of essential governmental functions but not in the performance of commercial activities (whether or not an essential governmental function).

Neither section 414(d) of the Code, section 3(32) of ERISA, nor section 4021(b)(2) of ERISA define key terms relating to governmental plans, including the terms ''established and maintained,'' ''political subdivision,'' ''agency,'' and ''instrumentality.'' Currently, there are no regulations interpreting section 414(d). Revenue Ruling 89–49 (1989–1 CB 117), see § 601.601(d)(2), sets forth a facts and circumstances analysis for determining whether a retirement plan is a governmental plan within the meaning of section 414(d).[3] This analysis is used by the IRS in issuing letter rulings. In connection with this advanced notice of proposed rulemaking, an advance notice of proposed rulemaking is also being issued with respect to the general definition of a governmental plan (REG–157714–06 that is being published elsewhere in this issue of the **Federal Register**).

Governmental plans are subject to different rules than retirement plans of nongovernmental employers. Governmental plans are excluded from the provisions of titles I and IV of ERISA. In addition, governmental plans receive special treatment under the Code. These plans are exempt from certain qualification requirements and they are deemed to satisfy certain other qualification requirements under certain conditions. As a result, the principal qualification requirements for a tax-qualified governmental plan[4] are that the plan—

- Be established and maintained by the employer for the exclusive benefit of the employer's employees or their beneficiaries;
- Provide definitely determinable benefits;
- Be operated pursuant to its terms;
- Satisfy the direct rollover rules of section 401(a)(31);
- Satisfy the section 401(a)(17) limitation on compensation;
- Comply with the statutory minimum required distribution rules under section 401(a)(9);
- Satisfy the pre-ERISA vesting requirements under section 411(e)(2);[5]
- Satisfy the section 415 limitations on benefits, as applicable to governmental plans; and
- Satisfy the prohibited transaction rules in section 503.

State and local governments, political subdivisions thereof, and agencies or instrumentalities thereof are generally not permitted to offer cash or deferred arrangements under section 401(k). However, an ITG is permitted to offer a cash or deferred arrangement under section 401(k).

Notice 2006–89 (2006–2 CB 772) and Notice 2007–67 (2007–35 IRB 465), see § 601.601(d)(2), summarize the changes made by section 906(a)(1) of PPA '06 and provide transitional relief to ITGs under a reasonable and good faith standard to comply with such changes. The notices provide that until such guidance is issued, a plan established and maintained by an ITG for its employees is treated as satisfying the requirements of section 906(a)(1) of PPA '06 to be a governmental plan under section 414(d) of the Code if it complies with those requirements based on a reasonable and good faith interpretation of section 414(d). For further background, see the ''Background'' section of the preamble of the section 414(d) draft ITG regulations in the Appendix to this ANPRM under the headings, ''Notices Issued by the IRS Relating to ITG Retirement Plans under PPA '06.''

The Treasury Department and the IRS participated in a series of telephone listening meetings with the ITG community following the passage of PPA '06. The attached draft notice of proposed rulemaking in the Appendix to this ANPRM takes into account comments provided through a number of informative and cooperative comments received in response to Notices 2006–89 and 2007–67 and open and direct consultations with the Indian tribal community. Those comments received from Notices 2006–89 and 2007–67 and during the consultations were considered in drafting the proposed rulemaking.

The Treasury Department and the IRS have determined to seek public comment and consult with ITGs on the draft proposed regulations in advance of issuing a notice of proposed rulemaking. In light of the interaction of the governmental plan definitions in the Code and ERISA, a copy of the comments will be forwarded to DOL and PBGC.

Explanation of Provisions

Attached to the Appendix to this ANPRM is a draft notice of proposed rulemaking. These draft regulations include proposed rules, a preamble, and a request for comments. The Treasury Department and IRS invite the public to comment on the rules that the Treasury Department and IRS are considering proposing, which would set forth special rules relating to retirement plans of ITGs.

Section 414(d) Draft ITG Regulations

A plan established and maintained by an ITG is a governmental plan under section 414(d), as amended by section 906 of PPA '06, only if all of its participants are employees substantially all of whose services are in the performance of essential governmental functions (but not in the performance of commercial activities whether or not an essential governmental function). Therefore, the rules under the section 414(d) draft general regulations (in the Appendix to the ANPRM that is being published elsewhere in this issue of the **Federal Register**) would apply to ITG governmental plans, as well as the special rules under the attached section 414(d) draft ITG regulations. The anticipated proposed regulations would use the broader concepts of governmental activity and commercial activity, instead of the terms essential governmental function and commercial activity. See the ''Explanation of Provisions'' section in the section 414(d)

[2] Section 906(a) of PPA '06 made similar amendments to sections 3(32) and 4021(b)(2) of ERISA.

[3] See also Rev. Rul. 57–128 (1957–1 CB 311), see § 601.601(d)(2), which provides guidance on determining when an entity is a governmental instrumentality for purposes of the exemption from employment taxes under section 3121(b)(7) and 3306(c)(7).

[4] A special rule applies to contributory plans of certain governmental entities. Section 414(h)(2) provides that, for a qualified plan established by a State government or political subdivision thereof, or by any agency or instrumentality of the foregoing, where the contributions of the governmental employer are designated as employee contributions under section 414(h)(1) but the governmental employer picks up the contributions, the contributions picked up will be treated as employer contributions.

[5] Section 411(e)(2) states that a plan described in section 411(e)(1) is treated as meeting the requirements of section 411 if the plan meets the vesting requirements resulting from the application of section 401(a)(4) and (a)(7) as in effect on September 1, 1974.

draft ITG regulations in the Appendix to this ANPRM under the heading, ''Determination of Governmental and Commercial Activities.''

Under the section 414(d) draft ITG regulations (in the Appendix to this ANPRM), whether a plan of an ITG is a governmental plan or a nongovernmental plan within the meaning of section 414(d) would be based, in part, on: (1) A determination of which activities are commercial activities and (2) a determination of whether employees of the ITG covered by the plan are employees who perform substantial services in commercial activities of the ITG (and are thus commercial employees).

The anticipated proposed regulations would provide that certain specific activities are deemed to be governmental or commercial for purposes of section 414(d). Under the anticipated proposed regulations, commercial activities would be operations involving a hotel, casino, service station, convenience store, or marina. These activities are examples that were identified as commercial activities in Notices 2006–89 and 2007–67, as well as in the Joint Committee on Taxation Technical Explanation to section 906 of PPA '06. The section 414(d) draft ITG regulations in the Appendix to this ANPRM would provide that governmental activities include activities related to the building and maintenance of public roads, sidewalks, and buildings, activities related to public work projects (such as schools and government buildings), and activities that are subject to a treaty or special rules that pertain to trust land ownership and use. See § 601.601(d)(2).

In addition to listing certain specified activities, the anticipated proposed regulations would provide a facts and circumstances test for determining whether an activity is a governmental or commercial activity. See the ''Explanation of Provisions'' section in the section 414(d) draft ITG regulations in the Appendix to this ANPRM under the heading, ''Governmental and Commercial Activities.'' The anticipated proposed regulations would also provide examples illustrating the application of the facts and circumstances tests to particular activities.

The anticipated proposed regulations would also provide rules for determining whether employees covered by an ITG plan are employees who perform substantial services in activities that are governmental. For this purpose, the determination of whether an employee's services are for governmental or commercial activities would generally be based on the employee's assigned duties and responsibilities. See the ''Explanation of Provisions'' section in the section 414(d) draft ITG regulations in the Appendix to this ANPRM under the headings, ''Determination of Governmental ITG Employees'' and ''Determination of Commercial ITG Employees.''

The anticipated proposed regulations do not address the broader issue of whether a retirement plan is a governmental plan within the meaning of section 414(d). That topic is addressed in the advance notice of proposed rulemaking relating generally to the definition of governmental plan that is being published elsewhere in this issue of the **Federal Register**.

Request for Comments

Before a notice of proposed rulemaking is issued, consideration will be given to any written comments that are submitted timely (preferably a signed original and eight (8) copies) to the IRS. All comments will be available for public inspection and copying. Copies of the comments will be provided to the DOL and PBGC.

Comments are also requested on whether, as an alternative to issuing proposed regulations, the Department of the Treasury and IRS should publish a notice that reflects some or all of the rules in the draft proposed regulations and that also modifies the rule in Notice 2007–67 concerning when a mixed ITG is required to be amended to be two different plans, one for governmental employees and another for commercial employees. If so, the notice would include a significant transitional period for compliance similar to the transition period that would be expected to apply for regulations (such as not being effective until plan years that begin at least 18 months after publication of the notice). The Department of the Treasury and IRS invite comments on whether this method of guidance would be preferable to the issuance of regulations.

The IRS and Department of the Treasury plan to schedule a public hearing on the ANPRM. That hearing will be scheduled and announced at a later date. In addition to a public hearing, the Treasury Department and IRS anticipate scheduling consultation listening meetings in order to obtain comments from tribal governments on the section 414(d) draft ITG regulations. It is expected that these meetings will take place in different locations across the country. Participants will be encouraged to pre-register for the meetings. Information relating to these meetings, including dates, times, locations, registration, and the procedures for submitting written and oral comments, will be available on the IRS Web site relating to governmental plans at *http://www.irs.gov/retirement/article/0,,id=181779,00.html.*

EO 13175, Consultation and Coordination With Indian Tribal Governments

In the Appendix to this ANPRM is a draft notice of proposed rulemaking. These draft regulations include proposed rules, a preamble, and a request for comments. The Treasury Department and the IRS invite the public to comment on the rules under consideration, which would set forth special rules relating to retirement plans of ITGs. This solicitation of comments is in furtherance of the objective of Executive Order 13175 under which Treasury consults with tribal officials in the development of Federal policies that may have tribal implications. The IRS and Treasury Department will consult with Indian tribes through the normal comment process in the **Federal Register**, issuing this advance notice of public rulemaking, and reaching out to Indian tribes through a series of consultation listening meetings.

Drafting Information

The principal author of this advance notice of proposed rulemaking is Pamela R. Kinard, Office of the Chief Counsel (Tax-exempt and Government Entities), however, other personnel from the IRS and Treasury Department participated in its development.

Steven T. Miller,

Deputy Commissioner for Services and Enforcement.

Appendix

The following is draft language for a notice of proposed rulemaking that would set forth rules relating to the determination of whether a plan of an Indian tribal government is a governmental plan within the meaning of section 414(d). The IRS and Treasury release this draft language in order to solicit comments from the governmental plans community:

Background

This document contains proposed regulations under section 414(d) of the Internal Revenue Code (Code). These regulations, when finalized, would provide guidance relating to the determination of whether a plan of an Indian tribal government or other entities related to an Indian tribal government is a governmental plan within the meaning of section 414(d). The definition of a governmental plan

under section 414(d) applies for purposes of Part I of Subchapter D of Chapter 1 of Subtitle A (Income Taxes) of the Code (sections 401 through 420) and certain other Code provisions that refer to section 414(d) (such as sections 72(t)(10), 501(c)(25)(C), 4975(g)(2), 4980B(d)(2), 9831(a)(1), and 9832(d)(1) of the Code).

Statutory Definition of Governmental Plan

Both the Code and the Employee Retirement Income Security Act of 1974 (ERISA) define the term ''governmental plan.'' Prior to the Pension Protection Act of 2006, Public Law 109–280 (120 Stat. 780) (PPA '06), section 414(d) of the Code provides that the term ''governmental plan'' means a plan established and maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing. Sections 3(32) and 4021(b)(2) of ERISA have parallel definitions of the term ''governmental plan.'' The term ''governmental plan'' also includes any plan to which the Railroad Retirement Act of 1935 or 1937 (49 Stat. 967, as amended by 50 Stat. 307) applies and which is financed by contributions required under that Act and any plan of an international organization which is exempt from taxation by reason of the International Organizations Immunities Act Public Law 79–291 (59 Stat. 669).

Section 906 of PPA '06

Section 906(a) of PPA '06 amended section 414(d) of the Code (and the parallel provisions in sections 3(32) and 4021(b)(2) of ERISA) to include in the definition of ''governmental plan'' certain plans of an Indian tribal government, a subdivision of an Indian tribal government, or an agency or instrumentality thereof. Specifically, under section 906(a)(1) of PPA '06, the term ''governmental plan'' includes a plan which is established and maintained for its employees by an Indian tribal government (as defined in section 7701(a)(40)), a subdivision of an Indian tribal government (determined in accordance with section 7871(d)), or an agency or instrumentality of either (ITG), and all of the participants of which are employees of such entity substantially all of whose services as such an employee are in the performance of essential governmental functions but not in the performance of commercial activities (whether or not an essential governmental function). Section 906(c) of PPA '06 provides that the amendments made by section 906 of PPA '06 apply to any year beginning on or after the date of enactment, which is August 17, 2006.

In its Technical Explanation [6] to section 906 of PPA '06, the Joint Committee on Taxation refers to an employee substantially all of whose services for an ITG are in the performance of essential governmental services and not in the performance of commercial activities (whether or not such activities are an essential governmental function) as a qualified employee who is eligible to participate in a governmental plan as described in section 414(d). The Technical Explanation states, for example, that a governmental plan includes a plan of an ITG, all of the participants of which are teachers in tribal schools. However, the Technical Explanation also states that a governmental plan does not include a plan covering tribal employees who are employed by a hotel, casino, service station, convenience store, or marina operated by a tribal government.

Exemption of Governmental ITG Plans From Certain Qualified Plan Rules

Governmental plans under Code section 414(d), including governmental ITG plans, receive special treatment with respect to certain qualification rules. Such plans are exempt from certain qualification requirements and are deemed to satisfy certain other qualification requirements under certain conditions. For example, the nondiscrimination and minimum participation rules do not apply to governmental plans.[7] In addition, the Code provides other exemptions for section 414(d) governmental plans:

- Section 401(a)(10)(B)(iii), which provides that the top-heavy requirements of section 416 do not apply to a governmental plan.
- Section 410(c)(1)(A), which provides that the minimum participation provisions of section 410 do not apply to a governmental plan.
- Section 411(e), which provides that a governmental plan is treated as satisfying the requirements of section 411 if the plan meets the pre-ERISA vesting requirements.
- Section 412(e)(2)(C), which provides that the minimum funding standards of section 412 do not apply to a governmental plan.
- Section 417, which provides rules relating to qualified joint and survivor annuities and qualified preretirement survivor annuities.

Section 415 also provides a number of special rules for governmental plans. The special rules include section 415(b)(11) (under which governmental pensions are not limited to 100% of a participant's average high 3 compensation), section 415(b)(2)(I) (the reduced limitation to the annual benefit payable beginning before age 62 and the reduction in the dollar limitation to the annual benefit payable for participation or services of less than 10 years do not apply to disability or survivor benefits received from a governmental plan), section 415(m) (benefits provided under a qualified governmental excess benefit arrangement are not taken into account in determining the section 415 benefit limitations under a section 414(d) governmental plan), and section 415(n) (permissive service credit).

As a result, the principal qualification requirements for a tax-qualified governmental plan [8] are that the plan—

- Be established and maintained by the employer for the exclusive benefit of the employer's employees or their beneficiaries;
- Provide definitely determinable benefits;
- Be operated pursuant to its terms;
- Satisfy the direct rollover rules of sections 401(a)(31) and 402(f);
- Satisfy the section 401(a)(17) limitation on compensation;
- Comply with the statutory minimum required distribution rules under section 401(a)(9);
- Satisfy the pre-ERISA vesting requirements under section 411(e)(2); [9]
- Satisfy the section 415 limitations on benefits, as applicable to governmental plans; and

[6] Joint Committee on Taxation, Technical Explanation of H.R. 4, the ''Pension Protection Act of 2006'' as passed by the House on July 28, 2006, and considered by the Senate on August 3, 2006 (JCX–38–06), August 3, 2006, 109th Cong., 2nd Sess. 244 (2006).

[7] Section 861 of PPA '06 amended sections 401(a)(5)(G) and 401(a)(26)(G) of the Code to provide that the minimum participation standards and nondiscrimination requirements of section 410 and the additional participation requirements under section 401(a)(26) do not apply to governmental plans within the meaning of section 414(d) of the Code. Section 861 of PPA '06 also exempts governmental plans from the nondiscrimination and participation requirements applicable to qualified cash or deferred arrangements under section 401(k)(3) of the Code.

[8] A special rule applies to contributory plans of certain governmental entities. Section 414(h)(2) provides that, for a qualified plan established by a State government or political subdivision thereof, or by any agency or instrumentality of the foregoing, where the contributions of the governmental employer are designated as employee contributions under section 414(h)(1) but the governmental employer picks up the contributions, the contributions picked up will be treated as employer contributions.

[9] Section 411(e)(2) states that a plan described in section 411(e)(1) is treated as meeting the requirements of section 411 if the plan meets the vesting requirements resulting from the application of section 401(a)(4) and (a)(7) as in effect on September 1, 1974.

• Satisfy the prohibited transaction rules in section 503.

State and local governments, political subdivisions thereof, and agencies or instrumentalities thereof are generally not permitted to offer cash or deferred arrangements under section 401(k).[10] However, Indian tribal governments and their related entities are permitted to offer cash or deferred arrangements as part of a plan maintained by an ITG.[11]

Rules Treating Indian Tribal Governments as States for Purposes of Issuing Tax-Exempt Bonds

Section 7871 provides special rules for Indian tribal governments. Section 7871(a)(4) provides that an Indian tribal government is to be treated as a State for purposes of section 103, relating to tax-exempt bonds.[12] Section 7871(c)(1) generally provides that section 103(a) applies to an obligation issued by an Indian tribal government only if such obligation is part of an issue substantially all of the proceeds of which are to be used in the exercise of any essential governmental function.

On August 9, 2006, an advance notice of proposed rulemaking under section 7871 was published in the **Federal Register** (71 FR 45474). The ANPRM describes the rules that the Treasury Department and the IRS anticipate proposing on the definition of essential governmental function under section 7871(e). The rules would provide that an activity is considered an essential governmental function that is customarily performed by State and local governments if: (1) There are numerous State and local governments with general taxing powers that have been conducting the activity and financing it with tax-exempt governmental bonds; (2) State and local governments with general taxing powers have been conducting the activity and financing it with tax-exempt governmental bonds for many years; and (3) the activity is not a commercial or industrial activity. The ANPRM provides examples of activities customarily performed by State and local governments, including public works projects such as roads, schools, and government buildings.

Notices Issued by the IRS Relating to ITG Retirement Plans Under PPA '06

Notice 2006–89 (2006–2 CB 772) and Notice 2007–67 (2007–35 IRB 467), see § 601.601(d)(2), summarize the changes made by section 906(a)(1) of PPA '06 and provide transitional relief to ITGs under a reasonable and good faith standard to comply with such changes. The notices provide that, until such guidance is issued, a plan established and maintained by an ITG for its employees is treated as satisfying the requirements of section 906(a)(1) of PPA '06 to be a governmental plan under section 414(d) of the Code if it complies with those requirements based on a reasonable and good faith interpretation of section 414(d). The notices further provide that it is not a reasonable and good faith interpretation of section 414(d) for an ITG plan to claim to be a governmental plan within the meaning of section 414(d) if employees participating in the plan perform services for a hotel, casino, service station, convenience store, or marina operated by an ITG.

In Notices 2006–89 and 2007–67, the Treasury Department and IRS announced that regulations would be proposed to provide guidance on section 414(d), including changes made to section 414(d) by section 906 of PPA '06, and to provide transitional relief pending the issuance of these regulations. Comments were requested on issues relating to section 906 of PPA '06, including transitional issues not addressed in the notice.

The transitional relief provided to plans of ITGs under Notices 2006–89 and 2007–67 continues up to the date that is six months after the date that guidance is issued under section 414(d) of the Code, as amended by section 906 of PPA '06 (extended date). For ITG plans that provide benefits both to employees substantially all of whose work is in essential governmental functions that are not commercial activities (governmental ITG employees) and to employees who perform services substantially in the performance of commercial activities (commercial ITG employees), the Notices provide that the ITG plan will be treated as satisfying the reasonable, good faith standard if certain steps are taken, which include adopting a separate plan covering commercial ITG employees effective as of the beginning of the first plan year beginning on or after August 17, 2006, the enactment of PPA '06. The commercial ITG plan, beginning on the same effective date, must comply with the qualification requirements for plans that are not governmental plans.

These proposed regulations would provide guidance relating to ITG plans under section 414(d). The transitional relief provided under Notices 2006–89 and 2007–67 would end six months after the effective date of the final regulations published in the **Federal Register**.

The transitional relief in Notices 2006–89 and 2007–67 is conditioned on the ITG plans involved not being amended, for periods before the extended date, to reduce benefits unless the reduction does not distinguish between reductions for commercial ITG employees and governmental ITG employees or the reduction for commercial ITG employees is the minimum amount necessary to satisfy any requirement under the Code. If any reduction occurs that does not satisfy these conditions, the transitional relief provided under Notices 2006–89 and 2007–67 ends on the date that the reduction goes into effect.

Executive Order 13175

Executive Order 13175 requires that Federal departments and agencies engage in consultation procedures in certain circumstances where regulations are issued which have substantial direct effects with respect to the Federal government and Indian tribes. While these regulations when issued as final regulations would not have such substantial direct effects, the IRS and Treasury Department have followed similar procedures. Further, the Treasury Department and the IRS participated in a series of telephone listening meetings with the ITG community following the passage of PPA '06 and these proposed regulations also take into account the comments that were provided in response to Notices 2006–89 and 2007–67, including the related open and direct consultations with the Indian tribal community.

Judicial Determinations

The few court cases that discuss section 906 of PPA '06 primarily relate to welfare benefit plans. One reason for the legislative change to section 414(d) of the Code and section 3(32) of ERISA is ''to clarify the legal ambiguity regarding the status of employee benefit plans established and maintained by tribal governments.'' [13] In *Bolssen* v.

[10] Section 401(k)(4)(B)(ii) provide that a cash or deferred arrangement shall not be treated as a qualified cash or deferred arrangement if it is part of a plan maintained by a State or local government or political subdivision thereof, or any or agency or instrumentality thereof.

[11] See section 401(k)(4)(B)(iii). For a general overview of the special rules relating to plans of ITGs, see the Joint Committee on Taxation, *Overview of Federal Tax Provisions Relating to Native American Tribes and Their Members* (JCX 61–08), July 18, 2008.

[12] An Indian tribal government is treated in the same manner as a State for certain specified purposes under the Code, but not for purposes of section 414(d) (or any provision in sections 401 through 424, other than sections 403(b)(1)(A)(ii)).

[13] See *Dobbs* v. *Anthem Blue Cross & Blue Shield,* 475 F.3d 1176, 1178 (10th Cir. 2007) (citing 150 Cong. Rec. S9526, 9533), *rev'd in part* 600 F.3d 1275 (2010). See also *Bolssen* v. *Unum Life*

Unum Life Insurance Company of America, 629 F.Supp. 2d 878 (E.D. Wis. 2009), Mr. Bolssen sued the Unum Life Insurance Company for failing to provide disability insurance benefits. He argued that the case should be remanded to state court because the insurance plan sponsored by his employer, an Indian tribal casino, was a governmental plan within the meaning of section 3(32) of ERISA. In analyzing whether the welfare benefit plan was a governmental plan, the *Bolssen* court looked to another case involving an Indian tribal casino, *San Manuel Indian Bingo & Casino* v. *NLRB,* 475 F.3d 1306 (DC Cir. 2007). In *San Manuel Indian Bingo & Casino,* the court held that the National Labor Relations Act applied to an Indian tribal casino because the operation of the casino was a commercial function. The court reasoned that ''it can be argued any activity of a tribal government is by definition 'governmental,' and even more so an activity aimed at raising revenue that will fund governmental functions. Here, though, we use the term 'governmental' in a restrictive sense to distinguish between the traditional acts governments perform and collateral acts that, though perhaps in some way related to the foregoing, lie outside their scope.'' [14]

The court, in *San Manuel Indian Bingo & Casino,* held that the operating a casino is not a traditional act of government, but is commercial in nature.[15] The court in *Bolssen* applied the same reasoning to conclude that disability plan of the casino was not a governmental plan within the meaning of section 3(32) of ERISA.

Explanation of Provisions

These proposed regulations would provide special rules for purposes of the definition of a ''governmental plan'' under section 414(d) of the Code, as it relates to plans of ITGs. The Treasury Department and IRS also expect to issue separate proposed regulations under section 414(d) to define a governmental plan for purposes other than the special rules applicable to ITGs. However, these proposed regulations relating to ITGs would provide Indian tribal governments with guidance in determining whether an ITG plan is a governmental ITG plan or a commercial ITG plan. As discussed in the background of this preamble, under the heading ''Exemption of Governmental ITG Plans from Certain Qualified Plan Rules,'' governmental plans receive special treatment with respect to certain qualification rules. Thus, the determination of whether an ITG plan is a governmental ITG plan is essential in ensuring compliance with the qualified plan rules because an ITG must be able to ascertain which of its plans are governmental plans under section 414(d) and which of its plans must comply with the requirements for a plan that is not a governmental plan. These proposed regulations take into account comments received in response to Notices 2006–89 and 2007–67 and a number of open and direct consultations with the Indian tribal community. Those comments received from Notices 2006–89 and 2007–67 and during the consultations were considered in drafting these proposed regulations.

Determination of Governmental and Commercial Activities

As discussed earlier in the background section of this preamble, a governmental plan, as it relates to ITGs, may include a plan established and maintained by an ITG, but such a plan is a governmental plan under section 414(d) only if all of its participants are employees substantially all of whose services are in the performance of essential governmental functions (but not in the performance of commercial activities whether or not an essential governmental function). Key to determining whether a plan of an ITG is a governmental plan within the meaning of section 414(d) is the determination of the terms ''essential governmental function'' and ''commercial activity.''

These proposed regulations would use the concepts of ''governmental activity'' and ''commercial activity,'' instead of the terms ''essential governmental function'' and ''commercial activity.'' The terms ''governmental activity'' and ''commercial activity'' would apply only for purposes of the governmental plan rules under section 414(d) and not for any other purpose under the Code, including section 7871. The use of these terms is meant to provide guidance on the requirements of section 414(d) with respect to ITG plans, while maintaining flexibility and without directly impacting future guidance on section 7871.

These proposed regulations would define a governmental ITG plan as any plan that is established and maintained by an Indian tribal government, a subdivision of an Indian tribal government, or an agency or instrumentality of either, and all of its participants are employees substantially all of whose services are in the performance of governmental activities. The regulations would define a commercial ITG plan as a plan covering any ITG employees who perform substantial services in a commercial activity, such as a hotel, casino, service station, convenience store, or marina, which are examples of commercial activities that are listed in the Joint Committee on Taxation Technical Explanation to section 906 of PPA '06.[16] A plan would also be a commercial plan if it covers any individual who is not an employee of an ITG.

Governmental and Commercial Activities

Under the proposed regulations, whether a plan of an ITG is a commercial plan or a governmental plan within the meaning of section 414(d) is based in part on (1) a determination of which activities are commercial activities and (2) a determination of whether employees of the Indian tribal government covered by the plan are employees who perform substantial services in commercial activities (and are thus commercial employees).

Under the first step, the proposed regulations would provide guidance for determining whether an activity operated by an ITG is a governmental activity or a commercial activity for purposes of section 414(d). This is achieved by listing certain specific activities that are deemed to be governmental or commercial for purposes of section 414(d). Specific governmental activities would include the following: (1) Activities that are related to public infrastructure, such as the building and maintaining of public roads and buildings; (2) activities that involve providing criminal protection services to the public (such as police and fire departments) or providing civil or public administrative service (such as providing public housing and operating public schools and hospitals, as well as managing the ITG's civil service system); and (3) activities subject to a treaty or special rules that pertain to trust land ownership and use. Under the regulations, operations involving a hotel, casino, service station, convenience store, and marina would be commercial activities. As discussed above, these activities are examples that are identified as commercial activities in Notices 2006–89 and 2007–67, as well as in the Joint Committee on

Insurance Company of America, 629 F.Supp. 2d 878, 881 (E.D. Wis. 2009).

[14] *San Manuel Indian Bingo & Casino,* 475 F.3d at 1313.

[15] Id. at 1315.

[16] Joint Committee on Taxation, *Technical Explanation of H.R. 4, the ''Pension Protection Act of 2006'' as passed by the House on July 28, 2006, and considered by the Senate on August 3, 2006* (JCX–38–06), August 3, 2006, 109th Cong., 2nd Sess. 244 (2006).

Taxation Technical Explanation to section 906 of PPA '06.

In addition to listing certain specified activities, the proposed regulations would provide a facts and circumstances test for determining whether an activity is a governmental or commercial activity. The proposed regulations provide that, in making a determination of whether an activity is a governmental activity, the factors to be considered include whether—

- The activity provides a public benefit to members of the Indian tribal government (not treating the generation of profits from commercial acts as providing a public benefit); and
- The absence of one or more of the relevant factors listed for a commercial activity as provided in these proposed regulations.

The proposed regulations also provide that, in making a determination of whether an activity is a commercial activity, the factors to be considered include whether—

- The activity is a type of activity that is operated to earn a profit;
- The activity is a type of activity that is typically performed by private businesses; and
- The activity is a type of activity where the customers are substantially from outside of the Indian tribal community, including whether the activity is located or conducted outside of Indian tribal land.

These proposed regulations also provide examples illustrating the application of the facts and circumstances tests to particular activities. Some examples of activities of an Indian tribal government that are commercial might include: (1) Operating a bank for a profit, serving tribal and non-tribal customers; (2) operating a trucking business for a profit; and (3) operating a factory producing goods for sale primarily to non-tribal customers. Conversely, examples of activities of an Indian tribal government that are governmental could include: (1) A community swimming pool on tribal land used primarily by tribal members; and (2) the operation of a cultural center and a museum on tribal land.

The proposed regulations would also delegate to the Commissioner of Internal Revenue the authority to publish guidance under section 414(d) that the Commissioner determines to be necessary or appropriate with respect to determining whether a plan of an Indian tribal government is a commercial ITG plan because the tribe's employees are performing services in an activity that the Commissioner determines to be a commercial activity. Any such guidance would be published in the form of revenue rulings, notices, or other guidance published in the Internal Revenue Bulletin (see § 601.601(d)(2)).

Determination of Governmental ITG Employees

These proposed regulations would also provide rules for the second step, namely determining whether employees covered by an ITG plan are employees who perform substantially all of their services in activities that are governmental. For this purpose, the determination of whether an employee's services are for governmental or commercial activities would generally be based on the employee's assigned duties and responsibilities. In making this determination, the rules in these regulations would not require that a plan keep track of the individual hours worked by any employee or that the compensation of any particular employee be traced through the hours worked by that employee. The proposed regulations would provide that an employee whose assigned duties and responsibilities are in the performance of a governmental activity is treated as performing substantially all of his or her services in a governmental activity, and not treated as performing services for a commercial activity, even though the performance of those services for the governmental activity may temporarily involve significant time working in the commercial activity. For example, the chief financial officer (CFO) for an ITG may be expected to spend a substantial amount of time working on the financing for any casino, marina, or hotel to be built on the ITG's tribal lands, but, despite temporarily working in a commercial activity, the proposed regulations would provide that the CFO is a governmental employee of the ITG all of whose services are in that capacity.

Determination of Commercial ITG Employees

The proposed regulations set forth rules for determining an employee's assigned duties and responsibilities, and thus when his or her services are substantially in the performance of a governmental or commercial activity. The analysis would start with the location of the employee's services in relation to the activity. The regulations provide that if a commercial activity has a specific location that is identifiable and is not associated with a governmental activity, any employee performing services at the location of activity is a commercial employee. One example is a security guard whose work is providing security services at a location which is an Indian tribal casino. In the case of an employee who works at a location other than a location where a commercial activity is being performed, the result would depend on the employee's assigned duties and responsibilities.

Another key part of the analysis is who pays the employee. If an employee is on the payroll of an ITG entity that is engaged in a commercial activity, the employee's assigned duties and responsibilities are treated as being for a commercial activity and, thus, the employee is a commercial ITG employee. For example, if a cashier is on the payroll of a convenience store (which is a commercial activity) owned by an ITG, the cashier is a commercial ITG employee. However, in the case of an employee who is not on a payroll of an ITG that engages in a commercial activity, the result would depend on the employee's assigned duties and responsibilities.

Where an employee neither works at a location where a commercial activity is being performed nor is on the payroll of a commercial entity, the result would depend on the employee's assigned duties and responsibilities, taking into account the facts and circumstances. Thus, for example, a bookkeeper located in a governmental building and paid through the general payroll of the ITG would nevertheless be a commercial employee if the facts and circumstances indicate that his or her assigned duties and responsibilities are to maintain the books and records for a hotel owned and operated by an ITG.

The statutory language in section 414(d) makes it clear that a plan is not a governmental ITG plan if it covers any employee who is a commercial ITG employee. There is no de minimis exception relating to this rule under section 414(d). In light of these circumstances, an ITG may choose to use caution when covering employees in a governmental plan. If, after applying the rules, an ITG plan sponsor is not certain whether an employee is a governmental ITG or commercial ITG employee, the ITG may choose to provide coverage for the employee in its commercial ITG plan in order to ensure the preservation of the status of the governmental ITG plan. Coverage of a governmental employee in a commercial plan would not adversely affect the qualified status of the commercial plan.

Reasonable, Good Faith Interpretation

The proposed regulations provide that, in general, an ITG plan will not be treated as failing to satisfy the assignment of employee rules if the plan complies with those rules under a

standard that constitutes a reasonable, good faith interpretation of the statute, taking into account the final regulations and any other published guidance that relates to the application of section 414(d) to ITGs. The reasonable, good faith interpretation standard for the assignment of employees to governmental and commercial plans would only apply if the benefit levels between the separate governmental and commercial plans are uniform. Thus, this reasonable, good faith interpretation standard would not apply if the benefit level for employees under a plan purporting to be a governmental plan is higher than that of the benefit level under a separate plan covering employees who include commercial employees.

Assignment of Shared Employees

Under these rules, there may be cases in which an employee is transferred from one ITG employer to another. An employee may also perform substantially all of his or her services in the performance of a governmental activity and later the employee's assigned duties and responsibilities may change, so that the employee is subsequently performing substantially all of his or her duties in the performance of a commercial activity. In addition, an employee may work two separate and distinct jobs, one in a commercial activity of an ITG and another in a governmental activity of an ITG (for example, an ITG employee who works as a full-time police officer and also works at the front desk in the lobby of a hotel over the weekends). For all of these scenarios, assuming the ITG maintains separate plans for its governmental and commercial employees, the ITG should assign the employee to either plan based on prorating service credits and allocating compensation between the governmental and commercial activities.

Application of the Controlled Group Rules to ITG Plans

These proposed regulations do not address the rules under which, for purposes of sections 401, 408(k), 408(p), 410, 411, 415, and 416, all employees of all corporations that are members of a controlled group of corporations are treated as employed by a single employer for purposes of these controlled group rules. Note that, under current guidance, a reasonable, good faith interpretation standard applies with respect to governments. See Notice 89–23 (1989–1 CB 654) and Notice 96–64 (1996–2 CB 229), see § 601.601(d)(2) of this chapter.

Proposed Effective Date

The proposed regulations would apply to plan years beginning 6 months after publication of these regulations as final regulations. For plan years after the statutory effective date of the PPA '06 amendment of section 414(d) and prior to the effective date of these regulations as final regulations, a plan of an ITG would be treated as a governmental plan for purposes of section 414(d), providing that a reasonable, good faith effort is made to ensure that the plan satisfy the conditions for being a governmental plan under section 414(d), taking into account relevant guidance, including Notices 2006–89 and 2007–67. To the extent that a plan of an Indian tribal government complies with the requirements under either the notices or the proposed regulations, the plan will be treated as making a reasonable, good faith effort to satisfy the requirements of section 414(d).

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. In addition, because no collection of information is imposed on small entities, the provisions of the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply, and therefore, a Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking will be submitted to the Small Business Administration for comment on its impact on small business.

Comments and 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. The Treasury Department and the IRS specifically request comments on the clarity of the proposed rules and how they can be made easier to understand. Comments are specifically requested on whether a correction mechanism under the Employee Plans Compliance Resolution System (EPCRS), as set forth in Rev. Proc. 2008–50 (2008–35 IRB 464), see § 601.601(d)(2), might be helpful for cases in which an employee substantially all of whose services are not in the performance of a governmental activity has nevertheless inadvertently become a participant in a plan purporting to be a governmental plan. For example, assuming the various conditions for self correction have been satisfied (see section 4.09 of Rev. Proc. 2008–50, which provides that the failure must be an operational failure which occurred by mistake or oversight, even though the plan had established practices and procedure to ensure qualification, and which is promptly corrected), the plan's assets and liabilities with respect to the employee might be transferred to a similar plan covering commercial employees under which the employee would accrue benefits up to the level that would have applied if he or she had participated in that commercial plan during the period when he or she was a commercial employee. All comments will be available for public inspection and copying.

A public hearing has been scheduled for (date to be provided when proposed regulations are published), beginning at 10 a.m. in the Auditorium, Internal Revenue Building, 1111 Constitution Avenue NW., Washington, DC. Due to building security procedures, visitors must enter at the main entrance, located at 1111 Constitution Avenue NW. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted 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** portion of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments must submit written or electronic comments and an outline of the topics to be discussed and time to be devoted to each topic (signed original and eight (8) copies) by (date to be provided when proposed regulations are published). A period of 10 minutes will be allotted to each person for making comments. An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving comments has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal author of these proposed regulations is Pamela R. Kinard, Office of Division Counsel/ Associate Chief Counsel (Tax Exempt and Government Entities), Internal Revenue Service. However, personnel from other offices of the IRS and

Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read in part:

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

Par. 2. Section 1.414(d)–1 is amended by adding paragraph (g) to read as follows:

§ 1.414(d)–1 Definition of governmental plan.

* * * * *

(g) *Special rules for plans of Indian tribal governments*—(1) *Definition of governmental plan as it relates to Indian tribal governments.* For purposes of applying paragraph (a)(3) of this section, a governmental plan as it relates to an Indian tribal government is a plan that is established and maintained for its employees by an Indian tribal government, a subdivision of an Indian tribal government, or an agency or instrumentality of either (ITG), provided that the employees covered under the plan provide substantially all of their services in the performance of governmental activities as determined in paragraph (g)(6) of this section.

(2) *Definition of commercial ITG plans.* For purposes of paragraph (g) of this section, the term *commercial ITG plan* means a plan of an ITG that covers any ITG employee who is not a governmental ITG employee under paragraph (g)(8) of this section or that covers any individual who is not an employee of an ITG.

(3) *Definition of an Indian tribal government.* For purposes of this paragraph (g), the term *Indian tribal government* has the meaning set forth in section 7701(a)(40).

(4) *Definition of subdivision of an Indian tribal government.* For purposes of this paragraph (g), the term *subdivision of an Indian tribal government* has the meaning set forth in section 7871(d).

(5) *Definition of agency or instrumentality of an Indian tribal government or subdivision of an Indian tribal government.* For purposes of this paragraph (g), the term *agency or instrumentality of an Indian tribal government or subdivision of an Indian tribal government* means an entity that would be treated as an ''agency or instrumentality of a State or political subdivision of a State'' under paragraph (f) of this section if the related Indian tribal government or subdivision of an Indian tribal government were treated as a State or political subdivision of a State, respectively.

(6) *Definition of governmental activities*—(i) *In general.* The following activities are governmental activities for purposes of paragraph (g)(1) of this section:

(A) Activities that are related to the building and maintaining of public roads; public sidewalks, public buildings, and related areas, such as parking lots.

(B) Activities that are related to public sewer and drainage facilities, and related facilities such as a waste-water treatment plant.

(C) Activities relating to public works projects, such as schools and government buildings.

(D) Activities relating to public utilities, such as electricity and other power sources, including the development of newer and emerging technologies.

(E) Activities related to providing criminal protection services, such as police and fire departments, providing civil and public administrative services, such as operating and managing public housing, libraries, judiciary buildings, and administrative buildings, teaching in and managing public schools, managing and providing services at public hospitals and health clinics, operating the government's civil service system, and other related public services.

(F) Activities subject to a treaty or special rules that pertain to trust land ownership and use.

(ii) *Facts and circumstances test.* Whether any other activity is a governmental activity for purposes of section 414(d) is based on facts and circumstances. In making this determination, the facts to be considered include the following:

(A) Whether the activity provides a public benefit to members of the Indian tribal government; and

(B) Whether there is the absence of one or more of the relevant factors listed for a commercial activity as provided in paragraph (g)(7) of this section.

(iii) *Examples.* The following examples illustrate the application of this paragraph (g)(6):

Example 1. (i) *Facts.* Indian tribal government C owns and operates a community swimming pool on tribal land. Indian tribal members of Indian tribal government C may use the pool for free. Other local community members pay a fee to use the pool. Due to its location, this pool is used primarily by tribal members of Indian tribal government C.

(ii) *Conclusion.* Based on the facts and circumstances and the factors in paragraph (g)(6)(ii) of this section, the operation of the community swimming pool is a governmental activity of Indian tribal government C because it is a type of activity that is operated on a nonprofit basis and is similar to an activity that other non-tribal local governments operate for their communities. In addition, the pool is located inside tribal land and provides recreational benefits to tribal members.

Example 2. (i) *Facts.* Indian tribal government D owns and operates a cultural center and a museum on tribal land. The purpose of the cultural center and museum is to preserve and showcase items related to the culture of Indian tribal government D, including crafts and artistry. The center contains an exhibit area, a lobby and reception area, a small gift shop, a theater and various activity rooms. A variety of civic functions are held in the activity rooms. The other areas display and sell local handicraft items produced locally by members of Indian tribal government D.

(ii) *Conclusion.* Based on the facts and circumstances and the factors in paragraph (g)(6)(ii) of this section, the operation of the cultural center and museum is a governmental activity of Indian tribal government D even though the majority of its visitors are individuals who are not members of the tribe. Its purpose is to promote and display the culture of Indian tribal government D, which is a type of activity that is generally operated on a nonprofit basis (similar to municipal museums operated by public authorities) and not by private businesses. In addition, the center and museum are located inside tribal land and provide a public benefit by educating the public and preserving and highlighting the culture of the tribe.

(7) *Definition of commercial activities*—(i) *In general.* The following activities are commercial activities for purposes of paragraph (g)(2) of this section:

(A) Activities relating to the operation of a hotel.

(B) Activities relating to the operation of a casino.

(C) Activities relating to the operation of a service station.

(D) Activities relating to the operation of a convenience store.

(E) Activities relating to the operation of a marina.

(ii) *Facts and circumstances test.* Whether any other activity is a commercial activity for purposes of section 414(d) is based on facts and circumstances. In making this determination, the facts to be considered include the following:

(A) Whether the activity is a type of activity that is operated to earn a profit.

(B) Whether the activity is a type of activity that is typically performed by private businesses.

(C) Whether the activity is a type of activity where the customers are substantially from outside of the Indian tribal community, including whether the activity is located or conducted outside of Indian tribal land.

(iii) *Delegation of authority to the Commissioner.* Any activity that the Commissioner of the Internal Revenue Service determines is a commercial activity under section 414(d), in revenue rulings, notices, or other guidance published in the Internal Revenue Bulletin (see § 601.601(d)(2) of this chapter).

(iv) *Examples.* The following examples illustrate the application of this paragraph (g)(7)(ii):

Example 1. (i) *Facts.* Indian tribal government A owns and operates a recreational RV park and campground facility, serving transient non-tribal customers, primarily tourists. Other RV parks and campgrounds in the area operated by non-tribal private entities also attract the same type of customers. Very few, if any, tribal members of Indian tribal government A use this RV park and campground facility. Indian tribal government A charges a fee to customers to use the RV park and campground.

(ii) *Conclusion.* Based on the facts and circumstances and the factors in paragraph (g)(7)(ii) of this section, the operation of the recreational RV park and campground facility is a commercial activity of Indian tribal government A because it is the type of activity that is operated to earn a profit and is the type of activity that is performed by other private businesses. In addition, the facility includes customers who are substantially from outside of the Indian tribal community.

Example 2. (i) *Facts.* Indian tribal government B owns and operates a bank. This bank serves both tribal and non-tribal customers primarily living in the local area (either on or off the tribal land). No distinction is made between the services and fees provided to any customer based on whether or not he or she is a tribal member of Indian tribal government B.

(ii) *Conclusion.* Based on the facts and circumstances and the factors in paragraph (g)(7)(ii) of this section, the operation of a bank is a commercial activity of Indian tribal government B because it is the type of activity that is operated to earn a profit and is the type of activity that is performed by other private businesses.

Example 3. (i) *Facts.* Indian tribal government E entered into a lease with Company X, which is in the trucking business. The lease provides that Indian tribal government E will purchase tractors, trailers and other equipment and lease such equipment to Company X on a long-term basis.

(ii) *Conclusion.* Based on the facts and circumstances and the factors in paragraph (g)(7)(ii) of this section, the leasing transactions relate to a commercial activity of Indian tribal government E because it is the type of activity that is operated to earn a profit and is the type of activity that is performed by other private businesses.

Example 4. (i) *Facts.* Indian tribal government G operates a factory on tribal land that produces goods for sale primarily to non-tribal customers, intended to earn a profit.

(ii) *Conclusion.* Based on the facts and circumstances and the factors in paragraph (g)(7)(ii) of this section, this is a commercial activity of Indian tribal government G because the activity is operated to earn a profit and is the type of activity that is performed by private businesses. In addition, the customers are substantially from outside of the Indian tribal community. The result could be different if the factory produced goods to promote and display the culture of Indian tribal government G, even if non-tribal customers primarily purchase the goods. This could be a governmental activity, depending on the factors.

(8) *Determination of ITG employees*—(i) *Governmental and commercial ITG employees.* This paragraph (g)(8) applies to determine whether an employee is an employee substantially all of whose services are in the performance of a governmental activity of an ITG (a governmental ITG employee), or is instead an employee who renders a significant portion of his or her services in the performance of a commercial activity of an ITG (a commercial ITG employee), for purposes of this paragraph (g). As provided in paragraph (g)(8)(iv) of this section, this determination is based on the employee's assigned duties and responsibilities.

(ii) *Location of the activity.* If a commercial activity (within the meaning of paragraph (g)(7) of this section) of an ITG has a specific location that is readily identifiable and is not associated with a governmental activity, an employee performing substantial services at such a location is treated as having assigned duties and responsibilities for that commercial activity and, thus, the employee is a commercial ITG employee within the meaning of paragraph (g)(8) of this section. For example, a guard who is assigned to provide security services for an Indian tribal government at an Indian tribal casino (which is a commercial activity under paragraph (g)(7)(i)(B) of this section) is a commercial ITG employee within the meaning of paragraph (g)(8) of this section. However, where an employee is not on a payroll of an ITG that engages in a commercial activity, the result would depend on the other rules in this paragraph (g)(8).

(iii) *Payroll records.* If an employee is on the payroll of an ITG entity that is engaged in a commercial activity (within the meaning of paragraph (g)(7) of this section), the employee's assigned duties and responsibilities are being treated as for the commercial activity and, thus, the employee is a commercial ITG employee. For example, if a cashier is on the payroll of a convenience store (which is a commercial activity under paragraph (g)(7)(i)(D) of this section) owned by an ITG, the cashier is a commercial ITG employee within the meaning of paragraph (g)(8) of this section.

(iv) *Duties and responsibilities.* Subject to the specific rules in paragraph (g)(8)(ii) or (iii) of this section, whether an employee is a governmental or commercial ITG employee within the meaning of this paragraph (g)(8) is based on the employee's assigned duties and responsibilities, taking into account facts and circumstances. Thus, whether an employee is a governmental or commercial ITG employee depends on whether the facts and circumstances indicate that the employee's assigned duties and responsibilities are substantially in the performance of a governmental or commercial activity. Thus, for example, a bookkeeper located in a governmental building and on the payroll of the general ITG government would nevertheless be a commercial employee if the facts and circumstances indicate that his or her assigned duties and responsibilities are to maintain the books and records for the hotel owned and operated by an ITG. However, an employee whose assigned duties and responsibilities are in the performance of a governmental activity, based on all the facts and circumstances, in accordance with the standards set forth in this paragraph (g)(8), is not treated as performing services for a commercial activity, even if the performance of services for the governmental activity may temporarily involve significant time working in a commercial activity in furtherance of the employee's duties and responsibilities for the governmental activity. For example, although, over a six-month period, the chief financial officer (CFO) for an ITG may spend a substantial amount of time working on the financing for a casino to be built on the ITG's tribal lands, the CFO would not be a commercial employee within the meaning of this paragraph (g)(8) because the CFO's duties and responsibilities are for a governmental activity.

(v) *Reasonable, good faith interpretation.* Except as provided in paragraph (g)(8)(ii) and (iii) of this section, an ITG plan will not be treated as failing to satisfy the rules in this paragraph (g)(8) if it complies with those rules under a standard that

constitutes a reasonable, good faith interpretation of the statute, taking into account the rules in this paragraph (g) and any other published guidance that relates to the application of section 414(d) to ITGs. However, this paragraph (g)(8)(v) applies with respect to the assignment of employees to governmental and commercial plans only if the benefit levels provided by the separate governmental and commercial plans are uniform. Thus, this paragraph (g)(8)(v) would not apply if the benefit level for employees under a plan purported to be a governmental plan is higher than that provided under a separate plan which covers commercial ITG employees.

(vi) *Examples.* The following examples further illustrate the application of this paragraph (g)(8):

Example 1. (i) *Facts.* Employee A, who is an attorney, works at the Attorney General's office of Indian tribal government B. Employee A's job location is in a government office building on tribal lands. The assigned duties and responsibilities of Employee A are principally to review the operations of marina boat operators to ensure that they comply with tribal rules and regulations as applicable to marina boat operators. Employee A provides some services for the marina, such as speaking at conferences or meetings with marina boat operators. Employee A's area of expertise is contract law.

(ii) *Conclusion.* Based on the facts and circumstances and the factors in paragraph (g)(8)(ii) through (iv) of this section, Employee A is a governmental ITG employee within the meaning of this paragraph (g)(8). Employee A primarily performs services for Indian tribal government B at a government building which is a governmental location and Employee A is on the payroll of Indian tribal government B. In addition, Employee A's assigned duties and responsibilities are primarily to provide government oversight services for Indian tribal government B.

Example 2. (i) *Facts.* Employee C is a police officer providing services for Indian tribal government D. Employee C's job location is the tribal police station located in a government building on tribal lands. The assigned duties and responsibilities of Employee C indicate that Employee C is expected to maintain public order, detect crime, and apprehend offenders on tribal lands of Indian tribal government D. Occasionally, while on patrol, Employee C must go to the casino operated by Indian tribal government D to restore order relating to a disturbance. Employee C's area of expertise is in general law enforcement.

(ii) *Conclusion.* Based on the facts and circumstances and the factors in paragraph (g)(8)(ii) through (iv) of this section, Employee C is a governmental ITG employee within the meaning of this paragraph (g)(8). Employee C primarily performs services for Indian tribal government D at either a government building or while on patrol, even though Employee C's patrol duties include providing law enforcement services at the casino, which is a commercial activity under paragraph (g)(7)(i)(B) of this section. In addition, the assigned duties and responsibilities of Employee C, as well as Employee C's area of expertise, relate to general law enforcement and do not substantially relate to a commercial activity.

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DEPARTMENT OF THE TREASURY

Alcohol and Tobacco Tax and Trade Bureau

27 CFR Part 9

[Docket No. TTB–2011–0009; Notice No. 123]

RIN 1513–AB67

Proposed Establishment of the Middleburg Virginia Viticultural Area

AGENCY: Alcohol and Tobacco Tax and Trade Bureau, Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Alcohol and Tobacco Tax and Trade Bureau (TTB) proposes to establish the approximately 198-square mile ''Middleburg Virginia'' viticultural area in Loudoun and Fauquier Counties in northern Virginia. TTB designates viticultural areas to allow vintners to better describe the origin of their wines and to allow consumers to better identify wines they may purchase. TTB invites comments on this proposed addition to its regulations.

DATES: TTB must receive written comments on or before January 9, 2012.

ADDRESSES: You may send comments on this notice to one of the following addresses:

- *http://www.regulations.gov* (via the online comment form for this notice as posted within Docket No. TTB–2011–0009 at ''Regulations.gov,'' the Federal e-rulemaking portal);
- *U.S. Mail:* Director, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, P.O. Box 14412, Washington, DC 20044–4412; or
- *Hand delivery/courier in lieu of mail:* Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street NW., Suite 200–E, Washington, DC 20005.

See the Public Participation section of this notice for specific instructions and requirements for submitting comments, and for information on how to request a public hearing.

You may view copies of this notice, selected supporting materials, and any comments TTB receives about this proposal at *http://www.regulations.gov* within Docket No. TTB–2011–0009. A direct link to this docket is posted on the TTB Web site at *http://www.ttb.gov/wine/wine_rulemaking.shtml* under Notice No. 123. You also may view copies of this notice, all related petitions, maps or other supporting materials, and any comments TTB receives about this proposal by appointment at the TTB Information Resource Center, 1310 G Street NW., Washington, DC 20005. Please call 202–453–2270 to make an appointment.

FOR FURTHER INFORMATION CONTACT: Elisabeth C. Kann, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street NW., Box 12, Washington, DC 20005; *phone* 202–453–1039, ext. 002.

SUPPLEMENTARY INFORMATION:

Background on Viticultural Areas

TTB Authority

Section 105(e) of the Federal Alcohol Administration Act (FAA Act), 27 U.S.C. 205(e), authorizes the Secretary of the Treasury to prescribe regulations for the labeling of wine, distilled spirits, and malt beverages. The FAA Act requires that these regulations should, among other things, prohibit consumer deception and the use of misleading statements on labels, and ensure that labels provide the consumer with adequate information as to the identity and quality of the product. The Alcohol and Tobacco Tax and Trade Bureau (TTB) administers the regulations promulgated under the FAA Act.

Part 4 of the TTB regulations (27 CFR part 4) allows the establishment of definitive viticultural areas and the use of their names as appellations of origin on wine labels and in wine advertisements. Part 9 of the TTB regulations (27 CFR part 9) sets forth standards for the preparation and submission of petitions for the establishment or modification of American viticultural areas and lists the approved American viticultural areas.

Definition

Section 4.25(e)(1)(i) of the TTB regulations (27 CFR 4.25(e)(1)(i)) defines a viticultural area for American wine as a delimited grape-growing region having distinguishing features as described in part 9 of the regulations and a name and a delineated boundary as established in part 9 of the regulations. These designations allow vintners and consumers to attribute a given quality, reputation, or other characteristic of a wine made from grapes grown in an area to its geographic origin. The establishment of viticultural areas allows vintners to describe more accurately the origin of their wines to

consumers and helps consumers to identify wines they may purchase. Establishment of a viticultural area is neither an approval nor an endorsement by TTB of the wine produced in that area.

Requirements

Section 4.25(e)(2) of the TTB regulations outlines the procedure for proposing an American viticultural area and provides that any interested party may petition TTB to establish a grape-growing region as a viticultural area. Section 9.12 of the TTB regulations (27 CFR 9.12) prescribes standards for petitions for the establishment or modification of American viticultural areas. Such petitions must include the following:

- Evidence that the area within the proposed viticultural area boundary is nationally or locally known by the viticultural area name specified in the petition;
- An explanation of the basis for defining the boundary of the proposed viticultural area;
- A narrative description of the features of the proposed viticultural area that affect viticulture, such as climate, geology, soils, physical features, and elevation, that make it distinctive and distinguish it from adjacent areas outside the proposed viticultural area boundary;
- A copy of the appropriate United States Geological Survey (USGS) map(s) showing the location of the proposed viticultural area, with the boundary of the proposed viticultural area clearly drawn thereon; and
- A detailed narrative description of the proposed viticultural area boundary based on USGS map markings.

Middleburg Virginia Petition

In August 2008, TTB first received a petition from Rachel E. Martin, executive vice president of Boxwood Winery in Middleburg, Virginia, proposing the establishment of the ''Middleburg Virginia'' American viticultural area in portions of Loudoun and Fauquier Counties in northern Virginia. The petition states that the proposed viticultural area derives its name from the Town of Middleburg, Virginia, and it is bounded by the Potomac River to the north and by mountains to the east, south, and west. The 2008 petition notes that the proposed viticultural area covers approximately 190-square miles (121,600 acres) and contains 229 acres of commercial vineyards and 12 wineries.

In July 2009, Ms. Martin submitted to TTB a modification to the proposed Middleburg Virginia viticultural area boundary line in order to include several additional vineyards within the proposed area. The modification increased the proposed viticultural area by 1,920 acres in the Burnt Mill Run area, east of Zulla, on the USGS Rectortown map. According to the petitioner, the additional acreage has the same distinguishing features as the originally proposed viticultural area. With the petitioner's modified boundary line, the proposed Middleburg Virginia viticultural area contains 251 acres of commercial grape growing in 10 vineyards and 14 wineries. With the petitioner's agreement, TTB also made several small modifications to the originally-proposed boundary line in order to better match the provided maps with the petition's narrative boundary description. These changes were made in the vicinity of the town of Marshall and Little Cobbler Mountain and then near the hamlet of Airmont along Route 734. TTB estimates that the proposed Middleburg Virginia viticultural area, as described in below, covers approximately 198-square miles (or 126,720 acres). TTB also notes that the proposed viticultural area does not overlap or otherwise affect any established or proposed American viticultural area.

Unless otherwise noted, all information and data contained in the below sections are from the petition for the proposed Middleburg Virginia viticultural area and its supporting exhibits.

Name Evidence

The Town of Middleburg is located in southern Loudoun County along U.S. Route 50, to the immediate north of Fauquier County and to the west of Washington, DC, according to maps submitted with the petition. The Town of Middleburg was established in 1787 by Leven Powell, who was a soldier and statesman (''Colonel John Leven Powell Returns to Middleburg,'' Audrey Windsor Bergner, Middleburg Press, 1995). Originally named ''Chinn's Crossroads'' after Joseph Chinn, Lt. Col. Powell renamed the town Middleburg, most likely because it was the midpoint on the trade route between the seaport of Alexandria, Virginia, and inland Winchester, Virginia (*ibid.*).

The petitioner submitted several documents as evidence of the Middleburg name and its association with the proposed viticultural area. In one magazine, the Middleburg area is cited as an internationally renowned equestrian center (''The Chronicle of the Horse,'' June 20, 2008). In addition, a June 2011 article from Washingtonian Magazine that was submitted by the petitioner as a supplemental exhibit features the Middleburg region in an article entitled ''Best of Middleburg,'' which includes a ''Grape Adventures'' section that highlights some of the wineries located within the proposed Middleburg Virginia viticultural area (''Best of Middleburg—Grape Adventures,'' Lydia Strohl, Washingtonian Magazine, June 2011). Further, two local monthly newspapers for the Middleburg area, Middleburg Eccentric and Middleburg Life, contain various news articles, event listings, advertisements, and real estate listings for locations within the proposed Middleburg Virginia viticultural area.

Tourism guides for the region also contain references to places throughout the proposed Middleburg Virginia viticultural area. One visitors' guide contains information about special events, day trips, lodging, dining, and shopping in the greater Middleburg area, which includes areas outside the Town of Middleburg that are located within the proposed viticultural area (''Visitor's Guide to Middleburg, Virginia,'' revised in 2006). Another visitor's guide for the Middleburg region contains photographs of historical buildings, touring information, and a map of the Middleburg area (''Destination Middleburg—A Walking Tour into the Past,'' Middleburg Beautification and Preservation, Inc., October 2001). TTB adds that the official tourism Web site for the Commonwealth of Virginia lists a variety of places to visit, dine, and stay that are located throughout the proposed Middleburg Virginia viticultural area under its listing for ''Middleburg'' (available at *http://www.virginia.org/Cities/Middleburg/*).

Boundary Evidence

As noted above, the proposed Middleburg Virginia viticultural area is located entirely within the Commonwealth of Virginia in portions of Loudoun and Fauquier Counties. The USGS maps show that the shared Loudoun-Fauquier County boundary line runs west-northwest to east-southeast through the proposed viticultural area, south of the Town of Middleburg. The Potomac River, which separates Maryland from Virginia, forms the northern portion of the proposed viticultural area's boundary line. The proposed eastern, southern, and western portions of the boundary line are based on geographical features that mark the transition from wooded, rolling hills with many creeks to more mountainous areas, specifically, Catoctin and Bull Run Mountains to the east, Watery,

Swains, Little Cobbler, and Hardscrabble Mountains to the south, and the Blue Ridge Mountains to the west. The proposed boundary line uses rivers, creeks, roads, elevation points, a national park boundary line, and other points shown on the USGS maps.

Distinguishing Features

The distinguishing features of the proposed Middleburg Virginia viticultural area are its climate, topography, geology, and soils.

Climate

The geographical location and terrain of the proposed Middleburg Virginia viticultural area result in a unique microclimate within the larger northern Virginia region. Climatic data for the 2005 and 2006 average growing seasons (April 1 to October 31) for the proposed viticultural area distinguish it from the surrounding regions (data compiled by the petitioner from the National Oceanic and Atmospheric Administration, U.S. Meteorological Department, and Weather Underground, *http://www.wunderground.com*). The data are summarized in the below table.

Area/location relative to Middleburg	Degree days [1] (difference from Middleburg)	Maximum temperature	Minimum temperature	Average total precipitation	Wind speed average
	Units	°F	°F	Inches	mph
Proposed Middleburg AVA	3,568	83.43	48.2	25.55	2.25
Hagerstown, MD (north)	3,412 (156 less)	86	38.5	16.60	6.5
Winchester, VA (west)	3,594 (26 more)	86	41	19.92	3.5
Culpeper, VA (south)	3,758 (190 more)	85	42	21.03	1.5
Leesburg, VA (east-southeast)	3,957 (389 more)	91.09	45.6	18.78	3.0
Dulles, VA (east)	3,717 (149 more)	89.85	43.4	30.38	6.0
Manassas, VA (southeast)	3,688 (120 more)	88.8	42.2	17.36	2.6

[1] In the Winkler climate classification system, heat accumulation during the grape-growing season measured in growing degree days defines climatic regions (''General Viticulture,'' by A.J. Winkler, J.A. Cook, W.M. Kliewer, and L.A. Lider, University of California Press, 1974, pp. 61–64). One degree day accumulates for each degree Fahrenheit that a day's mean temperature is above 50 degrees, the minimum temperature required for grapevine growth.

As shown by the maximum and minimum temperatures in the above table, the proposed Middleburg Virginia viticultural area has both cooler highs and warmer lows than the surrounding regions during the growing season. As a result, the proposed viticultural area has a more moderated growing season climate than the surrounding areas. TTB notes that the moderated growing season temperatures contribute to developing consistent grape growth and achieving maturity for harvest before the onset of freezing temperatures. The proposed Middleburg Virginia viticultural area is generally cooler than the surrounding areas in Virginia as evidenced by its lower number of growing degree days, according to the above table.

The table also shows that the average total precipitation for the proposed Middleburg Virginia viticultural area growing season is 25.55 inches, which is greater than the growing season precipitation totals for the surrounding Hagerstown, Winchester, Culpeper, Leesburg, Dulles, and Manassas areas, at 16.60, 19.92, 21.03, 18.78, 30.38, and 17.36 inches, respectively. Based on the data in the table, the Middleburg Virginia viticultural area receives significantly more growing season precipitation than the surrounding areas except for the Dulles area the east, which receives almost 5 inches more precipitation during the growing season.

The table further shows that the wind speed average for the proposed Middleburg Virginia viticultural area is 2.25 miles per hour (mph), which is significantly less than the wind speed averages for the surrounding Hagerstown, Winchester, Leesburg, Dulles, and Manassas areas, at 6.5, 3.5, 3.0, 6.0, and 2.6 mph, respectively (although it is greater than the wind speed average for the Culpeper area to the south, at 1.5 mph). The moderate winds in the proposed viticultural area, which consist of gentle western breezes from the Ashby Gap in the Blue Ridge Mountains, dissipate the morning fog, lessen the effect of frost, and reduce mildew during the growing season.

Topography

The terrain of the proposed Middleburg Virginia viticultural area generally contains rolling hills, woods, and many creeks. It is located within the Blue Ridge Anticlinorium, between the Blue Ridge Mountains to the west and the Catoctin and Bull Run Mountains to the east. As shown on the USGS maps, elevations within the proposed viticultural area range from 220 feet (along the Potomac River shoreline, which forms the northern portion of the proposed boundary line) to 1,470 feet (at the peak of Naked Mountain in the southwest corner of the proposed viticultural area). According to the USGS maps, the southern portion of the proposed viticultural area trends southeast to southwest toward the foothills of the Blue Ridge Mountains and gradually gains in elevation.

As shown on the USGS maps submitted with the petition, the steep slopes of the 600- to 890-foot Catoctin Mountain ridge are located to the east of the proposed boundary line of the Middleburg Virginia viticultural area. The 700- to 1,370-foot Bull Run Mountains are located to the southeast, which contrast with the 450- to 550-foot gently mounded hills, rolling terrain, and spring-fed ponds and lakes within the proposed viticultural area, according to the USGS maps.

The USGS maps also show that the 900- to 1,340-foot Watery Mountains are located to the south of the boundary line of the proposed viticultural area. By contrast, the land formations within the southern portion of the proposed viticultural area are less undulating, a feature that is important for a vineyard site, according to Alex Blackburn, the certified soil scientist who compiled the soils data for the petition (see ''Soils,'' below).

The Little Cobbler, Red Oak, and Hard Scrapple Mountains, which are heavily wooded with steep slopes ranging in elevation from 800 to 1,300 feet, are located to the southwest of the proposed viticultural area. This area is not recommended for grape growing because of erosion hazards and the difficulty of cultivation along the sleep slopes of the region, according to Mr. Blackburn.

According to the USGS maps, the steep terrain and ridgelines of the 1,200- to 1,800 foot Blue Ridge Mountains are located to the west of the proposed boundary line. The higher elevations and mountainous terrain of the Blue

Ridge Mountains contrast with the lower elevation, rolling terrain within the proposed viticultural area, as shown on the USGS maps.

The Potomac River is immediately to the north of the northern portion of the proposed boundary line, flowing eastward into the Chesapeake Bay, as indicated on the USGS maps. North of the Potomac River, the terrain in Maryland is similar to that of the proposed viticultural area.

Geology

A geology map submitted with the petition shows that the proposed Middleburg Virginia viticultural area is underlain predominantly by fractured granite and gneiss bedrock with scattered, small greenstone dykes (''Middleburg Virginia AVA Geology and Soil Association Map,'' Loudoun County Department of Building and Development, National Resources Division, and the Fauquier County GIS Department, undated). According to the Mr. Blackburn, the granite and gneiss bedrock underlying the proposed Middleburg Virginia viticultural area produce soils that are generally lower in natural fertility and water availability, which reduces problems related to vine vigor and produces better fruit quality. The boundary line of the proposed Middleburg Virginia viticultural area largely follows the distinctive geology of the area, which contrasts to the geology of the surrounding regions.

The Potomac River and Maryland are located to the north of the proposed Middleburg Virginia viticultural area. In Maryland, the intrusions of greenstone resembling Catoctin greenstone are more numerous than those in the granites and gneisses in the proposed viticultural area. The greenstone intrusions to the north are so numerous that they more closely resemble the Catoctin greenstone formation that is located to the east, southeast, and west of the proposed viticultural area.

The regions to the east of the proposed Middleburg Virginia viticultural area are dominated by the Catoctin Formation, which consists of mostly greenstone and charnokytes, and also some acidic quartzite. The Catoctin Formation continues to the Antietam Formation, which underlies the Bull Run Mountains. To the southeast of the proposed viticultural area, the bedrock consists of schist and phylites (ibid.). An area of the same granite and gneiss bedrock formations as those within the proposed viticultural area lies to the southwest of the proposed boundary line, although those areas are at higher elevations and are not well-suited for grape growing.

To the west of the proposed Middleburg Virginia viticultural area, granites and gneisses continue to units of the Catoctin Formation, both of which form the Blue Ridge Mountains. The Ridge and Valley province, consisting of folded sedimentary rocks, begins on the western side of the Blue Ridge Mountains.

Soils

The soils evidence in the petition was documented by Mr. Blackburn, with contributions from Jim Sawyer, Head Soil Specialist, Fauquier County, Virginia, and Frederick M. Garst, GIS Specialist, USDA–NRCS, Harrisonburg, Virginia. The table below, which is based on that documentation, compares the extent of the dominant soils of the proposed Middleburg Virginia viticultural area both within and outside of the proposed viticultural area.

Soil series	Percentage within the proposed viticultural area	Percentage in the areas around the proposed viticultural area
Purcellville, Tankerville, and Middleburg	38.0	22.8
Tankerville and Philomont	24.0	1.2
Mongle, Codorus, and Hatboro	13.0	5.4
Swampoodle and Purcellville	11.0	3.4
Eubanks	6.5	6.0
Cardiff and Glenelg	3.0	2.9
Penn, Nestoria, and Manassas	2.5	0.6

As indicated in the above table and in a map included with the petition, the Purcellville-Tankerville-Middleburg and the Tankerville-Philomont soil associations are the dominant soil associations in the proposed viticultural area. These soils formed in the granite and gneiss bedrock of the proposed viticultural area, with some occasional greenstone dyke. Messrs. Sawyer and Garst noted that the dominant soil characteristics and prevalent geological properties distinguish the proposed Middleburg Virginia viticultural area from the surrounding areas.

The Purcellville soils are very deep and well-drained, with moderate available water capacity, or water available to plants. Tankerville soils are moderately deep and well-drained to excessively drained, with a lower available water capacity than Purcellville soils. Philomont soils, formed in relatively coarser granite than that in which Purcellville and Tankerville soils formed, are very deep and well-drained, with low available water capacity. Compared to the surrounding areas, the soils in the proposed viticultural area are generally lower in natural fertility and in available water capacity. According to Mr. Blackburn, these four soils are among the best in the Blue Ridge Physiographic Province for fruit production, and grapevines grown in these soils have better quality fruit with few vigor problems. However, vineyard blocks containing these soils must be sited on specific landforms with good natural drainage that are not easily erodible or susceptible to frost.

The soils of lesser extent in the proposed Middleburg Virginia viticultural area include Mongle, Codorus, and Hatboro soils (13 percent of the total land area); Swampoodle and Purcellville soils (11 percent); and Eubanks soils (6.5 percent). The Mongle, Codorus, Hatboro, and Swampoodle soils are moderately well-drained to very poorly drained and are located in flood plains or other low-lying areas that are generally unsuited to grape production. The Eubanks soils are very deep and well-drained, with moderate available water capacity.

Most of the soils outside of the proposed viticultural area are different because they formed in rocks that are different from those in the proposed Middleburg Virginia viticultural area. To the north, in Maryland, the soils formed in bedrock with increased greenstone intrusions. The greenstone intrusions affect soil fertility and

available water capacity, which, in turn, affects vineyard management, vine growth, and fruit quality. To the south, toward and through Culpepper County, the soils formed in granite and gneisses, with fewer greenstone intrusions than in the proposed viticultural area. The soils in that region more closely resemble Philomont soils than the Purcellville, Tankerville, and Swampoodle soils in the proposed viticultural area. To the east, the dominant Airmont, Weverton, and Stumptown soils formed in the mainly quartzite Antietam Formation, which is a continuation of the Catoctin Formation. To the west, the soils formed in granite and gneiss, which continue as units of the Catoctin Formation.

Thus, as compared to the soils in the proposed viticultural area, the soils in the surrounding areas would require different vineyard management, produce different yields, and result in different vine growth and fruit quality.

TTB Determination

TTB concludes that the petition to establish the approximately 190-square mile ''Middleburg Virginia'' viticultural area merits consideration and public comment as invited in this notice.

Boundary Description

See the narrative boundary description of the petitioned-for viticultural area in the proposed regulatory text published at the end of this notice.

Maps

The petitioner provided the required maps, and TTB lists them below in the proposed regulatory text.

Impact on Current Wine Labels

Part 4 of the TTB regulations prohibits any label reference on a wine that indicates or implies an origin other than the wine's true place of origin. If TTB establishes this proposed viticultural area, its name, ''Middleburg Virginia,'' will be recognized as a name of viticultural significance under 27 CFR 4.39(i)(3). The text of the proposed regulation clarifies this point. Consequently, wine bottlers using ''Middleburg Virginia'' in a brand name, including a trademark, or in another label reference as to the origin of the wine, will have to ensure that the product is eligible to use the viticultural area's name as an appellation of origin.

On the other hand, TTB does not believe that any single part of the proposed viticultural area name standing alone, that is, ''Middleburg'' or ''Virginia,'' would have viticultural significance in relation to this proposed viticultural area because: (1) According to Geographic Names Information Service, the ''Middleburg'' area name refers to 73 locations in 14 States, including 22 populated places within the United States, so TTB believes that a determination of ''Middleburg'' as a term of viticultural significance could lead to consumer and industry confusion and should be avoided; and (2) ''Virginia,'' standing alone, is locally and nationally known as referring to the Commonwealth of Virginia, which is already a term of viticultural significance as a state-wide appellation of origin under 27 CFR 4.25(a)(1)(ii), which provides that a State is an American appellation of origin, and 27 CFR 4.39(i)(3), which states that ''[a] name has viticultural significance when it is the name of a state * * *.'' Therefore, the proposed part 9 regulatory text set forth in this document specifies only ''Middleburg Virginia'' as a term of viticultural significance for purposes of part 4 of the TTB regulations.

For a wine to be eligible to use a viticultural area name as an appellation of origin or a term of viticultural significance in a brand name, at least 85 percent of the wine must be derived from grapes grown within the area represented by that name or term, and the wine must meet the other conditions listed in 27 CFR 4.25(e)(3). If the wine is not eligible to use the viticultural area name as an appellation of origin and that name or other term of viticultural significance appears in the brand name, then the label is not in compliance and the bottler must change the brand name and obtain approval of a new label. Similarly, if the viticultural area name or other term of viticultural significance appears in another reference on the label in a misleading manner, the bottler would have to obtain approval of a new label.

Different rules apply if a wine has a brand name containing a viticultural area name or other term of viticultural significance that was used as a brand name on a label approved before July 7, 1986. See 27 CFR 4.39(i)(2) for details.

Public Participation

Comments Invited

TTB invites comments from interested members of the public on whether TTB should establish the proposed viticultural area. TTB is also interested in receiving comments on the sufficiency and accuracy of the name, boundary, climatic, and other required information submitted in support of the petition. Please provide any available specific information in support of your comments.

Because of the potential impact of the establishment of the proposed Middleburg Virginia viticultural area on wine labels that include the words ''Middleburg Virginia'' as discussed above under Impact on Current Wine Labels, TTB is also particularly interested in comments regarding whether there will be a conflict between the proposed viticulturally significant terms and currently used brand names. If a commenter believes that a conflict will arise, the comment should describe the nature of that conflict, including any anticipated negative economic impact that approval of the proposed viticultural area will have on an existing viticultural enterprise. TTB is also interested in receiving suggestions for ways to avoid conflicts, for example by adopting a modified or different name for the viticultural area.

Submitting Comments

You may submit comments on this notice by using one of the following three methods:

- *Federal e-Rulemaking Portal:* You may send comments via the online comment form linked to this notice in Docket No. TTB–2011–0009 on ''Regulations.gov,'' the Federal e-rulemaking portal, at *http://www.regulations.gov.* A link to the docket is available under Notice No. 123 on the TTB Web site at *http://www.ttb.gov/wine/wine-rulemaking.shtml.* Supplemental files may be attached to comments submitted via Regulations.gov. For information on how to use Regulations.gov, click on the site's Help or FAQ tabs.
- *U.S. Mail:* You may send comments via postal mail to the Director, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, P.O. Box 14412, Washington, DC 20044–4412.
- *Hand Delivery/Courier:* You may hand-carry your comments or have them hand-carried to the Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street NW., Suite 200–E, Washington, DC 20005.

Please submit your comments by the closing date shown above in this notice. Your comments must reference Notice No. 123 and include your name and mailing address. Your comments also must be made in English, be legible, and be written in language acceptable for public disclosure. TTB does not acknowledge receipt of comments, and TTB considers all comments as originals.

If you are commenting on behalf of an association, business, or other entity, your comment must include the entity's name as well as your name and position

title. If you comment via Regulations.gov, please include the entity's name in the ''Organization'' blank of the comment form. If you comment via postal mail or hand delivery/courier, please submit your entity's comment on letterhead.

You may also write to the Administrator before the comment closing date to ask for a public hearing. The Administrator reserves the right to determine whether to hold a public hearing.

Confidentiality

All submitted comments and attachments are part of the public record and subject to disclosure. Do not enclose any material in your comments that you consider to be confidential or that is inappropriate for public disclosure.

Public Disclosure

On the Federal e-rulemaking portal, Regulations.gov, TTB will post, and the public may view, copies of this notice, selected supporting materials, and any electronic or mailed comments TTB receives about this proposal. A direct link to the Regulations.gov docket containing this notice and the posted comments received on it is available on the TTB Web site at *http://www.ttb.gov/wine/wine-rulemaking.shtml* under Notice No. 123. You may also reach the docket containing this notice and the posted comments received on it through the Regulations.gov search page at *http://www.regulations.gov.* All posted comments will display the commenter's name, organization (if any), city, and State, and, in the case of mailed comments, all address information, including email addresses. TTB may omit voluminous attachments or material that TTB considers unsuitable for posting.

You and other members of the public may view copies of this notice, all related petitions, maps and other supporting materials, and any electronic or mailed comments TTB receives about this proposal by appointment at the TTB Information Resource Center, 1310 G Street NW., Washington, DC 20005. You may also obtain copies at 20 cents per 8.5- × 11-inch page. Contact TTB's information specialist at the above address or by telephone at (202) 453–2270 to schedule an appointment or to request copies of comments or other materials.

Regulatory Flexibility Act

TTB certifies that this proposed regulation, if adopted, would not have a significant economic impact on a substantial number of small entities. The proposed regulation imposes no new reporting, recordkeeping, or other administrative requirement. Any benefit derived from the use of a viticultural area name would be the result of a proprietor's efforts and consumer acceptance of wines from that area. Therefore, no regulatory flexibility analysis is required.

Executive Order 12866

This proposed rule is not a significant regulatory action as defined by Executive Order 12866. Therefore, it requires no regulatory assessment.

Drafting Information

Elisabeth C. Kann of the Regulations and Rulings Division drafted this notice.

List of Subjects in 27 CFR Part 9

Wine.

Proposed Regulatory Amendment

For the reasons discussed in the preamble, TTB proposes to amend title 27, chapter I, part 9, Code of Federal Regulations, as follows:

PART 9—AMERICAN VITICULTURAL AREAS

1. The authority citation for part 9 continues to read as follows:

Authority: 27 U.S.C. 205.

2. Subpart C is amended by adding § 9.____ to read as follows:

Subpart C—Approved American Viticultural Areas

§ 9. Middleburg Virginia.

(a) *Name.* The name of the viticultural area described in this section is ''Middleburg Virginia''. For purposes of part 4 of this chapter, ''Middleburg Virginia'' is a term of viticultural significance.

(b) *Approved maps.* The 13 United States Geological Survey (scale 1:24,000) topographic maps used to determine the boundary of the Middleburg Virginia viticultural area are titled:

(1) Harpers Ferry Quadrangle, West Virginia-Virginia-Maryland, 1996;

(2) Point of Rocks Quadrangle, Maryland-Virginia, 1970, photoinspected 1981;

(3) Waterford Quadrangle, Virginia-Maryland, 1970, photorevised 1984;

(4) Purcellville Quadrangle, Virginia-Loudoun Co., 1970, photorevised 1984;

(5) Lincoln Quadrangle, Virginia-Loudoun Co., 1970, photoinspected 1981;

(6) Middleburg Quadrangle, Virginia, 1968, photorevised 1978, photoinspected 1981;

(7) Rectortown Quadrangle, Virginia, 1970, photoinspected 1981;

(8) Marshall Quadrangle, Virginia-Fauquier Co., 1970, photorevised 1983;

(9) Orlean Quadrangle, Virginia, 1970, photorevised 1983;

(10) Upperville Quadrangle, Virginia, 1970, photorevised 1983;

(11) Linden Quadrangle, Virginia, 1994;

(12) Ashby Gap Quadrangle, Virginia, 1970, photorevised 1978, photoinspected 1981; and

(13) Bluemont Quadrangle, Virginia, 1970, photorevised 1979; photoinspected 1981.

(c) *Boundary.* The Middleburg Virginia viticultural area is located in Loudoun and Fauquier Counties, Virginia. The boundary of the Middleburg Virginia viticultural area is as described below:

(1) The beginning point is on the Harpers Ferry map at the intersection of the easternmost boundary line of the Harpers Ferry National Historical Park and the south bank of the Potomac River in Loudoun County, Virginia. From the beginning point, follow the south bank of the Potomac River easterly (downstream) for approximately 8.2 miles, crossing onto the Point of Rocks map, to the mouth of Catoctin Creek; then

(2) Proceed southwesterly (upstream) along the meandering Catoctin Creek for approximately 4 miles to State Route 663 (locally known as Taylorstown Road) at Taylorstown; then

(3) Proceed easterly on State Route 663 for approximately 0.1 mile to State Route 665 (locally known as Loyalty Road) in Taylorstown; then

(4) Proceed southerly on State Route 665 for approximately 5.4 miles, crossing onto the Waterford map, to State Route 662 on the south side of Waterford; then

(5) Proceed southerly on State Route 662 for approximately 2.5 miles to State Route 9 (locally known as Charles Town Pike) near Paeonian Springs; then

(6) Proceed southerly on State Route 9 (Charles Town Pike) for approximately 0.7 mile, crossing over State Route 7 (locally known as Harry Byrd Highway), to State Business Route 7 (locally known as E. Colonial Highway); then

(7) Proceed westerly on State Business Route 7 (E. Colonial Highway) for approximately 0.4 mile to the road's intersection with the continuation of State Route 662 (locally known as Canby Road); then

(8) Proceed southerly on State Route 662 (Canby Road) for approximately 4 miles, crossing over the southwest corner of the Purcellville map onto the Lincoln map, to State Route 729; then

(9) Proceed southwesterly on State Route 729 for approximately 2.8 miles to the State Route 729 bridge at North Fork Creek; then

(10) Proceed southeasterly (downstream) along the meandering North Fork Creek for approximately 4 miles to the confluence of North Fork Creek with Goose Creek; then

(11) Proceed southwesterly (upstream) along the meandering Goose Creek for approximately 5.6 miles to State Route 734 at Carters Bridge; then

(12) Proceed southeasterly on State Route 734 for approximately 2.4 miles, crossing onto the Middleburg map, to State Route 629; then

(13) Proceed southerly on State Route 629 for approximately 1 mile to the road's intersection with U.S. Route 50 at BM 341 at Dover, then continue in a straight line due south for approximately 150 feet to the Little River; then

(14) Proceed southwesterly (upstream) along the meandering Little River for approximately 8 miles to the State Route 626 bridge at Halfway; then

(15) Proceed northwesterly on State Route 626 for approximately 0.3 mile to State Route 706, and then continue northwesterly on State Route 706 for approximately 1.6 miles, crossing onto the Rectortown map, to Burnt Mill Run; then

(16) Proceed west-southwesterly (upstream) along Burnt Mill Run for approximately 0.4 mile to State Route 705; then

(17) Proceed south-southwesterly on State Route 705 for approximately 0.5 mile to State Route 715; then

(18) Proceed west-northwesterly on State Route 715 for approximately 0.4 mile to State Route 709 at Zulla; then

(19) Proceed south-southwesterly on State Route 709 for approximately 4.6 miles, crossing onto the Marshall map, to Interstate Highway 66 (0.6 mile south of Brookes Corner); then

(20) Proceed west-northwesterly on Interstate Highway 66 for approximately 4.0 miles, crossing onto the Orlean map, to State Route 732 (locally known as Ramey Road); then

(21) Proceed westerly on State Route 732 approximately 2 miles to State Route 731 (locally known as Ashville Road) near Ashville; then

(22) From the intersection of State Routes 732 and 731, proceed northwesterly in a straight line, crossing onto the Upperville map, to the marked 1,304-foot peak on Little Cobbler Mountain, then northerly in a straight line to the marked 1,117-foot peak on Little Cobbler Mountain, and then continue northerly in a straight line to the marked 771-foot peak near the northern end of Little Cobbler Mountain; then

(23) Proceed west in a straight line for approximately 2.7 miles to the 595-foot elevation point on State Route 724, southeast of Markham, and continue west in a straight line for approximately 3.1 miles, crossing onto the Linden map, to the point where the line meets the intersection of State Route 726 and an unnamed side road (near a cemetery), approximately 0.7 mile southwest of the intersection of State Route 726 and State Route 55 (near Belle Meade); then

(24) Proceed northeasterly along State Route 726 for approximately 0.7 mile to State Route 55; then

(25) Proceed east-northeast in a straight line for approximately 1.7 miles to the point where the line meets State Route 688 at BM 629 in Wildcat Hollow; then

(26) Proceed northerly and then northeasterly on State Route 688 for approximately 5.5 miles, crossing over and back between the Linden and Upperville maps and then continuing on the Upperville map, to the road's intersection with U.S. Route 17; then

(27) Proceed northerly on U.S. Route 17 for approximately 2.0 miles, crossing onto the Ashby Gap map, to U.S. Route 50 (just east of Paris); then

(28) Proceed east-northeasterly in a straight line for approximately 1.5 miles to the marked 797-foot elevation point located along State Route 618 at a fork in the road approximately 0.65 miles north of U.S. Route 50; then

(29) Proceed southeasterly in a straight line for approximately 0.9 mile to U.S. Route 50 at BM 625, which is located at a bridge over an unnamed branch of Panther Skin Creek; then

(30) Proceed south-southeasterly in a straight line for approximately 2.9 miles, crossing onto the Upperville map, to the intersection of State Routes 712 and 710 at Kerfoot; then

(31) Proceed southeasterly on State Route 710 for approximately 2.5 miles, crossing onto the Rectortown map, to the State Route 710 bridge over Goose Creek; then

(32) Proceed northeasterly (downstream) along the meandering Goose Creek for approximately 10.9 miles to State Route 626 at Bentons Bridge; then

(33) Proceed northwesterly on State Route 626 for approximately 4.0 miles, crossing onto the Bluemont map, to State Route 630 at Unison; then

(34) Proceed northeasterly on State Route 630 for approximately 0.75 mile to Dog Branch; then

(35) Proceed northwesterly along Dog Branch for approximately 1.75 miles to State Route 719; then

(36) Proceed north-northeasterly on State Route 719 for approximately 2 miles to State Route 734 at Airmont; then

(37) Proceed east-southeasterly on State Route 734 for approximately 0.7 mile to State Route 735; then

(38) Proceed northeasterly on State Route 735 for approximately 2 miles to State Route 725; then

(39) Proceed north-northeasterly in a straight line for approximately 4.4 miles, crossing over the northwest corner of the Lincoln map and then onto the Purcellville map, to the intersection of State Routes 711 and 690, (northwest of Purcellville); then

(40) Proceed north-northeasterly on State Route 690 for approximately 3.1 miles to State Route 9, then proceed east on State Route 9 for approximately 0.2 mile to the continuation of State Route 690, then proceed northerly on State Route 690 for approximately 5.3 miles, crossing onto the Harpers Ferry map, to the road's intersection with the 600-foot elevation line immediately south of the road's marked 592-foot elevation point (located 0.75 mile east-northeast of the radio facilities at the 1,424-foot peak of Short Hill Mountain); then

(41) Proceed northerly along the 600-foot elevation line for approximately 4 miles to the intersection of the 600-foot elevation line with the Harpers Ferry National Historical Park south boundary, approximately 0.2 mile south of the point where the Washington and Frederick Counties, Maryland, boundary line intersects with the south bank of the Potomac River; then

(42) Proceed east and north approximately 0.75 mile along the Harpers Ferry National Historical Park boundary line, returning to the south bank of the Potomac River and the beginning point.

Dated: November 3, 2011.

John J. Manfreda,

Administrator.

[FR Doc. 2011–28930 Filed 11–7–11; 8:45 am]

BILLING CODE 4810–31–P

DEPARTMENT OF THE TREASURY

Financial Crimes Enforcement Network

31 CFR Parts 1010 and 1030

RIN 1506–AB14

Anti-Money Laundering Program and Suspicious Activity Reporting Requirements for Housing Government Sponsored Enterprises

AGENCY: Financial Crimes Enforcement Network (''FinCEN''), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: FinCEN, a bureau of the Department of the Treasury (''Treasury''), is issuing proposed rules defining certain housing government sponsored enterprises as financial institutions for the purpose of requiring them to establish anti-money laundering programs and report suspicious activities pursuant to the Bank Secrecy Act. The proposal to require these organizations to establish anti-money laundering programs and report suspicious activities is intended to help prevent fraud and other financial crimes.

DATES: Written comments on this notice of proposed rulemaking (''NPRM'') must be submitted on or before January 9, 2012.

ADDRESSES: You may submit comments, identified by Regulatory Identification Number (RIN) 1506–AB14, by any of the following methods:

- *Federal E-rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. Include 1506–AB14 in the submission. Refer to Docket Number FINCEN–2011–0004.
- *Mail:* FinCEN, P.O. Box 39, Vienna, VA 22183. Include 1506–AB14 in the body of the text. Please submit comments by one method only.

Comments submitted in response to this NPRM will become a matter of public record. Therefore, you should submit only information that you wish to make publicly available.

Inspection of comments: Public comments received electronically or through the U. S. Postal Service sent in response to a notice and request for comment will be made available for public review as soon as possible on *http://www.regulations.gov.* Comments received may be physically inspected in the FinCEN reading room located in Vienna, Virginia. Reading room appointments are available weekdays (excluding holidays) between 10 a.m. and 3 p.m., by calling the Disclosure Officer at (703) 905–5034 (not a toll-free call).

FOR FURTHER INFORMATION CONTACT: The FinCEN regulatory helpline at (800) 949–2732 and select Option 6.

SUPPLEMENTARY INFORMATION:

I. Background

A. Statutory and Regulatory Provisions

The Bank Secrecy Act (''BSA'')[1] authorizes the Secretary of the Treasury (the ''Secretary'') to issue regulations requiring financial institutions to keep records and file reports that the Secretary determines ''have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, or in the conduct of intelligence or counterintelligence activities, including analysis, to protect against international terrorism.''[2] In addition, the Secretary is authorized to impose anti-money laundering (''AML'') program requirements on financial institutions.[3] The authority of the Secretary to administer the BSA has been delegated to the Director of FinCEN.[4]

The BSA defines the term ''financial institution.''[5] The term includes, in part, ''any business or agency which engages in any activity which the Secretary of the Treasury determines, by regulation, to be an activity which is similar to, related to, or a substitute for any activity in which any business described in [31 U.S.C. 5312(a)(2)(A)–(X)] is authorized to engage.''[6]

With the enactment of 31 U.S.C. 5318(g) in 1992,[7] Congress authorized the Secretary to require financial institutions to report suspicious transactions. As amended by the USA PATRIOT Act,[8] subsection (g)(1) states:

> The Secretary may require any financial institution, and any director, officer, employee, or agent of any financial institution, to report any suspicious transaction relevant to a possible violation of law or regulation.[9]

As amended by the USA PATRIOT Act, the BSA requires financial institutions to establish AML programs that include, at a minimum: (1) The development of internal policies, procedures, and controls; (2) the designation of a compliance officer; (3) an ongoing employee training program; and (4) an independent audit function to test programs.[10] When prescribing minimum standards for AML programs, FinCEN must ''consider the extent to which the requirements imposed under [the AML program requirement] are commensurate with the size, location, and activities of the financial institutions to which such regulations apply.''[11]

FinCEN has promulgated AML program and Suspicious Activity Report (''SAR'') regulations for a number of financial institutions. These financial institutions include banks, brokers or dealers in securities, mutual funds, insurance companies, futures commission merchants and introducing brokers in commodities, money services businesses, and casinos.[12]

B. FinCEN's Anti-Mortgage Fraud Initiatives

FinCEN has placed efforts to combat mortgage fraud and related criminal activity as one of its highest priorities in recent years. FinCEN's efforts have included the analysis of SARs and other data reported to FinCEN, often together with other data sets and information available to the Government, to support and inform regulatory and law enforcement investigations, proceedings and prosecutions at the Federal, State and local levels. Since 2006, FinCEN has published a broad range of information focused on mortgage fraud in order to advise on trends and patterns, and to provide indicators to help the financial industry protect itself against fraud and other financial crime.[13] Criminal activity can arise at

[1] ''Bank Secrecy Act'' is the name that has come to be applied to the Currency and Foreign Transactions Reporting Act (Titles I and II of Pub. L. 91–508), its amendments, and the other statutes referring to the subject matter of that Act. These statutes are codified at 12 U.S.C. 1829b, 12 U.S.C. 1951–1959, and 31 U.S.C. 5311–5314 and 5316–5332, and notes thereto.

[2] 31 U.S.C. 5311.

[3] 31 U.S.C. 5318(h).

[4] *See* Treasury Order 180–01 (Sept. 26, 2002).

[5] 31 U.S.C. 5312(a)(2).

[6] 31 U.S.C. 5312(a)(2)(Y).

[7] 31 U.S.C. 5318(g) was added to the BSA by section 1517 of the Annunzio-Wylie Anti-Money Laundering Act, Title XV of the Housing and Community Development Act of 1992, Public Law 102–550; it was expanded by section 403 of the Money Laundering Suppression Act of 1994 (the Money Laundering Suppression Act), Title IV of the Riegle Community Development and Regulatory Improvement Act of 1994, Public Law 103–325, to require designation of a single government recipient for reports of suspicious transactions.

[8] Public Law 107–56 sec. 352(c), 115 Stat. 322, *codified at* 31 U.S.C. 5318 note. Public Law 107–56 is the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (''USA PATRIOT Act'').

[9] 31 U.S.C. 5318(g)(1).

[10] 31 U.S.C. 5318(h).

[11] USA PATRIOT Act, Public Law 107–56 sec. 352(c), 115 Stat. 322, *codified at* 31 U.S.C. 5318 note.

[12] *See* 31 CFR 1020.210, 1020.320, 1021.210, 1021.320, 1022.210, 1022.320, 1023.210, 1023.320, 1024.210, 1024.320, 1025.210, 1025.320, 1026.210, and 1026.320.

[13] *See* Mortgage Loan Fraud Update (SARs Jan. 1–Mar. 31, 2011), June 2011, *http://www.fincen.gov/news_room/rp/files/MLF_Update_1st_Qtly_11_FINAL_508.pdf*; Mortgage Loan Fraud Update (SARs Jan. 1–Dec. 31, 2010), Mar. 2011, *http://www.fincen.gov/news_room/rp/files/MLF_Update_4th_Qtly_10_FINAL_508.pdf*; Mortgage Loan Fraud Update (SARs July 1–Sept. 30, 2010), Jan. 2011, *http://www.fincen.gov/news_room/rp/files/MLF_Update_3rd_Qtly_10_FINAL.pdf*; Mortgage Loan Fraud Update (SARs Apr. 1–June 30, 2010), Dec. 2010, *http://www.fincen.gov/news_room/rp/files/MLF_Update_2nd_Qtly_10_FINAL.pdf*; Mortgage Loan Fraud Update: SAR Filings Jan. 1–Mar. 31, 2010, *http://www.fincen.gov/news_room/rp/files/MLF_Update_1st_Qtly_10_FINAL.pdf*; Advisory to Financial Institutions on Filing Suspicious Activity Reports Regarding Home Equity

Continued

different times in the product cycle of residential mortgage related transactions, affecting a range of persons in the primary and secondary markets. In the traditional money laundering sense, criminals may attempt to invest the proceeds of illegal activity in a range of assets, including real estate, such as through direct purchase or in paying down loans.[14] The purpose of fraud, regardless of whether in conjunction with a mortgage or other real estate related transaction, is overwhelmingly for criminal profit, and the proceeds of such fraud often are laundered through one or more transactions involving financial intermediaries. The victim of mortgage fraud might be an individual losing equity in a home, or a defrauded lender or investor. Fraud may have an impact on the securitization of mortgages, potentially affecting the availability of mortgages and the cost to borrowers.

Fraud in the residential mortgage markets may occur in a variety of situations, affecting a variety of actors. Fraud may occur at the loan origination stage, involving material misrepresentations or omissions, false statements, straw buyers, false appraisals, identity theft, etc.[15] Fraud may occur in the context of loan modifications, including when unscrupulous actors seek to take advantage of homeowners struggling to meet their mortgage payments.[16] Fraud may occur in home equity conversion loans (''HECMs''), commonly known as reverse mortgages.[17] FinCEN analysis and many law enforcement investigations have revealed mortgage related fraud to be part of organized criminal activity involving multiple properties and various types of criminal activity including the foregoing.[18] Often, mortgage fraud may only be discovered after default or in the context of foreclosure proceedings, repurchase demands, collateral reviews, audits, examinations or insurance investigations.[19] FinCEN has determined, as a result of individual investigations and through its broader analyses, that criminal activity and actors in the residential mortgage market may be connected with a range of other organized criminal activity affecting a range of financial institutions.[20]

FinCEN continues to support broader Administration efforts to combat mortgage fraud and mitigate vulnerabilities to abuse. On April 6, 2009, Treasury Secretary Geithner, together with the Attorney General, Housing and Urban Development Secretary and others, announced a multi-agency crackdown targeting loan modification fraud and foreclosure rescue scams; this included a new FinCEN-led effort to ''marshal information about possible fraudulent actors, drawing upon a variety of data available to law enforcement, regulatory agencies, and the consumer protection community, for the purpose of identifying and proactively referring potential criminal targets to participating law enforcement authorities.'' [21]

In November 2009, President Obama established the Financial Fraud Enforcement Task Force (''FFETF'') to hold accountable those who helped bring about the last financial crisis, and to prevent another crisis from happening.[22] The Treasury Department and FinCEN are among the members of the Task Force.[23] FinCEN has actively participated in the FFETF's Mortgage Fraud Working Group (''MFWG''), including in the MFWG's Mortgage Fraud Summits around the country.[24] The foregoing experiences have affirmed the importance of SARs filed by depository institutions in efforts to combat mortgage fraud.

By this NPRM, FinCEN proposes AML program and SAR requirements for the Federal National Mortgage Association (''Fannie Mae''), the Federal Home Loan Mortgage Corporation (''Freddie Mac''), and the Federal Home Loan Banks (''Banks'') (collectively, the ''Housing Government Sponsored Enterprises'' or ''Housing GSEs''). FinCEN believes that the proposed regulations would augment FinCEN's initiatives in this area.[25] The Housing GSEs are involved in providing financing to the residential mortgage market and thus may be exposed to the risk of fraud, particularly when investing in whole mortgage loans. Although the respective elements of the businesses of the Banks and Fannie Mae and Freddie Mac may differ, all of them are involved in providing financing to the residential mortgage market and thus may be exposed to fraud risks. While purchasing mortgage loans, extending loans secured by mortgages and other real estate related collateral, and engaging in a variety of related financial

Conversion Mortgage Fraud Schemes, Apr. 2010, *http://www.fincen.gov/statutes_regs/guidance/pdf/fin-2010-a006.pdf*; Filing Trends in Mortgage Loan Fraud, Feb. 2009, *http://www.fincen.gov/news_room/nr/pdf/20090225a.pdf*; Mortgage Loan Fraud: an Update of Trends Based upon Analysis of Suspicious Activity Reports, Apr. 2008, *http://www.fincen.gov/news_room/rp/files/MortgageLoanFraudSARAssessment.pdf*; Suspected Money Laundering in the Residential Real Estate Industry, Apr. 2008, *http://www.fincen.gov/news_room/rp/files/MLR_Real_Estate_Industry_SAR_web.pdf*; Money Laundering in the Commercial Real Estate Industry, Dec. 2006, *http://www.fincen.gov/news_room/rp/reports/pdf/CREassessment.pdf*; Mortgage Loan Fraud: An Industry Assessment Based Upon Suspicious Activity Report Analysis, Nov. 2006, *http://www.fincen.gov/news_room/rp/reports/pdf/mortgage_fraud112006.pdf.*

[14] *See* Suspected Money Laundering in the Residential Real Estate Industry, Apr. 2008, *http://www.fincen.gov/news_room/rp/files/MLR_Real_Estate_Industry_SAR_web.pdf*; Money Laundering in the Commercial Real Estate Industry, Dec. 2006, *http://www.fincen.gov/news_room/rp/reports/pdf/CREassessment.pdf.*

[15] For a description of commonly reported fraud related to loan origination, *see, e.g.,* Mortgage Loan Fraud: An Industry Assessment Based Upon Suspicious Activity Report Analysis, Nov. 2006, *http://www.fincen.gov/news_room/rp/reports/pdf/MortgageLoanFraud.pdf.*

[16] *See* Mortgage Loan Fraud: Loan Modification and Foreclosure Rescue Scams, May 2010, *http://www.fincen.gov/news_room/rp/files/MLFLoanMODForeclosure.pdf.*

[17] *See* FinCEN Advisory FIN–2010–005, Advisory to Financial Institutions on Filing Suspicious Activity Reports Regarding Home Equity Conversion Mortgage Fraud Schemes, April 27, 2010, *http://www.fincen.gov/statutes_regs/guidance/pdf/fin-2010-a005.pdf.*

[18] *See, e.g.,* Department of Justice, Press Release, Financial Fraud Enforcement Task Force Announces Results of Broadest Mortgage Fraud Sweep in History (June 17, 2010), *http://www.justice.gov/opa/pr/2010/June/10-opa-708.html*; and speech of Attorney General Eric Holder at the Operation Stolen Dreams Press Conference (June 17, 2010) (noting participation of FinCEN), *http://www.justice.gov/ag/speeches/2010/ag-speech-100617.html.*

[19] *See, e.g.,* Mortgage Loan Fraud Update: Suspicious Activity Report Filings from July 1–September 30, 2009 (February 2010), *http://www.fincen.gov/news_room/rp/files/MLF_Update.pdf.*

[20] *See* Mortgage Loan Fraud Connections with Other Financial Crime: An Evaluation of Suspicious Activity Reports Filed by Money Services Businesses, Securities and Futures Firms, Insurance Companies and Casinos, Mar. 2009, *http://www.fincen.gov/news_room/nr/pdf/20090316.pdf.*

[21] *See http://www.treasury.gov/press-center/press-releases/Pages/tg83.aspx; see also* Treasury Department Press Release, Federal, State Partners Convene to Discuss Ongoing Anti-Fraud Efforts in Housing Markets (September 17, 2009), *http://www.treasury.gov/press-center/press-releases/Pages/tg291.aspx.*

[22] *See* Executive Order 13519 (November 17, 2009).

[23] *See* remarks of Timothy Geithner, Secretary, U.S. Department of the Treasury, on ''The Financial Fraud Enforcement Task Force'', Nov. 17, 2009, *http://www.treasury.gov/press-center/press-releases/Pages/tg408.aspx.*

[24] *See http://www.fincen.gov/fraudenftaskforce.html; http://www.justice.gov/opa/pr/2010/February/10-opa-192.html; http://www.justice.gov/opa/pr/2010/March/10-opa-316.html;* and *http://www.stopfraud.gov/news/news-04232010.html.*

[25] FinCEN recently proposed regulations that would require non-bank residential mortgage lenders and originators to establish AML programs and file SARs. If adopted, that rule would apply regulatory requirements to mortgage companies and brokers analogous to those currently applicable to banks and other financial institutions. *See* Anti-Money Laundering Program and Suspicious Activity Report Filing Requirements for Residential Mortgage Lenders and Originators, Notice of Proposed Rulemaking, 75 FR 76677 (December 9, 2010).

activities, the Housing GSEs have access to information on suspected mortgage fraud and money laundering that has proven valuable to law enforcement and regulators in the investigation and prosecution of mortgage fraud and other financial crimes.[26] While current fraud reporting obligations on the Housing GSEs, discussed below, have value in combating fraud, the usefulness could be increased by including the Housing GSEs within FinCEN's framework to support broader regulatory and law enforcement efforts to combat mortgage fraud and related financial crimes, consistent with the purposes of the BSA.

C. Establishment and Authority of the Federal Housing Finance Agency and the Housing GSEs

The Federal Housing Finance Regulatory Reform Act of 2008 (the ''Reform Act'') [27] created the Federal Housing Finance Agency (''FHFA'') as an independent agency of the Federal Government. FHFA was established on the date of enactment of the Reform Act —July 30, 2008. The Reform Act provided for the abolishment of the Office of Federal Housing Enterprise Oversight (''OFHEO'') and the Federal Housing Finance Board (''FHFB'') one year after the date of enactment. These agencies, together with the Housing and Urban Development Government Sponsored Enterprise Mission Teams, were combined to establish FHFA.[28]

FHFA has regulatory authority over Fannie Mae, Freddie Mac and the Banks (collectively referred to in FHFA regulations as the ''regulated entities''), and over the Office of Finance of the Federal Home Loan Bank System.[29] FHFA is responsible for ensuring that the Housing GSEs operate in a safe and sound manner, including being capitalized adequately and maintaining internal controls, that they carry out their public policy missions, and that their activities foster liquid, efficient, competitive, and resilient national housing finance markets. Where FHFA has not acted with superseding regulations, the Housing GSEs continue to operate under regulations promulgated by OFHEO and FHFB.[30]

Fannie Mae and Freddie Mac were chartered by Congress primarily to establish secondary market facilities for residential mortgages.[31] Specifically, Congress established Fannie Mae and Freddie Mac to provide stability in the secondary market for residential mortgages, respond appropriately to the private capital market, provide ongoing assistance to the secondary market for residential mortgages (including activities relating to mortgages on housing for low- and moderate-income families involving a reasonable economic return that may provide less of a return than Fannie Mae's and Freddie Mac's other activities), and promote access to mortgage credit throughout the nation.

The Federal Home Loan Banks were organized under the Federal Home Loan Bank Act (''Bank Act'').[32] The Banks are financial cooperatives; only members of a Bank may purchase the capital stock of a Bank, and only members or certain eligible housing associates (such as State housing finance agencies) may obtain access to secured loans, known as advances, or other products provided by a Bank.[33] Each Bank is managed by its own board of directors and serves the public interest by enhancing the availability of residential mortgage and community lending credit through its member institutions.[34] Any eligible institution (generally a federally-insured depository institution or State-regulated insurance company) may become a member of a Bank if it satisfies certain criteria and purchases a specified amount of the Bank's capital stock.[35] The Bank Act also requires each Bank to establish an affordable housing program (known as ''AHP'') and contribute a specified portion of its previous year's net income to support that program.[36]

II. Notice of Proposed Rulemaking—In General

This NPRM would define financial institution for certain purposes of the BSA to include the Housing GSEs. Specifically, this NPRM proposes SAR requirements and AML program requirements.

A. Housing GSEs Proposed To Be Defined as Financial Institutions

The BSA does not expressly enumerate any of the Housing GSEs among the entities defined as ''financial institutions'' under the BSA.[37] Nevertheless, the BSA definition of financial institution is broad, listing numerous types of businesses, including commercial banks and other depository institutions. The BSA also authorizes the Secretary to include additional types of businesses within the BSA definition if the Secretary determines that they engage in any activity ''similar to, related to, or a substitute for'' any activity of any of the listed businesses.[38]

The Housing GSEs work closely with other BSA-defined financial institutions—in fact the majority of their members or servicers are commercial banks, thrifts, credit unions and insurance companies. Many of the products and services offered by the Housing GSEs can be viewed as substitutes for or related to products and services offered by commercial banks and nonbank financial institutions included in the statutory definition under 31 U.S.C. 5312(a)(2).

The main role of the Housing GSEs is to support the primary mortgage market and affordable housing programs through the purchase, guarantee and securitization of mortgage loans, and the extension of loans (known as ''advances'' in the Federal Home Loan Bank System) secured primarily by mortgage loans and real estate related assets. Typically, a significant portion of these mortgage loans are made by

[26] *See* Section II.B., *infra,* for a review of current fraud detection and reporting by the Housing GSEs.

[27] Division A of the Housing and Economic Recovery Act of 2008 (''HERA''), Public Law 110–289, 122 Stat. 2654 (2008).

[28] The authorities, powers and responsibilities of FHFA are contained in the Federal Home Loan Bank Act, 12 U.S.C. 1421 *et seq.,* as amended by Division A of HERA. and the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (Safety and Soundness Act), 12 U.S.C. 4501 *et seq.,* as amended by Division A of HERA. *See* Notice of Establishment, 73 FR 52356 (Sept. 9, 2008). *http://www.fhfa.gov/webfiles/160/FHFA_%20Notice_of_Establishment_-_73_FR_52356_(Sept_9%2c_2008).pdf.*

[29] The Housing GSEs are defined as FHFA regulated entities in Safety and Soundness Act, as amended, 12 U.S.C. 4501 *et seq.* The definition of ''regulated entity'' provides ''[t]he term 'regulated entity' means—(A) the Federal National Mortgage Association and any affiliate thereof; (B) the Federal Home Loan Mortgage Corporation and any affiliate thereof; and (C) any Federal Home Loan Bank.'' (12 U.S.C. 4502(20)).

[30] On September 6, 2008, FHFA appointed itself conservator of Fannie Mae and Freddie Mac, pursuant to 12 U.S.C. 4617. *http://www.fhfa.gov/webfiles/1858/NoticeregardingconservatorFNMA.pdf; http://www.fhfa.gov/webfiles/1857/NoticeregardingconservatorFHLMC.pdf.*

[31] *See* 12 U.S.C. 1451, 1716.

[32] 12 U.S.C. 1423, 1432(a).

[33] 12 U.S.C. 1426(a)(4), 1430(a), 1430b.

[34] 12 U.S.C. 1427.

[35] 12 U.S.C. 1424; 12 CFR part 1263.

[36] 12 U.S.C. 1430(j).

[37] 31 U.S.C. 5312(a)(2) and (c)(1). The BSA definition includes institutions that are already subject to federal regulation such as banks, savings associations, credit unions, securities broker-dealers, and futures commission merchants. Money services businesses (such as money transmitters and currency exchanges) are also defined as financial institutions under the BSA, and, like the former categories, under FinCEN's implementing regulations. The BSA definition also includes dealers in precious metals, stones, or jewels; pawnbrokers; loan or finance companies; private bankers; insurance companies; travel agencies; telegraph companies; sellers of vehicles, including automobiles, airplanes, and boats; persons engaged in real estate closings and settlements; investment bankers; investment companies; and commodity pool operators and commodity trading advisors that are registered or required to register under the Commodity Exchange Act (7 U.S.C. 1 *et seq.*).

[38] 31 U.S.C. 5312(a)(2)(Y).

commercial banks, credit unions and thrifts, which are already financial institutions under the BSA and subject to FinCEN's regulations.[39] The Housing GSEs also establish and manage affordable housing programs, similar to affordable housing and community reinvestment programs of commercial banks and thrifts in underserved markets. Some of the Banks also have acquired member asset programs, known as ''AMA,'' whereby they acquire fixed-rate, single-family mortgage loans from participating member institutions, which are also generally commercial banks or other depository institutions already included within the BSA's definition of financial institutions. In summary, the Housing GSEs provide liquidity, through loan purchases and collateralized advances, that permit banks and other customers to offer a broad range of credit products and related services.

FinCEN believes, as discussed above, that the Housing GSEs engage in activities that are ''similar to, related to, or a substitute for'' financial services that are provided by other BSA-defined financial institutions. For this reason, FinCEN is proposing to exercise its authority under 31 U.S.C. 5312(a)(2)(Y) to define these entities as financial institutions. As explained more fully below, this rulemaking would define Housing GSEs as financial institutions for the purpose of requiring them to establish AML programs and file SARs. This NPRM is supported by the FHFA, their primary regulator.

While this NPRM proposes to define the Housing GSEs as ''financial institutions'' under our BSA authority, the Housing GSEs will not be considered ''Financial Institutions'' within the regulatory meaning of the term under FinCEN's regulations at 31 CFR 1010.100(t). Placement within the regulatory definition of ''Financial Institution'' would trigger other recordkeeping and reporting requirements that FinCEN does not consider appropriate for the Housing GSEs at this time. The term Housing Government Sponsored Enterprise is proposed to be added as a new defined term at 31 CFR 1010.100(lll).

In light of FinCEN's efforts to combat mortgage fraud, money laundering and terrorist financing, and the anticipated value of adding information to FinCEN's database to support law enforcement, FinCEN requests comment about whether there are other types of mortgage related businesses and professions that might encounter similar risks and vulnerabilities to those presented by the Housing GSEs. Specifically, FinCEN requests comment on whether there are other entities that engage in mortgage related activities that are ''similar to, related to, or a substitute for'' financial services that are provided by BSA-defined financial institutions that should be defined as financial institutions under the BSA in subsequent rulemakings; for example: Private mortgage insurers and reinsurers, mortgage servicers, and other types of businesses in the primary and secondary mortgage markets.

FinCEN also requests comments about whether it would be appropriate to include in a Final Rule any provisions that account for the differences in the business, operation and mission of the Banks and Fannie Mae and Freddie Mac.

B. Suspicious Activity Reporting and AML Program Requirements

Under the rules proposed by this NPRM, the Housing GSEs would be required to file SAR forms directly with FinCEN, as do other financial institutions subject to SAR filing regulations. FinCEN expects that the transition to compliance with FinCEN's regulation will not be difficult or costly, because the Housing GSEs already have policies, procedures and training programs in place to comply with the FHFA's current fraud reporting regulation, which is very similar to the proposed SAR reporting regulation.

As part of a final rule adopted on January 27, 2010, FHFA issued new fraud reporting regulations, codified at 12 CFR part 1233, ''Reporting of Fraudulent Financial Instruments.''[40] That regulation requires each Housing GSE to submit a timely report to FHFA upon discovery that it has purchased or sold a fraudulent loan or financial instrument, or suspects a possible fraud relating to the purchase or sale of any loan or financial instrument. In addition, each Housing GSE must establish and maintain internal controls, policies, procedures, and operational training programs to discover such transactions. The regulation applies to all programs and products of the Housing GSEs.[41]

Accordingly, FinCEN believes that most, if not all, of the Housing GSEs should already have anti-fraud programs in place that would satisfy most of FinCEN's AML program and SAR regulatory requirements. The only additional actions that may be required to comply with the proposed regulations (in addition to reporting a wider range of suspected financial crime than is currently required) would be minor modifications to existing policies and procedures to formalize and implement two of FinCEN's regulatory requirements that are not expressly required under the FHFA's regulations; specifically: (1) The appointment of a compliance officer to monitor for compliance with FinCEN's regulations, and (2) periodic independent testing to monitor for compliance. Housing GSEs that anticipate the need to submit a relatively low number of SAR forms may establish procedures to submit individual forms via FinCEN's established systems, so that the Housing GSE likely may be able to file SARs without reliance on, or changes to, their existing systems. FinCEN will issue guidance, if necessary, to clarify FinCEN's regulations and assist the Housing GSEs with compliance related matters.

Upon the designation of the Housing GSEs as ''financial institutions'' under the BSA, the Housing GSEs, as well as their directors, officers, and employees, and agents will become subject to the BSA's liability safe harbor for financial institutions that file SARs at 31 U.S.C. 5318(g)(3). This safe harbor is intended to encourage financial institutions to report suspicious activities, even if, as here, the proposed SAR regulation will likely require reporting of a wider range of suspected fraud, money laundering and financial crimes related to the products and services offered by the Housing GSEs than those entities are currently accustomed to report.

FinCEN further requests comment about whether there are other types of entities that engage in mortgage related activities that should be defined as financial institutions or loan or finance companies under the BSA in subsequent rulemakings, as part of FinCEN's incremental approach, discussed in more detail in the proposed rulemaking Anti-Money Laundering Program and Suspicious Activity Report Filing Requirements for Residential Mortgage Lenders and Originators,[42] to address vulnerabilities in the mortgage finance sector.

[39] 31 U.S.C. 5312(a)(2).

[40] 75 FR 4255 (Jan. 27, 2010).

[41] 75 FR 4255, 4258–4259. Should FinCEN issue a final rule imposing AML and SAR requirements on the Housing GSEs, FHFA may amend these regulations to avoid any conflicts or duplicative requirements with FinCEN's regulations, consistent with the requirements of the Safety and Soundness Act, as amended.

[42] *See* 75 FR 76677, December 9, 2010. *http://edocket.access.gpo.gov/2010/pdf/2010-30765.pdf.*

III. Section-by-Section Analysis

A. Definition of Housing Government Sponsored Enterprises

Section 1010.100(lll) defines the key terms used in the proposed rules. The definitions reflect FinCEN's determination that AML program and SAR requirements should be applied to the Housing GSEs, which are defined as Regulated Entities under 12 U.S.C. 4502(20) subject to the general supervision and regulation of the FHFA. The definition of Housing Government Sponsored Enterprise includes: (1) The Federal National Mortgage Association; (2) the Federal Home Loan Mortgage Corporation; and (3) each Federal Home Loan Bank. The proposed definition does not include any entity-affiliated party [43] of Fannie Mae, Freddie Mac, or any Bank, including the Office of Finance of the Federal Home Loan Bank System.

B. Compliance and Enforcement

Section 1010.810(b)(10) delegates authority to examine the Housing GSEs for compliance with the requirements of these regulations to the FHFA. FHFA is the general regulator for the Housing GSEs and enforces its own statutes and regulations regarding safety and soundness. FHFA will be FinCEN's delegate for examination for compliance with these proposed regulations, and FinCEN will work with FHFA to coordinate and direct such delegated compliance examination activities. FinCEN will continue to retain enforcement authority under the BSA, including for the imposition of civil penalties for violations of the BSA and these regulations.

C. Anti-Money Laundering Program

Section 1030.210(a) requires that each Housing GSE develop and implement an anti-money laundering program reasonably designed to prevent the Housing GSE from being used to facilitate money laundering or the financing of terrorist activities, and other financial crimes, including mortgage fraud. The program must be in writing and must be approved by senior management. A Housing GSE's written program also must be made available to FinCEN upon request.

Section 1030.210(b) sets forth the minimum requirements of a Housing GSE's AML program. Beyond these minimum requirements, however, the proposed rule is intended to give Housing GSEs the flexibility to design their programs to mitigate their own enterprise-specific risks. Section 1030.210(b)(1) requires the AML program to incorporate policies, procedures, and internal controls based upon the Housing GSE's assessment of the risks of money laundering, terrorism finance and other financial crimes associated with its products, customers, distribution channels, and geographic locations. As explained above, a Housing GSE's assessment of customer-related information is a key component to an effective AML program. Thus, a Housing GSE's AML program must ensure that the Housing GSE obtains all the information necessary to make its AML program effective. Such information includes, but is not limited to, relevant customer information on individual borrowers and the retail financial institutions who are the Housing GSEs customers. The specific means to obtain such information is left to the discretion of the Housing GSE, although FinCEN anticipates that the Housing GSE may need to amend existing agreements to ensure that the Housing GSE receives necessary customer information. We do not anticipate that this requirement will entail obtaining information not already received in the ordinary course of business by the Housing GSEs, particularly with regard to information on individual borrowers. For purposes of making the required risk assessment, a Housing GSE must consider all relevant information, including whether the retail financial institutions who are its customers are subject to AML program requirements under the BSA.

Policies, procedures, and internal controls also must be reasonably designed to ensure compliance with BSA requirements. Housing GSEs may conduct some of their operations through third parties. Some elements of the compliance program may best be performed by personnel of these entities, in which case it is permissible for a Housing GSE to delegate contractually the implementation and operation of those aspects of its AML program to such an entity and to rely on the compliance program of such third parties that are subject to an independent AML program requirement under the BSA. Any Housing GSE that delegates responsibility for aspects of its AML program to a third party, however, remains fully responsible for the effectiveness of the program, as well as ensuring that compliance examiners are able to obtain information and records relating to the AML program.

Section 1030.210(b)(2) requires that a Housing GSE designate a compliance officer to be responsible for administering the AML program. The person should be competent and knowledgeable regarding BSA requirements and money laundering and fraud issues and risks, and should be empowered with full responsibility and authority to develop and enforce appropriate policies and procedures. The role of the compliance officer is to ensure that (1) The program is implemented effectively; (2) the program is updated as necessary; and (3) appropriate persons are trained and educated in accordance with § 1030.210(b)(3).

Section 1030.210(b)(3) requires that a Housing GSE provide for education and training of appropriate persons. Employee training is an integral part of any AML program. In order to carry out their responsibilities effectively, employees of a Housing GSE (and of any third party not already receiving training as part of another AML program requirement) with responsibility under the program must be trained in the requirements of the rule and money laundering and fraud risks generally so that red flags associated with existing or potential customers can be identified. Such training may be conducted by outside or in-house seminars, and may include computer-based training. The nature, scope, and frequency of the education and training program of the Housing GSE will depend upon the employee functions performed. However, those with obligations under the AML program must be sufficiently trained to carry out their responsibilities effectively. Moreover, these employees should receive periodic updates and refreshers regarding the AML program.

Section 1030.210(b)(4) requires that a Housing GSE provide for independent testing of the program on a periodic basis to ensure that it complies with the requirements of the rule and that the program functions as designed. An outside consultant or accountant need not perform the testing and review. The review may be conducted by an officer, employee or group of employees, so long as the reviewer is not the designated compliance officer and does not report directly to the compliance officer. The frequency of the independent testing will depend upon the Housing GSE's assessment of risks posed by its operations. Any recommendations resulting from such testing should be implemented promptly or reviewed by senior management. A Housing GSE may rely on the testing performed by third parties that are subject to an independent AML program requirement.

Section 1030.210(c) states that compliance with the AML program requirements will be determined by

[43] *See* 12 U.S.C. 4502(11).

FinCEN or its delegates, under the terms of the BSA.

D. Reports of Suspicious Transactions

Section 1030.320(a) contains the rules setting forth the obligation of Housing GSEs to report suspicious transactions that are conducted or attempted by, at, or through a Housing GSE and involve or aggregate at least $5,000 in funds or other assets. It is important to recognize that transactions are reportable under this rule and 31 U.S.C. 5318(g) regardless of whether they involve currency. The $5,000 minimum amount is consistent with existing SAR filing requirements for other financial institutions.

Section 1030.320(a)(1) contains the general statement of the obligation to file reports of suspicious transactions. The obligation extends to transactions conducted or attempted by, at, or through a Housing GSE. The proposed rule also contains a provision in § 1030.320(a)(1) designed to encourage the reporting of transactions that appear relevant to violations of law or regulation, even in cases in which the rule does not explicitly so require; for example, in the case of a transaction falling below the $5,000 threshold in the proposed rule.

Section 1030.320(a)(2) specifically describes the four categories of transactions that require reporting. A Housing GSE is required to report a transaction if it knows, suspects, or has reason to suspect that the transaction (or a pattern of transactions of which the transaction is a part): (i) Involves funds derived from illegal activity or is intended or conducted to hide or disguise funds or assets derived from illegal activity; (ii) is designed, whether through structuring or other means, to evade the requirements of the BSA; (iii) has no business or apparent lawful purpose, and the Housing GSE knows of no reasonable explanation for the transaction after examining the available facts; or (iv) involves the use of the Housing GSE to facilitate criminal activity.[44]

A determination as to whether a report is required must be based on all the facts and circumstances relating to the transaction and customer of the Housing GSE in question. Different fact patterns will require different judgments. Some examples of red flags associated with existing or potential customers are referenced in previous FinCEN reports on mortgage fraud.[45] However, the means of commerce and the techniques of money laundering are continually evolving, and there is no way to provide an exhaustive list of suspicious transactions.[46]

Section 1030.320(a)(3) provides that the obligation to identify and to report a suspicious transaction rests with the Housing GSE involved in the transaction. However, where more than one Housing GSE, or another financial institution with a separate suspicious activity reporting obligation, is involved in the same transaction, only one report is required to be filed, provided it contains all relevant facts and each institution maintains a copy of the report and any supporting documentation.

The proposed rule is intended to require that a Housing GSE evaluate customer activity and relationships for fraud, money laundering and other financial crime risks, and design a suspicious transaction monitoring program that is appropriate for the particular Housing GSE in light of such risks.

Section 1030.320(b) sets forth the filing procedures to be followed by Housing GSEs making reports of suspicious transactions. Within 30 days after a Housing GSE becomes aware of a suspicious transaction (or within 60 days if no suspect has been identified), it must report the transaction by completing a SAR and filing it with FinCEN. Supporting documentation relating to each SAR is to be collected and maintained separately by the Housing GSE and made available upon request by FinCEN or any Federal, State, or local law enforcement agency, or any Federal regulatory authority that examines the Housing GSE for compliance with the BSA. Because FinCEN's SAR regulations provide that supporting documentation is deemed to be filed with the SAR, the regulatory authorities referenced in the previous sentence are consistent with those regulatory authorities to whom a SAR may be disclosed, as discussed in the rules of construction below. For situations requiring immediate attention, Housing GSEs are to telephone the appropriate law enforcement authority in addition to filing a SAR.

Section 1030.320(c) provides that filing Housing GSEs must maintain copies of SARs and the underlying related documentation for a period of five years from the date of filing. As indicated above, supporting documentation is to be made available to FinCEN and the specified law enforcement and regulatory authorities, upon request.

Section 1030.320(d)(1) reinforces the statutory prohibition against the disclosure by a financial institution of a SAR (regardless of whether the report would be required by the proposed rule or is filed voluntarily).[47] Thus, the section requires that a SAR and information that would reveal the existence of that SAR (''SAR information'') be kept confidential and not be disclosed, except as authorized within the rules of construction. The proposed rule includes rules of construction that identify actions an institution may take that are not precluded by the confidentiality provision. These actions include the disclosure of SAR information to FinCEN, or Federal, State, or local law enforcement agencies, or a Federal regulatory authority that examines the Housing GSE for compliance with the BSA. This confidentiality provision also does not prohibit the disclosure of the underlying facts, transactions, and documents upon which a SAR is based, or the sharing of SAR information within the Housing GSE's corporate organizational structure for purposes consistent with Title II of the BSA as determined by FinCEN in regulation or in guidance.[48]

Section 1030.320(d)(2) incorporates the statutory prohibition against disclosure of SAR information, other than in fulfillment of their official duties consistent with the BSA, by government users of SAR data. The section also clarifies that official duties do not include the disclosure of SAR information in response to a request for non-public information[49] or for use in a

[44] The fourth reporting category has been added to the suspicious activity reporting rules promulgated since the passage of the USA PATRIOT Act to make it clear that the requirement to report suspicious activity encompasses the reporting of transactions involving fraud and those in which legally derived funds are used for criminal activity, such as the financing of terrorism.

[45] *See* note 13, *supra.*

[46] FinCEN will continue to pursue a regulatory approach that involves a combination of guidance, training programs, and government-industry information exchange so that implementation of any new AML program and SAR reporting regulations can be accomplished in the most flexible and cost efficient way as possible, while protecting the primary and secondary mortgage markets and the financial system as a whole from fraud, money laundering and other financial crimes.

[47] *See* 31 U.S.C. 5318(g)(2).

[48] On November 23, 2010, FinCEN issued updated guidance for the banking, securities, and futures industries authorizing the sharing of SAR information with parent companies, head offices, and, under certain conditions, domestic affiliates. 75 FR 75607 (Dec. 3, 2010). No such guidance has been issued for the Housing GSEs.

[49] For purposes of this rulemaking, ''non-public information'' refers to information that is exempt from disclosure under the Freedom of Information Act.

private legal proceeding, including a request under 31 CFR 1.11.[50]

Section 1030.320(e) provides protection from liability for making reports of suspicious transactions, and for failures to disclose the fact of such reporting to the full extent provided by 31 U.S.C. 5318(g)(3). The protection afforded the GSEs in title 12 by FHFA explicitly requires ''good faith,''[51] unlike 31 U.S.C. 5318(g)(3) which contains no such requirement. Legal authority weighs heavily in favor of the proposition that this safe harbor is not subject to a ''good faith'' limitation.[52]

Section 1030.320(f) notes that compliance with the obligation to report suspicious transactions will be examined by FinCEN or its delegates, and provides that failure to comply with the rule may constitute a violation of the BSA and the BSA regulations.

Section 1030.320(g) provides that the new SAR requirement is effective when an anti-money laundering program required by the regulations is required to be implemented.

E. Special Information Procedures To Deter Money Laundering and Terrorist Activity

Section 1030.500 states generally that the Housing GSEs are covered by the special information procedures to detect money laundering and terrorist activity requirements set forth and cross referenced in sections 1030.520 (cross-referencing to 31 CFR 1010.520) and 1030.540 (cross-referencing to 31 CFR 1010.540). Sections 1010.520 and 101.540 implement sections 314(a) and 314(b)[53] of the USA PATRIOT Act, respectively, and generally apply to any financial institution listed in 31 U.S.C. 5312(a)(2).[54] For the sake of clarity, the Final Rule adds subpart E to Part 1030 to confirm that the section 314 rules will continue to apply to the Housing GSEs.

IV. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires that a regulation that has a significant economic impact on a substantial number of small entities, small businesses, or small organizations must include an initial regulatory flexibility analysis describing the regulation's impact on small entities. Such an analysis need not be undertaken if the agency has certified that the regulation will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b). In this case, a final regulation would apply only to the Housing GSEs, none of which are small entities for purposes of this requirement. Accordingly, FinCEN hereby certifies that a final regulation is not likely to have a significant economic impact on a substantial number of small business entities for purposes of the Regulatory Flexibility Act. Therefore, the provisions of the Regulatory Flexibility Act do not apply. *See* 5 U.S.C. 601(2) and 603(a).

V. Paperwork Reduction Act

The proposed regulation pertains to the Housing GSEs. As a result, the proposed regulation does not contain any information collection requirement that requires the approval of the Office of Management and Budget under the Paperwork Reduction Act *See* 44 U.S.C. 3501 *et seq.*

VI. Executive Order 13563 and 12866

Executive Orders 13563 and 12866 direct agencies to assess 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. It has been determined that the final rule is 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.

VII. Unfunded Mandates Act of 1995 Statement

Section 202 of the Unfunded Mandates Reform Act of 1995 (''Unfunded Mandates Act''), Public Law 104–4 (March 22, 1995), requires that an agency prepare a budgetary impact statement before promulgating a rule that may result in expenditure by the state, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. If a budgetary impact statement is required, section 202 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. Taking into account the factors noted above and using conservative estimates of average labor costs in evaluating the cost of the burden imposed by the proposed regulation, FinCEN has determined that it is not required to prepare a written statement under section 202.

List of Subjects in 31 CFR Parts 1010 and 1030

Administrative practice and procedure, Banks, Banking, Brokers, Currency, Federal home loan banks, Foreign banking, Foreign currencies, Gambling, Investigations, Mortgages, Penalties, Reporting and recordkeeping requirements, Securities, Terrorism.

Authority and Issuance

For the reasons set forth in the preamble, Chapter X of title 31 of the Code of Federal Regulations is proposed to be amended as follows:

PART 1010—GENERAL PROVISIONS

1. The authority citation for part 1010 continues to read as follows:

Authority: 12 U.S.C. 1829b and 1951–1959; 31 U.S.C. 5311–5314 and 5316–5332; title III, sec. 314 Pub. L. 107–56, 115 Stat. 307.

2. Amend § 1010.100 by adding new paragraph (lll) to read as follows:

§ 1010.100 General definitions.

* * * * *

(lll) *Housing government sponsored enterprise.* (1) A ''housing government sponsored enterprise'' is one of the following ''Regulated Entities'' under 12 U.S.C. 4502(20) subject to the general supervision and regulation of the Federal Housing Finance Agency (FHFA):

(i) The Federal National Mortgage Association;

[50] 31 CFR 1.11 is the Department of the Treasury's information disclosure regulation. Generally, these regulations are known as ''Touhy regulations,'' after the Supreme Court's decision in *United States ex rel. Touhy* v. *Ragen,* 340 U.S. 462 (1951). In that case, the Supreme Court held that an agency employee could not be held in contempt for refusing to disclose agency records or information when following the instructions of his or her supervisor regarding the disclosure. An agency's Touhy regulations are the instructions agency employees must follow when those employees receive requests or demands to testify or otherwise disclose agency records or information.

[51] 12 CFR 1233.5.

[52] *See Stoutt* v. *Banco Popular de Puerto Rico,* 320 F.3d 26, 31 (1st Cir. 2003) (no good faith requirement), *Lee* v. *Bankers Trust,* 166 F.3d 540, 544 (2d Cir. 1999) (same), *Henry* v. *Bank of America,* 2010 U.S. Dist. LEXIS 14561 *11–13 (N.D.Cal., Feb. 2, 2010) (same), *Eyo* v. *United States,* 2007 U.S. Dist. LEXIS 88088 *15–16 (D.N.J., Nov. 29, 2007) (same), *Nieman* v. *Firstar Bank,* 2005 U.S. Dist. LEXIS 38959 *18 (N.D. Iowa, Sept. 26, 2005) (same); *but see Lopez* v. *First Union National Bank,* 129 F.3d 1186, 1992 (11th Cir. 1997) (good faith requirement).

[53] In addition to falling within the definition of ''financial institution'' found at 31 U.S.C. 5312(a)(2), participants in the 314(b) program also must be ''required * * * to establish and maintain an anti-money laundering program. * * *'' 1010.540(a)(1).

[54] This proposed rule would define the Housing GSEs as financial institutions under section 5312(a)(2)(Y).

(ii) The Federal Home Loan Mortgage Corporation; or

(iii) Each Federal Home Loan Bank.

(2) The term ''housing government sponsored enterprise'' does not include any ''Entity-Affiliated Party,'' as defined in 12 U.S.C. 4502(11).

3. Amend § 1010.810 by adding new paragraph (b)(10) to read as follows:

§ 1010.810 Enforcement.

* * * * *

(b) * * *

(10) To the Federal Housing Finance Agency with respect to the housing government sponsored enterprises, as defined in § 1010.100(lll) of this part.

* * * * *

4. New part 1030 added to read as follows:

PART 1030—RULES FOR HOUSING GOVERNMENT SPONSORED ENTERPRISES

Subpart A—Definitions

Sec.

1030.100 Definitions.

Subpart B—Programs

1030.200 General.
1030.210 Anti-money laundering programs for housing government sponsored enterprises.

Subpart C—Reports Required To Be Made By Housing Government Sponsored Enterprises

1030.300 General.
1030.310–1030.315 [Reserved]
1030.320 Reports by housing government sponsored enterprises of suspicious transactions.
1030.330 [Reserved]

Subpart D—Records Required To Be Maintained By Housing Government Sponsored Enterprises.

1030.400 General.

Subpart E—Special Information Sharing Procedures To Deter Money Laundering and Terrorist Activity

1030.500 General.
1030.520 Special information sharing procedures to deter money laundering and terrorist activity for housing government sponsored enterprises.
1030.530 [Reserved]
1030.540 Voluntary information sharing among financial institutions.

Subpart F—Special Standards of Diligence; Prohibitions, and Special Measures for Housing Government Sponsored Enterprises

1030.600–1030.670 [Reserved]

Authority: 12 U.S.C. 1829b and 1951–1959; 31 U.S.C. 5311–5314 and 5316–5332; title III, sec. 314 Pub. L. 107–56, 115 Stat. 307.

Subpart A—Definitions

§ 1030.100 Definitions.

Refer to § 1010.100 of this chapter for general definitions not noted herein.

Subpart B—Programs

§ 1030.200 General.

Housing government sponsored enterprises are subject to the program requirements set forth and cross referenced in this subpart. Housing government sponsored enterprises should also refer to subpart B of part 1010 of this Chapter for program requirements contained in that subpart that apply to housing government sponsored enterprises.

§ 1030.210 Anti-money laundering programs for housing government sponsored enterprises.

(a) *Anti-money laundering program requirements for housing government sponsored enterprises.* Each housing government sponsored enterprise shall develop and implement a written anti-money laundering program that is reasonably designed to prevent the housing government sponsored enterprise from being used to facilitate money laundering or the financing of terrorist activities. The program must be approved by senior management. A housing government sponsored enterprise shall make a copy of its anti-money laundering program available to the Financial Crimes Enforcement Network or its designee upon request.

(b) *Minimum requirements.* At a minimum, the anti-money laundering program shall:

(1) Incorporate policies, procedures, and internal controls based upon the housing government sponsored enterprise's assessment of the money laundering and terrorist financing risks associated with its products and services. Policies, procedures, and internal controls developed and implemented by a housing government sponsored enterprise under this section shall include provisions for complying with the applicable requirements of subchapter II of chapter 53 of title 31, United States Code and this part, and obtaining all relevant customer-related information necessary for an effective anti-money laundering program.

(2) Designate a compliance officer who will be responsible for ensuring that:

(i) The anti-money laundering program is implemented effectively;

(ii) The anti-money laundering program is updated as necessary; and

(iii) Appropriate persons are educated and trained in accordance with paragraph (b)(3) of this section.

(3) Provide for on-going training of appropriate persons concerning their responsibilities under the program. A housing government sponsored enterprise may satisfy this requirement by training such persons or verifying that such persons have received training by a competent third party with respect to the products and services offered by the housing government sponsored enterprise.

(4) Provide for independent testing to monitor and maintain an adequate program. The scope and frequency of the testing shall be commensurate with the risks posed by the housing government sponsored enterprise's products and services. Such testing may be conducted by a third party or by any officer or employee of the housing government sponsored enterprise, other than the person designated in paragraph (b)(2) of this section.

(c) *Compliance.* Compliance with this section shall be examined by FinCEN or its delegates, under the terms of the Bank Secrecy Act. Failure to comply with the requirements of this section may constitute a violation of the Bank Secrecy Act and of this chapter.

(d) *Compliance date.* A housing government sponsored enterprise must develop and implement an anti-money laundering program that complies with the requirements of this section on or before one month from the effective date of this section.

Subpart C—Reports Required To Be Made by Housing Government Sponsored Enterprises

§ 1030.300 General.

Housing government sponsored enterprises are subject to the reporting requirements set forth and cross referenced in this subpart. Housing government sponsored enterprises should also refer to subpart C of part 1010 of this Chapter for reporting requirements contained in that subpart that apply to housing government sponsored enterprises.

§ 1030.310–1030.315 [Reserved]

§ 1030.320 Reports by housing government sponsored enterprises of suspicious transactions.

(a) *General*—(1) Every housing government sponsored enterprise shall file with FinCEN, to the extent and in the manner required by this section, a report of any suspicious transaction relevant to a possible violation of law or regulation. A housing government sponsored enterprise may also file with FinCEN a report of any suspicious transaction that it believes is relevant to the possible violation of any law or

regulation, but whose reporting is not required by this section.

(2) A transaction requires reporting under this section if it is conducted or attempted by, at, or through a housing government sponsored enterprise, it involves or aggregates funds or other assets of at least $5,000, and the housing government sponsored enterprise knows, suspects, or has reason to suspect that the transaction (or a pattern of transactions of which the transaction is a part):

(i) Involves funds derived from illegal activity or is intended or conducted in order to hide or disguise funds or assets derived from illegal activity (including, without limitation, the ownership, nature, source, location, or control of such funds or assets) as part of a plan to violate or evade any Federal law or regulation or to avoid any transaction reporting requirement under Federal law or regulation;

(ii) Is designed, whether through structuring or other means, to evade any requirements of this chapter or any other regulations promulgated under the Bank Secrecy Act;

(iii) Has no business or apparent lawful purpose or is not the sort in which the particular housing government sponsored enterprise customer would normally be expected to engage, and the housing government sponsored enterprise knows of no reasonable explanation for the transaction after examining the available facts, including the background and possible purpose of the transaction; or

(iv) Involves use of the housing government sponsored enterprise to facilitate criminal activity.

(3) More than one housing government sponsored enterprise may have an obligation to report the same transaction under this section, and financial institutions involved in that same transaction may have separate obligations to report suspicious activity with respect to that transaction pursuant to other provisions of this chapter. In those instances, no more than one report is required to be filed by the housing government sponsored enterprise(s) and any financial institution(s) involved in the transaction, provided that the report filed contains all relevant facts, including the name of each housing government sponsored enterprise or financial institution involved in the transaction, the report complies with all instructions applicable to joint filings, and each institution maintains a copy of the report filed, along with any supporting documentation.

(b) *Filing and notification procedures*—(1) *What to file.* A suspicious transaction shall be reported by completing a Suspicious Activity Report (''SAR''), and collecting and maintaining supporting documentation as required by paragraph (c) of this section.

(2) *Where to file.* The SAR shall be filed with FinCEN in accordance with the instructions to the SAR.

(3) *When to file.* A SAR shall be filed no later than 30 calendar days after the date of the initial detection by the reporting housing government sponsored enterprise of facts that may constitute a basis for filing a SAR under this section. If no suspect is identified on the date of such initial detection, a housing government sponsored enterprise may delay filing a SAR for an additional 30 calendar days to identify a suspect, but in no case shall reporting be delayed more than 60 calendar days after the date of such initial detection.

(4) *Mandatory notification to law enforcement.* In situations involving violations that require immediate attention, such as suspected terrorist financing or ongoing money laundering schemes, a housing government sponsored enterprise shall immediately notify by telephone an appropriate law enforcement authority in addition to filing timely a SAR.

(5) *Voluntary notification to FinCEN.* Any housing government sponsored enterprise wishing voluntarily to report suspicious transactions that may relate to terrorist activity may call FinCEN's Financial Institutions Hotline in addition to filing timely a SAR if required by this section.

(c) *Retention of records.* A housing government sponsored enterprise shall maintain a copy of any SAR filed by the housing government sponsored enterprise or on its behalf (including joint reports), and the original (or business record equivalent) of any supporting documentation concerning any SAR that it files (or is filed on its behalf), for a period of five years from the date of filing the SAR. Supporting documentation shall be identified as such and maintained by the housing government sponsored enterprise, and shall be deemed to have been filed with the SAR. A housing government sponsored enterprise shall make all supporting documentation available to FinCEN or any Federal, State, or local law enforcement agency, or any Federal regulatory authority that examines the housing government sponsored enterprise for compliance with the Bank Secrecy Act, upon request.

(d) *Confidentiality of SARs.* A SAR, and any information that would reveal the existence of a SAR, are confidential and shall not be disclosed except as authorized in this paragraph (d). For purposes of this paragraph (d) only, a SAR shall include any suspicious activity report filed with FinCEN pursuant to any regulation in this chapter.

(1) *Prohibition on disclosures by housing government sponsored enterprises*—(i) *General rule.* No housing government sponsored enterprise, and no director, officer, employee, or agent of any housing government sponsored enterprise, shall disclose a SAR or any information that would reveal the existence of a SAR. Any housing government sponsored enterprise, and any director, officer, employee, or agent of any housing government sponsored enterprise that is subpoenaed or otherwise requested to disclose a SAR or any information that would reveal the existence of a SAR, shall decline to produce the SAR or such information, citing this section and 31 U.S.C. 5318(g)(2)(A)(i), and shall notify FinCEN of any such request and the response thereto.

(ii) *Rules of construction.* Provided that no person involved in any reported suspicious transaction is notified that the transaction has been reported, this paragraph (d)(1) shall not be construed as prohibiting:

(A) The disclosure by a housing government sponsored enterprise, or any director, officer, employee, or agent of a housing government sponsored enterprise of:

(1) A SAR, or any information that would reveal the existence of a SAR, to FinCEN or any Federal, State, or local law enforcement agency, or any Federal regulatory authority that examines the housing government sponsored enterprise for compliance with the Bank Secrecy Act; or

(2) The underlying facts, transactions, and documents upon which a SAR is based, including but not limited to, disclosures to another housing government sponsored enterprise or a financial institution, or any director, officer, employee, or agent of a housing government sponsored enterprise or financial institution, for the preparation of a joint SAR; or

(B) The sharing by a housing government sponsored enterprise, or any director, officer, employee, or agent of the housing government sponsored enterprise, of a SAR, or any information that would reveal the existence of a SAR, within the housing government sponsored enterprise's corporate organizational structure for purposes consistent with Title II of the Bank Secrecy Act as determined by regulation or in guidance.

(2) *Prohibition on disclosures by government authorities.* A Federal,

State, local, territorial, or tribal government authority, or any director, officer, employee, or agent of any of the foregoing, shall not disclose a SAR, or any information that would reveal the existence of a SAR, except as necessary to fulfill official duties consistent with Title II of the Bank Secrecy Act. For purposes of this section, ''official duties'' shall not include the disclosure of a SAR, or any information that would reveal the existence of a SAR, in response to a request for disclosure of non-public information or a request for use in a private legal proceeding, including a request pursuant to 31 CFR 1.11.

(e) *Limitation on liability.* A housing government sponsored enterprise, and any director, officer, employee, or agent of any housing government sponsored enterprise, that makes a voluntary disclosure of any possible violation of law or regulation to a government agency or makes a disclosure pursuant to this section or any other authority, including a disclosure made jointly with another institution, shall be protected from liability for any such disclosure, or for failure to provide notice of such disclosure to any person identified in the disclosure, or both, to the full extent provided by 31 U.S.C. 5318(g)(3).

(f) *Compliance.* Housing government sponsored enterprises shall be examined by FinCEN or its delegates for compliance with this section. Failure to satisfy the requirements of this section may be a violation of the Bank Secrecy Act and of this chapter.

(g) *Applicability date.* This section is effective when an anti-money laundering program required by § 1030.210 of this part is required to be implemented.

§ 1030.330 Reports relating to currency in excess of $10,000 received in a trade or business.

Refer to § 1010.330 of this Chapter for rules regarding the filing of reports relating to currency in excess of $10,000 received by housing government sponsored enterprises.

Subpart D—Records Required To Be Maintained by Housing Government Sponsored Enterprises

§ 1030.400 General.

Housing government sponsored enterprises are subject to the recordkeeping requirements set forth and cross referenced in this subpart. Housing government sponsored enterprises should also refer to subpart D of part 1010 of this Chapter for recordkeeping requirements contained in that subpart that apply to housing government sponsored enterprises.

Subpart E—Special Information Sharing Procedures To Deter Money Laundering and Terrorist Activity

§ 1030.500 General.

Housing government sponsored enterprises are subject to special information sharing procedures to deter money laundering and terrorist activity requirements set forth and cross referenced in this subpart. Housing government sponsored enterprises should also refer to subpart E of part 1010 of this Chapter for special information sharing procedures to deter money laundering and terrorist activity contained in that subpart that apply to housing government sponsored enterprises.

§ 1030.520 Special information sharing procedures to deter money laundering and terrorist activity for housing government sponsored enterprises.

(a) Refer to § 1010.520 of this Chapter.

(b) [Reserved]

§ 1030.530 [Reserved]

§ 1030.540 Voluntary information sharing among financial institutions.

(a) Refer to § 1010.540 of this Chapter.

(b) [Reserved]

Subpart F—Special Standards of Diligence; Prohibitions, and Special Measures for Housing Government Sponsored Enterprises

§ 1030.600–1030.670 [Reserved]

Dated: November 2, 2011.

James H. Freis, Jr.,

Director, Financial Crimes Enforcement Network.

[FR Doc. 2011–28820 Filed 11–7–11; 8:45 am]

BILLING CODE 4802–10–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2011–0730; FRL–9487–5]

Approval and Promulgation of Air Quality Implementation Plans; Virginia; Consumer and Commercial Products

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve a State Implementation Plan (SIP) revision submitted by the Commonwealth of Virginia. The SIP revision adds a new chapter (9VAC5–45—Consumer and Commercial Products) in order to control volatile organic compounds (VOC) from portable fuel containers, consumer products, architectural and industrial (AIM) coatings, adhesives and sealants, and asphalt paving operations within the Northern Virginia and Fredericksburg VOC Emissions Control Areas. The SIP revision also includes new and revised documents incorporated by reference into the Virginia regulations (9VAC5–20–21—Documents Incorporated by Reference) in order to support the new and revised regulations. This action is being taken under the Clean Air Act (CAA).

DATES: Written comments must be received on or before December 8, 2011.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–R03–OAR–2011–0730 by one of the following methods:

A. *www.regulations.gov.* Follow the on-line instructions for submitting comments.

B. *Email: fernandez.cristina@epa.gov.*

C. *Mail:* EPA–R03–OAR–2011–0730, Cristina Fernandez, Associate Director, Office of Air Program Planning, Mailcode 3AP30, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

D. *Hand Delivery:* At the previously-listed EPA Region III address. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID Number EPA–R03–OAR–2011–0730. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at *www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or email. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your

comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the Virginia Department of Environmental Quality, 629 East Main Street, Richmond, Virginia 23219.

FOR FURTHER INFORMATION CONTACT: Gregory Becoat, (215) 814–2036, or by email at *becoat.gregory@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

On March 18, 2010, the Virginia Department of Environmental Quality (VADEQ) submitted a revision to the Virginia SIP. The SIP revision consists of new and revised standards for the control of VOCs from certain types of consumer and commercial products in the Northern Virginia and Fredericksburg VOC Emissions Control Areas. The SIP revision also includes new and revised documents incorporated by reference into the Virginia regulations to support the new and revised regulations. The regulations will control emissions of VOCs, which will reduce the formation of ozone, and thereby protect public health and welfare.

II. Summary of SIP Revision

The SIP revision amends Chapter 9VAC5–20–21—Documents Incorporated by Reference, in order to make administrative changes for clarity, style, format, and renumbering. The revision adds sections to 9VAC5–20–21 in order to incorporate by reference into the Virginia regulations the new and revised regulations. The Commonwealth of Virginia established a new chapter, 9VAC5–45—Consumer and Commercial Products (Chapter 45) in order to control VOC emissions from various consumer and commercial products within the Northern Virginia and Fredericksburg VOC Emissions Control Areas. The new chapter consists of general requirements that pertain to regulating consumer and commercial products, as well as, VOC content and emission limits for consumer and commercial products. Chapter 45 also contains the control technology, testing, monitoring, administrative, recordkeeping, and reporting requirements necessary to determine compliance with each of the applicable standards. This SIP revision establishes requirements to specify applicability to any product, owner, or other person subject to the provisions of Chapter 45, establish compliance with the standards in Chapter 45, establish emission tests for operations and products subject to the standards subject to the provisions of Chapter 45, specify monitoring requirements, and specify notification, records, and reporting requirements.

Chapter 45 establishes Article 1 and Article 2 in order to implement design, performance, and labeling standards for portable fuel containers and spouts before and after August 1, 2010 and to prohibit owners form manufacturing, distributing, and selling noncompliant products. The portable fuel containers and spouts requirements in this SIP revision establish (1) applicability to any person who sells, supplies, offers for sale, or manufactures for sale portable fuel containers and spouts within the Northern Virginia and Fredericksburg VOC Emissions Control Areas; (2) specify exemptions for any portable fuel container or spout manufactured, sold, supplied, or offered for sale within and used outside the Northern Virginia and Fredericksburg VOC Emissions Control Areas; (3) add definitions and terms; (4) specify performance standards for VOCs; (5) specify administrative requirements; (6) specify compliance procedures; (7) establish compliance schedules; (8) specify test methods and procedures; (9) specify monitoring applicability; and (10) specify notification, records, and reporting requirements. In addition, the SIP revision specifies certification and innovative products procedures for portable fuel containers and spouts manufactured after August 1, 2010.

The Commonwealth of Virginia establishes Article 3 and Article 4 in Chapter 45 in order to implement VOC content standards for certain individual consumer product categories before and after August 1, 2010 and to prohibit owners from manufacturing, distributing, advertising, or selling noncompliant products. This SIP revision adds regulations that establish (1) applicability to any consumer product that contains VOCs within the Northern Virginia and Fredericksburg VOC Emissions Control Areas; (2) specifies exemptions; (3) adds definitions and terms; (4) sets applicability to any person who sells, supplies, offers for sale, or manufactures consumer products that contains VOCs in excess of the specified limits; (5) specifies VOC content limits in percent VOCs by weight for consumer products with a specified compliance date; (6) establishes applicability for alternative control plan (ACP) for consumer products and criteria for innovative products exemption and requirements for waiver requests; and (7) specifies innovative products procedures. In addition, the regulations specify administrative requirements, compliance procedures, compliance schedules, test methods and procedures, monitoring applicability, and notification, records, and reporting requirements.

Chapter 45 adds Article 5 in order to control VOC emissions from AIM, implement VOC content standards, and prohibit owners from manufacturing, distributing, selling, and using noncompliant products. This SIP revision adds regulations that establish (1) applicability to any owner or person who supplies, sells, offers for sale, or manufactures any architectural coating within the Northern Virginia and Fredericksburg VOC Emissions Control Areas; (2) specifies exemptions; (3) adds definitions and terms; (4) specifies that no person or owner shall manufacture, blend, or repackage for sale, supply, sell, or offer for sale, or solicit for application or apply any architectural coating with VOC content in excess of the applicable limits; (5) establishes that the most restrictive VOC content limit shall apply to any coating that meets the definition of or is recommended for use for more than one of the coating categories specified; and (6) establishes requirements for various architectural and industrial maintenance coating types. In addition, the regulations specify administrative requirements, compliance procedures, compliance schedules, test methods and procedures, monitoring applicability, and notification, records, and reporting requirements.

This SIP revision also establishes Article 6 in Chapter 45 in order to control VOC emissions from adhesives, adhesive primers, sealants, and sealant primers, implement VOC content limits, and prohibit owners from manufacturing, distributing, selling, or

applying noncompliant products based on a model rule. The Ozone Transport Commission (OTC) states developed a model rule ''OTC Model Rule For Adhesives and Sealants'' dated 2006 which was based on the 1998 California Air Resources Board (CARB) reasonably available control technology (RACT) determination. This RACT determination applied to both the manufacture and use of adhesives, sealants, adhesive primers, or sealant primers, in both industrial and manufacturing facilities and in the field. California Air Districts used this determination to develop regulations for this category. EPA addressed this source category with a Control Techniques Guideline (CTG) document for Miscellaneous Industrial Adhesives dated September 2008. This CTG was developed in response to section 183(e) of the CAA requirement for EPA to study and regulate consumer and commercial products, which is included in EPA's Report to Congress, ''Study of Volatile Organic Compound Emissions from Consumer and Commercial Products—Comprehensive Emissions Inventory.'' The miscellaneous industrial adhesives category was limited to adhesives and adhesive primers used in industrial and manufacturing operations and did not include products applied in the field. Therefore, the OTC model rule and state efforts in developing individual regulations preceded EPA's CTG for this source category and were broader in applicability.

The adhesives and sealants requirements in this SIP revision set (1) applicability to any owner or person who supplies, sells, offers for sale, manufactures, uses, applies for compensation, solicits the use of, requires the use of, or specifies the application of, any adhesive, sealant, adhesive primer, or sealant primer that contains VOCs within the Northern Virginia and Fredericksburg VOC Emissions Control Areas; (2) set exemptions for specific products and compounds of adhesives, sealants, adhesive primers, or sealant primers; (3) add definitions and terms; (4) specify that no person or owner shall sell, supply, or offer for sale, or manufactured for sale any adhesive, sealant, adhesive primer or sealant primer with VOC content in excess of the limits specified; (5) specify requirements for owners or operators of a facility that uses or applies a surface preparation solvent or cleanup solvent or removes an adhesive, sealant, adhesive primer, sealant primer from the parts of spray application equipment; (6) specify requirements for proper storage and disposal, work practices, surface preparation and cleanup solvent composition; (7) provide for an alternative add-on control system requirement of at least 85 percent overall control efficiency (capture and destruction), by weight; (8) specify standards for visible emissions; specify administrative requirements; (9) specify compliance procedures and compliance schedules; (10) specify test methods and procedures; (11) specify monitoring applicability; (12) specify notification, records, and reporting requirements; (13) specify registration provisions; and (14) specify facility and control equipment maintenance or malfunction provisions.

Chapter 45 also adds Article 7 in order to control VOC emissions from asphalt paving operations, which prescribes the use of emulsified asphalt coatings except for the purpose of coating residential driveways and prohibit the mixing, storage, and application of noncompliant products. The SIP revision adds regulations that (1) establish applicability to any owner or person who manufactures, mixes, stores, uses, or applies any liquefied asphalt for paving operations within the Northern Virginia and Fredericksburg VOC Emissions Control Areas; (2) add definitions and terms; (3) specify no owner or person shall cause or permit the manufacture, mixing, storage, use, or application of liquefied asphalt for paving operations unless it is emulsified; specify exemptions; (4) specify standards for visible emissions; and (5) specify standards for fugitive dust/emissions. In addition, the regulations specify compliance procedures, test methods and procedures, monitoring provisions, and notification, records, and reporting requirements.

A detailed summary of EPA's review of and rationale for proposing to approve this SIP revision may be found in the Technical Support Document (TSD) for this action which is available on-line at *www.regulations.gov,* Docket number EPA–R03–OAR–2011–0730.

III. General Information Pertaining to SIP Submittals From the Commonwealth of Virginia

In 1995, Virginia adopted legislation that provides, subject to certain conditions, for an environmental assessment (audit) ''privilege'' for voluntary compliance evaluations performed by a regulated entity. The legislation further addresses the relative burden of proof for parties either asserting the privilege or seeking disclosure of documents for which the privilege is claimed. Virginia's legislation also provides, subject to certain conditions, for a penalty waiver for violations of environmental laws when a regulated entity discovers such violations pursuant to a voluntary compliance evaluation and voluntarily discloses such violations to the Commonwealth and takes prompt and appropriate measures to remedy the violations. Virginia's Voluntary Environmental Assessment Privilege Law, Va. Code Sec. 10.1–1198, provides a privilege that protects from disclosure documents and information about the content of those documents that are the product of a voluntary environmental assessment. The Privilege Law does not extend to documents or information (1) that are generated or developed before the commencement of a voluntary environmental assessment; (2) that are prepared independently of the assessment process; (3) that demonstrate a clear, imminent and substantial danger to the public health or environment; or (4) that are required by law.

On January 12, 1998, the Commonwealth of Virginia Office of the Attorney General provided a legal opinion that states that the Privilege Law, Va. Code Sec. 10.1–1198, precludes granting a privilege to documents and information ''required by law,'' including documents and information ''required by Federal law to maintain program delegation, authorization or approval,'' since Virginia must ''enforce Federally authorized environmental programs in a manner that is no less stringent than their Federal counterparts. * * *'' The opinion concludes that ''[r]egarding § 10.1–1198, therefore, documents or other information needed for civil or criminal enforcement under one of these programs could not be privileged because such documents and information are essential to pursuing enforcement in a manner required by Federal law to maintain program delegation, authorization or approval.''

Virginia's Immunity law, Va. Code Sec. 10.1–1199, provides that ''[t]o the extent consistent with requirements imposed by Federal law,'' any person making a voluntary disclosure of information to a state agency regarding a violation of an environmental statute, regulation, permit, or administrative order is granted immunity from administrative or civil penalty. The Attorney General's January 12, 1998 opinion states that the quoted language renders this statute inapplicable to enforcement of any Federally authorized programs, since ''no immunity could be afforded from administrative, civil, or

criminal penalties because granting such immunity would not be consistent with Federal law, which is one of the criteria for immunity.''

Therefore, EPA has determined that Virginia's Privilege and Immunity statutes will not preclude the Commonwealth from enforcing its program consistent with the Federal requirements. In any event, because EPA has also determined that a state audit privilege and immunity law can affect only state enforcement and cannot have any impact on Federal enforcement authorities, EPA may at any time invoke its authority under the CAA, including, for example, sections 113, 167, 205, 211 or 213, to enforce the requirements or prohibitions of the state plan, independently of any state enforcement effort. In addition, citizen enforcement under section 304 of the CAA is likewise unaffected by this, or any, state audit privilege or immunity law.

IV. Proposed Action

EPA is proposing to approve the Virginia SIP revision adding Chapter 45—Consumer and Commercial Products that consists of new and revised standards for the control of VOCs from portable fuel containers, consumer products, architectural and industrial coatings, adhesives and sealants, and asphalt paving operations in the Northern Virginia and Fredericksburg VOC Emissions Control Areas. EPA is also proposing to approve the Virginia SIP revision that includes new and revised documents incorporated by reference into the Virginia regulations (9VAC5–20–21—Documents Incorporated by Reference). EPA is soliciting public comments on the issues discussed in this document. These comments will be considered before taking final action.

V. Statutory and Executive Order Reviews

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

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this proposed rule, pertaining to Virginia's control of VOCs from commercial and consumer products does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

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

Dated: October 25, 2011.

W.C. Early,

Acting Regional Administrator, Region III.

[FR Doc. 2011–28644 Filed 11–7–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R08–OAR–2011–0636; FRL–9488–9]

Approval and Promulgation of State Implementation Plans; State of Utah; Smoke Management Requirements for Mandatory Class I Areas

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve a State Implementation Plan (SIP) revision package submitted by the State of Utah on September 29, 2011. The September 29, 2011 revision establishes rule R307–204 of the Utah Administrative Code (UAC). R307–204 contains smoke management requirements for land managers within the State of Utah as required by regulations for regional haze. The September 29, 2011 submittal supersedes and replaces R307–204 submitted as part of the State's December 12, 2003 Regional Haze (RH) SIP. The September 29, 2011 submittal also supersedes and replaces the State's May 8, 2006 submittal of R307–204.

EPA is also proposing to partially approve a SIP revision submitted by the State of Utah on May 26, 2011. Specifically, EPA is proposing to approve section XX.G of the State's RH SIP which contains the State's long-term strategy for fire programs as required by the regulations. The May 26, 2011 submittal supersedes and replaces SIP revisions to section XX.G of the RH SIP submitted by the State on December 12, 2003 and September 9, 2008. This action is being taken under section 110 of the Clean Air Act (CAA).

DATES: Comments must be received on or before December 8, 2011.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R08–OAR–2011–0636, by one of the following methods:

- *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Email: dygowski.laurel@epa.gov.*
- *Fax:* (303) 312–6064 (please alert the individual listed in the **FOR FURTHER INFORMATION CONTACT** if you are faxing comments).
- *Mail:* Carl Daly, Director, Air Program, Environmental Protection Agency (EPA), Region 8, Mailcode 8P–AR, 1595 Wynkoop Street, Denver, Colorado 80202–1129.
- *Hand Delivery:* Carl Daly, Director, Air Program, Environmental Protection

Agency (EPA), Region 8, Mailcode 8P–AR, 1595 Wynkoop, Denver, Colorado 80202–1129. Such deliveries are only accepted Monday through Friday, 8 a.m. to 4:30 p.m., excluding Federal holidays. Special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R08–OAR–2011–0636. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or email. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA, without going through *http://www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional instructions on submitting comments, go to Section I. General Information of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly-available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Air Program, Environmental Protection Agency (EPA), Region 8, Mailcode 8P–AR, 1595 Wynkoop, Denver, Colorado 80202–1129. EPA requests that if at all possible, you contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section to view the hard copy of the docket. You may view the hard copy of the docket Monday through Friday, 8 a.m. to 4 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Laurel Dygowski, Air Program, U.S. Environmental Protection Agency, Region 8, Mailcode 8P–AR, 1595 Wynkoop, Denver, Colorado 80202–1129, (303) 312–6144, *dygowski.laurel@epa.gov.*

SUPPLEMENTARY INFORMATION:

Definitions

For the purpose of this document, we are giving meaning to certain words or initials as follows:

(i) The words or initials *Act* or *CAA* mean or refer to the Clean Air Act, unless the context indicates otherwise.

(ii) The words *EPA, we, us* or *our* mean or refer to the United States Environmental Protection Agency.

(iii) The initials *SIP* mean or refer to State Implementation Plan.

(iv) The words Utah and *State* mean the State of Utah.

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I. General Information

What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit CBI to EPA through *http://www.regulations.gov* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a 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:

a. Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).

b. 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.

c. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

d. Describe any assumptions and provide any technical information and/or data that you used.

e. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

f. Provide specific examples to illustrate your concerns, and suggest alternatives.

g. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

h. Make sure to submit your comments by the comment period deadline identified.

II. Background

A. Introduction to the Regional Haze Rule

Regional haze is visibility impairment that is produced by a multitude of sources and activities which are located across a broad geographic area and emit fine particles ($PM_{2.5}$) (*e.g.,* sulfates, nitrates, organic carbon, elemental carbon, and soil dust), and their precursors (*e.g.,* SO_2, NO_X, and in some cases, ammonia (NH_3) and volatile organic compounds (VOC)). Fine particle precursors react in the atmosphere to form fine particulate matter which impairs visibility by scattering and absorbing light. Visibility impairment reduces the clarity, color, and visible distance that one can see. $PM_{2.5}$ can also cause serious health effects and mortality in humans and contributes to environmental effects such as acid deposition and eutrophication.

Data from the existing visibility monitoring network, the ''Interagency Monitoring of Protected Visual Environments'' (IMPROVE) monitoring network, show that visibility

impairment caused by air pollution occurs virtually all the time at most national park and wilderness areas. The average visual range [1] in many Class I areas (i.e., national parks and memorial parks, wilderness areas, and international parks meeting certain size criteria) in the western United States is 100–150 kilometers, or about one-half to two-thirds of the visual range that would exist without anthropogenic air pollution. In most of the eastern Class I areas of the United States, the average visual range is less than 30 kilometers, or about one-fifth of the visual range that would exist under estimated natural conditions. (64 FR 35715).

B. Requirements of the CAA and EPA's Regional Haze Rule (RHR)

In section 169A of the 1977 Amendments to the CAA, Congress created a program for protecting visibility in the nation's national parks and wilderness areas. This section of the CAA establishes as a national goal the ''prevention of any future, and the remedying of any existing, impairment of visibility in mandatory Class I Federal areas [2] which impairment results from manmade air pollution.'' Congress added section 169B to the CAA in 1990 to address regional haze issues. EPA promulgated a rule to address regional haze on July 1, 1999 (64 FR 35713), the regional haze rule (RHR). The RHR revised the existing visibility regulations to integrate into the regulation provisions addressing regional haze impairment and established a comprehensive visibility protection program for Class I areas. The requirements for regional haze, found at 40 CFR 51.308 and 51.309, are included in EPA's visibility protection regulations at 40 CFR 51.300–309. The requirement to submit a regional haze SIP applies to all 50 states, the District of Columbia and the Virgin Islands.[3] 40 CFR 51.308(b) and 40 CFR 51.309(c) required states to submit the first implementation plan addressing regional haze visibility impairment no later than December 17, 2007.

C. Roles of Agencies in Addressing Regional Haze

Successful implementation of the regional haze program will require long-term regional coordination among states, tribal governments and various federal agencies. As noted above, pollution affecting the air quality in Class I areas can be transported over long distances, even hundreds of kilometers. Therefore, to effectively address the problem of visibility impairment in Class I areas, states need to develop strategies in coordination with one another, taking into account the effect of emissions from one jurisdiction on the air quality in another.

Because the pollutants that lead to regional haze can originate from sources located across broad geographic areas, EPA has encouraged the states and tribes across the United States to address visibility impairment from a regional perspective. Five regional planning organizations (RPOs) were developed to address regional haze and related issues. The RPOs first evaluated technical information to better understand how their states and tribes impact Class I areas across the country, and then pursued the development of regional strategies to reduce emissions of particulate matter (PM) and other pollutants leading to regional haze.

The Western Regional Air Partnership (WRAP) RPO is a collaborative effort of state governments, tribal governments, and various federal agencies established to initiate and coordinate activities associated with the management of regional haze, visibility and other air quality issues in the western United States. WRAP member State governments include: Alaska, Arizona, California, Colorado, Idaho, Montana, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming. Tribal members include Campo Band of Kumeyaay Indians, Confederated Salish and Kootenai Tribes, Cortina Indian Rancheria, Hopi Tribe, Hualapai Nation of the Grand Canyon, Native Village of Shungnak, Nez Perce Tribe, Northern Cheyenne Tribe, Pueblo of Acoma, Pueblo of San Felipe, and Shoshone-Bannock Tribes of Fort Hall.

D. Development of the Requirements for 40 CFR 51.309

EPA's RHR provides two paths to address regional haze. One is 40 CFR 51.308 (Section 308), and requires states to perform source by source BART determinations and evaluate the need for other control strategy development. These strategies must be shown to make ''reasonable progress'' in improving visibility in Class I areas inside the state and in neighboring jurisdictions. The other path states may take to address regional haze is 40 CFR 51.309 (Section 309), and is an option for nine states termed the ''transport region states'' which includes: Arizona, California, Colorado, Idaho, Nevada, New Mexico, Oregon, Utah, and Wyoming, and the 211 Tribes located within those states. Section 309 requires states to adopt regional haze strategies that are based on recommendations from the Grand Canyon Visibility Transport Commission (GCVTC) for protecting the 16 Class I areas in the Colorado Plateau area [4]. GCVTC recommendations included strategies for addressing smoke emissions from wildland fires and agricultural burning, provisions to prevent pollution by encouraging renewable energy development, provisions regarding clean air corridors, mobile sources, and wind-blown dust, among other things. The EPA codified these recommendations as part of the 1999 RHR.

III. What are the requirements for RH SIPs submitted under 40 CFR 51.309?

As discussed above, the GCVTC had numerous recommendations for protecting the 16 Class I areas of the Colorado Plateau that EPA adopted as part of the Section 309 RHR. This proposed action only addresses the requirements pertaining to programs related to fire of 40 CFR 51.309(d)(6). Pursuant to 40 CFR 51.309(d)(6), a state must show that its smoke management program and all federal or private programs for prescribed fire in the state have a mechanism in place for evaluating and addressing the degree of

[1] Visual range is the greatest distance, in kilometers or miles, at which a dark object can be viewed against the sky.

[2] Areas designated as mandatory Class I Federal areas consist of national parks exceeding 6000 acres, wilderness areas and national memorial parks exceeding 5000 acres, and all international parks that were in existence on August 7, 1977. 42 U.S.C. 7472(a). In accordance with section 169A of the CAA, EPA, in consultation with the Department of Interior, promulgated a list of 156 areas where visibility is identified as an important value. 44 FR 69122 (November 30, 1979). The extent of a mandatory Class I area includes subsequent changes in boundaries, such as park expansions. 42 U.S.C. 7472(a). Although states and tribes may designate as Class I additional areas which they consider to have visibility as an important value, the requirements of the visibility program set forth in section 169A of the CAA apply only to ''mandatory Class I Federal areas.'' Each mandatory Class I Federal area is the responsibility of a ''Federal Land Manager.'' 42 U.S.C. 7602(i). When we use the term ''Class I area'' in this action, we mean a ''mandatory Class I Federal area.''

[3] Albuquerque/Bernalillo County in New Mexico must also submit a regional haze SIP to completely satisfy the requirements of section 110(a)(2)(D) of the CAA for the entire State of New Mexico under the New Mexico Air Quality Control Act (section 74–2–4).

[4] The Colorado Plateau is a high, semi-arid tableland in southeast Utah, northern Arizona, northwest New Mexico, and western Colorado. The 16 mandatory Class I areas are as follows: Grand Canyon National Park, Mount Baldy Wilderness, Petrified Forest National Park, Sycamore Canyon Wilderness, Black Canyon of the Gunnison National Park Wilderness, Flat [4]Tops Wilderness, Maroon Bells Wilderness, Mesa Verde National Park, Weminuche Wilderness, West Elk Wilderness, San Pedro Parks Wilderness, Arches National Park, Bryce Canyon National Park, Canyonlands National Park, Capital Reef National Park, and Zion National Park.

visibility impairment from smoke in their planning and application of burning. A state must also ensure that its prescribed fire smoke management programs have at least the following seven elements: actions to minimize emissions, evaluation of smoke dispersion, alternatives to fire, public notification, air quality monitoring, surveillance and enforcement, and program evaluation.

States must include in their section 309 plan a statewide process for gathering the essential post-burn activity information to support emissions inventory and tracking systems. States must identify existing administrative barriers to the use of non-burning alternatives and adopt a process for continuing to identify and remove administrative barriers where feasible. The SIP must include an enhanced smoke management program, which means the smoke management program considers visibility and is based on the criteria of efficiency, economics, law, emission reduction opportunities, land management objectives, and reduction of visibility impairment. States must also adopt a process to establish annual emission goals to minimize emission increases from fire.

IV. EPA's Analysis of the State's Submittals

A. Background of Submittals

On December 12, 2003, the State of Utah submitted a RH SIP intended to meet all of the requirements under 40 CFR 51.309. This submittal adopted SIP section XX-*Regional Haze* as well as UAC R–307–204 *Emissions Standards: Smoke Management.* The State revised the smoke management requirements of R307–204 in a May 8, 2006 submittal and then again in its September 29, 2011 submittal. The September 29, 2011 submittal supersedes and replaces the R307–204 portion of the December 12, 2003 submittal and all of the May 8, 2006 submittal. R307–204 contains provisions necessary to meet the requirements of 40 CFR 51.309(d)(6) which pertain to smoke management.

Section XX.G—*Long-Term Strategy for Fire Programs* of the State's RH SIP also contains provisions necessary to meet the requirements of 40 CFR 51.309(d)(6). The State originally submitted Section XX.G with its December 12, 2003 RH SIP submittal. The State resubmitted this section with subsequent SIP revisions on September 9, 2008 and May 26, 2011. Section XX.G of the May 26, 2011 submittal supersedes and replaces Section XX.G of the December 12, 2003 and September 9, 2008 submittals.

EPA will be taking action on the remainder of the December 12, 2003, September 9, 2008, and May 26, 2011 submittals at a later date.

B. Requirements Under 40 CFR 51.309(d)(6)

1. Evaluation of Current Fire Programs

Pursuant to 40 CFR 51.309(d)(6)(i), the State of Utah has evaluated all federal, state, and private prescribed fire programs in the State. The State based the evaluation on the potential of the programs to contribute to visibility impairment in the 16 mandatory Class I areas of the Colorado Plateau and how visibility protection from smoke is addressed in planning and operation of the programs. The State relied upon the WRAP report *Assessing Status of Incorporating Smoke Effects into Fire Planning and Operation* (found in section G of the Utah Technical Support Document (TSD)) as a guide for making this evaluation. The State of Utah also evaluated whether these prescribed fire programs contain the following elements: actions to minimize emissions; evaluation of smoke dispersion; alternatives to fire; public notification; air quality monitoring; surveillance and enforcement; and program evaluation.

Based on this evaluation, the State adopted R307–204 [5]. The State also adopted the *Utah Enhanced Smoke Management Plan* (ESMP) (found in Section G of the Utah TSD). The ESMP serves as a guide for land managers to implement the requirements of R307–204. The following discusses how R307–204, in conjunction with the ESMP, meet the requirements of 40 CFR 51.309(d)(6)(i). The following requirements apply to large wildland fire use events [6], large prescribed fires and large pile burns occurring on wildlands [7]. R307–204 does not apply to agricultural burning as discussed later in this preamble.

a. Actions to Minimize Fire Emissions

R307–204 has two requirements directed at minimizing fire emissions: use of emission reduction techniques [8] by land managers and the establishment by the State of annual emission goals for fire. Land managers must utilize emission reduction techniques as appropriate to minimize fire emissions and provide the State documentation of the techniques used. The State will establish an annual emission goal prior to the beginning of the fire season with the intention of minimizing emission increases from fire. The State will establish the annual emission goal in cooperation with other states, federal land management agencies, and private entities. To establish the goal, the State will determine if there are feasible emission reduction techniques for upcoming prescribed fire projects and will quantify the benefit from using the techniques.

b. Evaluation of Smoke Dispersion

R307–204 requires land managers to submit burn plan information for approval from the executive secretary prior to ignition of any large burn in accordance with 40 CFR 51.309(d)(6)(ii). The pre-burn information must identify any sensitive receptor, including any Class I or non-attainment area within 15 miles, distance and direction of the sensitive receptor in degrees from the project site, and a map that shows the daytime and nighttime smoke path and down-drainage flow for a minimum of 15 miles from the burn site. This information, in addition to the fire prescription [9] that is submitted as part of the burn plan prepared by the land manager, provides field level data that is essential for determining the dispersion of smoke from a fire and what areas it may potentially impact. Land managers are also required by R307–204 to use smoke or visibility modeling to predict the impacts of the fire.

c. Alternatives to Fire

Pursuant to R307–204–4(4), beginning in 2004 and annually thereafter, each land manager is required to submit to the executive secretary a list of areas treated using non-burning alternatives to fire during the previous calendar year, including the number of acres, the

[5] The rule was adopted by the Air Quality Board (AQB) in November 2003. Amendments to R307–204 were adopted by the AQB in April 2006 and July 2011.

[6] Wildland Fire Use Event means naturally ignited wildland fire that is managed to accomplish specific pre-stated resource management objectives in predefined geographic areas.

[7] Large Prescribed Fires are fires that cover 20 acres or more per burn. Large Prescribed Pile Fires are fires that exceed 30,000 cubic feet per day. Large Wildland Fire Use Events are those greater than 20 acres.

[8] An Emission Reduction Technique is a technique for controlling emissions from prescribed fires to minimize the amount of emissions produced per unit or acre burned

[9] Fire Prescription means the measurable criteria that define conditions under which a prescribed fire may be ignited, guide selection of appropriate management responses, and indicates other required actions. Prescription criteria may include safety, economic, public health, environmental, geographic, administrative, social, or legal considerations.

specific types of alternatives used, and the location of these areas.

d. Public Notification of Burning

Utah provides public information on current burning on a Web site at *http://www.utahfireinfo.gov*. In addition, land managers must include public notification procedures in their burn plan required by R307–204.

e. Air Quality Monitoring

Pursuant to R307–204, land managers shall monitor the effects of the prescribed fire on smoke sensitive receptors and on visibility in Class I areas. The method of monitoring, either visual or with instrumentation, is specified as part of the burn plan.

f. Surveillance and Enforcement

State staff conduct site inspections on prescribed fires that are close to Class I areas to verify compliance with the burn plan on an as-needed basis. The State generates reports after the inspection with the results of that inspection.

g. Program Evaluation

The State in conjunction with land managers will conduct an annual effectiveness review of the smoke management programs in the State. A formal progress report will be completed every five years as required by 40 CFR 51.309(d)(10)(ii).

h. Agricultural Fire

The WRAP emission inventory shows that agricultural burning is a very small portion of total emissions in Utah. According to the WRAP inventory, Utah agriculture burning accounts for only .25% of Utah's total emissions of PM, $PM_{2.5}$, SO_2, NO_X, VOC, and carbon monoxide. Utah's agriculture emissions comprise approximately three-quarters of a percent to one percent of the WRAP region emissions for agriculture burning for the same pollutants as those listed above. The State has concluded from this information that agricultural burning does not significantly contribute to visibility impairment in any Class I area. Thus, agricultural land managers are not subject to the R307–204 or other State requirements for smoke management.

2. Emission Inventory and Tracking System

a. Wildlands Inventory

Pursuant to 40 CFR 51.309(d)(6)(ii) and R307–204, the State maintains a fire emissions inventory for volatile organic compounds, nitrogen oxides, elemental and organic carbon, and fine particulate. The fires in the State are tracked in the WRAP Fire Emission Tracking System (FETS). The FETS is a web-enabled database for planned and unplanned fire events. The FETS is a planning tool for daily smoke management coordination, and retrospective analyses such as emission inventories and regional haze air quality planning tasks (see *http://wrapfets.org*).

b. Agricultural Lands Inventory

To meet the requirements of 40 CFR 51.309(d)(6)(ii), the State will work collaboratively with the Utah Farm Bureau Federation and Utah State University Extension to develop and implement an inventory and emissions tracking system for agricultural burning. A survey conducted in 2003 by the Utah State University Extension, in collaboration with the Utah Farm Bureau Federation, will be used by the State as a baseline for future emissions tracking activities. The State will conduct emission tracking activities on a periodic basis to determine if any significant changes have been made since the 2003 survey. Results from the periodic emission tracking activities will be provided in future progress reports to EPA required by 40 CFR 51.309(d)(10).

3. Identification and Removal of Administrative Barriers

The State and land managers for fire will annually assess whether administrative barriers to the use of non-burning alternatives exist. If a specific administrative barrier is identified as a result of this annual evaluation, the State will investigate how this barrier may be removed, if feasible, and will work collaboratively with land managers to remove the barrier as required by 40 CFR 51.309(d)(6)(iii). An evaluation of the administrative barriers to the use of the non-burning alternatives, if any, will be included in the formal progress report to EPA every five years as required by 40 CFR 51.309(d)(10).

4. Enhanced Smoke Management Program

Pursuant to 40 CFR 51.309(d)(6)(iv), the State has determined that all smoke management programs that operate within Utah are consistent with the *WRAP Enhanced Smoke Management Programs for Visibility Policy* (see Section G of the Utah TSD for a complete copy of this policy). This policy calls for programs to be based on the criteria of efficiency, economics, law, emission reduction opportunities, land management objectives, and reduction of visibility impacts.

5. Annual Emission Goals

R307–204 requires the State to establish annual emission goals in accordance with 40 CFR 51.309(d)(6)(v). Pursuant to the State's ESMP, the annual emission goals will seek to minimize emission increases in fire, excluding wildfire, to the maximum extent feasible.

Based on our analysis and evaluation of section XX.G of the Utah May 26, 2011 SIP submittal and R307–204 of the September 29, 2011 submittal, EPA concludes that the State has met all of the requirements of 40 CFR 51.309(d)(6).

V. Proposed Action

EPA is proposing to approve a SIP revision submitted by the State of Utah on September 29, 2011. The September 29, 2011 revision establishes rule R307–204 of the Utah Administrative Code (UAC). R307–204 contains smoke management requirements for land managers within the State of Utah as required by 40 CFR 51.309(d)(6) for regional haze. The September 29, 2011 submittal supersedes and replaces R307–204 submitted as part of the State's December 12, 2003 regional haze SIP. The September 29, 2011 submittal also supersedes and replaces the State's May 8, 2006 submittal of R307–204. EPA is also proposing to partially approve a SIP revision submitted by the State of Utah on May 26, 2011. Specifically, EPA is proposing to approve section XX.G of the State's Regional Haze (RH) SIP which contains the State's long-term strategy for fire programs as required by 40 CFR 51.309(d)(6). The May 26, 2011 submittal supersedes and replaces SIP revisions to section XX.G of the RH SIP submitted by the State on December 12, 2003 and September 9, 2008.

VI. Statutory and Executive Order Reviews

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

- Is not a ''significant regulatory action'' subject to review by the Office

of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);

- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999); is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and,
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

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

List of Subjects in 40 CFR Part 52

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

Dated: October 28, 2011.

James B. Martin,

Regional Administrator, Region 8.

[FR Doc. 2011–28896 Filed 11–7–11; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MB Docket No. 11–167; RM–11642; DA 11–1711]

Radio Broadcasting Services; Altamont, OR

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document sets forth a proposal to amend the FM Table of Allotments. The Commission requests comment on a petition filed by Threshold Communications, proposing to amend the Table of Allotments by substituting Channel 235C1 for vacant Channel 249C1, at Altamont, Oregon. The proposal is part of a contingently filed ''hybrid'' application and rule making petition. Channel 235C1 can be allotted at Altamont in compliance with the Commission's minimum distance separation requirements with a site restriction of 32.3 km (20.1 miles) east of Altamont, at 42–07–04 North Latitude and 121–21–50 West Longitude. *See* **SUPPLEMENTARY INFORMATION** *infra.*

DATES: The deadline for filing comments is December 5, 2011. Reply comments must be filed on or before December 20, 2011.

ADDRESSES: Federal Communications Commission, 445 12th Street SW., Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve counsel for petitioner as follows: Donald E. Martin, Esq., Donald E. Martin, P.C., Post Office Box 8433, Falls Church, Virginia 22041.

FOR FURTHER INFORMATION CONTACT: Deborah A. Dupont, Media Bureau (202) 418–7072.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Notice of Proposed Rule Making,* MB Docket No. 11–167, adopted October 12, 2011, and released October 14, 2011. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Reference Information Center (Room CY–A257), 445 12th Street SW., Washington, DC 20554. The complete text of this decision may also be purchased from the Commission's copy contractor, Best Copy and Printing, Inc., 445 12th Street SW., Room CY–B402, Washington, DC 20554, (800) 378–3160, or via the company's Web site, *http://www.bcpiweb.com.* This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, therefore, it does not contain any proposed information collection burden ''for small business concerns with fewer than 25 employees,'' pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506 (c)(4).

The Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding. Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. *See* 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, *see* 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio.

Federal Communications Commission.

Nazifa Sawez,

Assistant Chief, Audio Division,Media Bureau.

Rule Changes

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

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

Authority: 47 U.S.C. 154, 303, 334, 336 and 339.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Oregon, is amended by deleting 249C1 and adding 235C1 at Altamont.

[FR Doc. 2011–28790 Filed 11–7–11; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MB Docket No. 04–219, RM–10986, DA 11–1687]

Radio Broadcasting Services; Evergreen, AL, and Shalimar, FL

AGENCY: Federal Communications Commission.

ACTION: Dismissal.

SUMMARY: The Audio Division, at the request of Qantum of Ft. Walton Beach License Company, LLC, proponent of a petition for reconsideration of the Memorandum Opinion and Order in this proceeding, dismisses the petition for reconsideration and terminates the proceeding.

FOR FURTHER INFORMATION CONTACT: Deborah Dupont, Media Bureau, (202) 418–7072.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Order,* MB Docket No. 04–219, adopted October 6, 2011, and released October 7, 2011. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Information Center, Portals II, 445 12th Street SW., Room CY–A257, Washington, DC 20554. The complete text of this decision also may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street SW., Room CY–B402, Washington, DC 20554, (800) 378–3160, or via the company's Web site, *http://www.bcpiweb.com.* The *Order* is not subject to the Congressional Review Act. (The Commission, is, therefore, not required to submit a copy of this Report and Order to GAO, pursuant to the Congressional Review Act, see U.S.C. 801(a)(1)(A) because the proposed rule was dismissed.)

Federal Communications Commission.

Nazifa Sawez,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 2011–28793 Filed 11–7–11; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 21

[Docket No. FWS–R9–MB–2011–0060; 91200–1231–9BPP]

RIN 1018–AX90

Migratory Bird Permits; Definition of ''Hybrid'' Migratory Bird

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to revise the definition of ''hybrid'' as it relates to birds protected under the Migratory Bird Treaty Act. At present, the definition applies only to hybrids of two species on the list of migratory birds at 50 CFR 10.13. We propose to revise the definition to make it clear that it applies to the offspring of any species listed at 50 CFR 10.13.

DATES: Send comments on this proposal by February 6, 2012.

ADDRESSES: You may submit comments by either one of the following two methods:

- *Federal eRulemaking portal: http://www.regulations.gov.* Follow the instructions for submitting comments on Docket FWS–R9–MB–2011–0060.
- *U.S. mail or hand delivery:* Public Comments Processing, Attention: FWS–R9–MB–2011–0060; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 North Fairfax Drive, MS 2042–PDM; Arlington, VA 22203–1610.

We will not accept email or faxes. We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information that you provide. See the Public Comments section below for more information.

FOR FURTHER INFORMATION CONTACT: Dr. George T. Allen at (703) 358–1825.

SUPPLEMENTARY INFORMATION:

Background

At present, at 50 CFR 21.3, the term ''hybrid'' is defined as the ''offspring of birds listed as two or more distinct species in § 10.13 of subchapter B of this chapter, or offspring of birds recognized by ornithological authorities as two or more distinct species listed in § 10.13 of subchapter B of this chapter.'' This means that, under the definition of ''hybrid'' birds at 50 CFR 21.3, the only hybrid migratory birds that are protected by our regulations under the Migratory Bird Treaty Act (MBTA; 16 U.S.C. 703–712) are birds that are the offspring of two species already protected under the MBTA.

This definition has created difficulties because it differs from the longstanding Service application of ''hybrid'' to falconry and raptor propagation birds, in particular. ''Hybrid'' was not defined prior to 2008, when the falconry regulations were substantially revised (73 FR 59448–59477, October 8, 2008). We defined ''hybrid'' in 50 CFR 21.3 in a manner that conflicts with the use of the term in other regulations.

To ensure that all appropriate hybrid migratory birds receive protection under our regulations implementing the MBTA, we are proposing a change to the definition of ''hybrid.'' The proposed definition change would make it clear that the offspring of any species listed at 50 CFR 10.13 is protected under the MBTA, regardless of how many generations that bird is removed from the wild. The proposed definition would also be consistent with the definition of ''migratory bird'' at 50 CFR 10.12, and with the definition of ''hybrid'' at 50 CFR 23.5 of the regulations implementing the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). The definition of ''migratory bird'' in 50 CFR 10.12 is: ''Migratory bird means *any bird, whatever its origin* and whether or not raised in captivity, which belongs to a species listed in § 10.13 or which is a mutation *or a hybrid of any such species.* * * *'' (emphasis added). Likewise, the definition at 50 CFR 23.5 is ''*Hybrid* means any wildlife or plant that results from a cross of genetic material between two separate taxa *when one or both are listed* * * *'' (emphasis in original and added, respectively).

The proposed definition would also be consistent with the purpose of the MBTA (16 USC 701): The object and purpose of this Act is to aid in the restoration of such birds in those parts of the United States adapted thereto where the same have become scarce or extinct, *and also to regulate the introduction of American or foreign birds* or animals in localities where they have not heretofore existed (emphasis added). If hybrid raptors, with one foreign parent (not listed on § 10.13), could not be regulated under the MBTA, then these introduced birds could potentially pose a threat to native birds by, for example, competition or cross-breeding. The Service has recognized that threat in its regulations, explicitly prohibiting several times the release of hybrid raptors in the wild at 50 CFR 21.29 (b)(6)(v), (b)(12), (e)(9)(i), and (e)(9)(iv). If the Service did not have authority under the MBTA to regulate hybrids, then it would have no authority over release of hybrids under 50 CFR 21.29. The proposed definition change would thus harmonize with the Service's existing authority and regulation.

Similarly, if the Service did not have authority to regulate hybrids in which one parent was not listed on § 10.13, then it would have no authority to regulate hybrids with a ''prohibited raptor.'' In the 2008 revisions of the falconry regulations, the Service recently allowed possession of hybrids (50 CFR 21.29(c)(3)(i)(E)), except for hybrids of certain species: ''You may possess a raptor of any Falconiform or Strigiform species, including wild, captive-bred, *or hybrid individuals, except a federally listed threatened or endangered species, a bald eagle (Haliaeetus leucocephalus), a white-*

tailed eagle (Haliaeetus albicilla), a Steller's sea-eagle (Haliaeetus pelagicus), or a golden eagle (Aquila chrysaetos)'' (emphasis added). Under the current definition, the Service would not have MBTA authority with a hybrid of a foreign non-§ 10.13 listed raptor and a ''prohibited raptor,'' a conflict with this regulation. Again, the proposed definition change would harmonize with 50 CFR 21.29.

Lastly, the change is consistent with the Service's broad interpretation of hybrid species. As early as 1983 (48 FR 31600, July 8, 1983), the Service recognized that CITES and the MBTA cover hybrid species. The Service responded to comments that hybrids birds (and captive-bred birds) are not included within the terms of the MBTA, and the commenters implied that coverage of such birds in such regulations is an unlawful expansion of the MBTA. However, regulations governing captive-bred birds have been held to be within the Secretary's authority under the MBTA (*U.S.* v. *Richards,* 583 F.2d 491, 10th Cir. 1978). The court upheld the regulations on the basis that MBTA enforcement would be hindered if the defense was available that a bird involved, in this case a captive-bred falcon, was raised in captivity. In view of this decision, and the Supreme Court's expansive reading of the MBTA in *Andrus* v. *Allard,* 444 U.S. 51 (1979), the Service believes the coverage of hybrids is similarly within the Secretary's broad authority under the MBTA. Later in 1998, the Service interpreted migratory bird broadly at 50 CFR 10.12 (1998) as ''whatever its origin, whether or not raised in captivity.'' Such a definition continues the broad interpretation of hybrid species, as the MBTA applies to migratory birds, ''whatever its origins.'' Only in the 2008 falconry regulations revisions did the Service amend the definition of hybrid species to both parents on § 10.13. The proposed change returns the definition of hybrid to its earlier meaning, makes the Service's regulations consistent with its practices, as the Service's Office of Law Enforcement has treated hybrids as protected, in compliance with CITES. Hybrid raptors may be exceptionally difficult to identify, and without a regulation making it clear that hybrids raptors are protected under the MBTA as they are under CITES, the work of wildlife law enforcement and border inspectors would be more subjective and more difficult.

Public Comments

We request comments on this proposed rule. You may submit your comments and supporting materials by one of the methods listed in the **ADDRESSES** section. We will not consider comments sent by email or fax, or written comments sent to an address other than the one listed in the **ADDRESSES** section.

If you submit a comment via *http://www.regulations.gov,* your entire comment—including any personal identifying information—will be posted on the Web site. If you submit a hardcopy comment that includes personal identifying information, you may request that we withhold this information from public review, but we cannot guarantee that we will be able to do so. We will post all hardcopy comments on *http://www.regulations.gov.*

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection at *http://www.regulations.gov,* or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service (contact the person listed under **FOR FURTHER INFORMATION CONTACT**).

Required Determinations

Regulatory Planning and Review

The Office of Management and Budget (OMB) has determined that this proposed rule is not significant under Executive Order 12866 (E.O. 12866). OMB bases its determination upon the following four criteria.

(a) Whether the rule will have an annual effect of $100 million or more on the economy or adversely affect an economic sector, productivity, jobs, the environment, or other units of government.

(b) Whether the rule will create inconsistencies with other Federal agencies' actions.

(c) Whether the rule will materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

(d) Whether the rule raises novel legal or policy issues.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 (Pub. L. 104–121)), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (*i.e.,* small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies the rule would not have a significant economic impact on a substantial number of small entities.

SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide the statement of the factual basis for certifying that a rule would not have a significant economic impact on a substantial number of small entities. If adopted, there would no be costs associated with this proposed regulation change because the Service's Office of Law Enforcement has treated hybrids as protected, as is consistent with CITES. We have determined that because this proposed regulation change would not have a significant economic impact on a substantial number of small entities, a regulatory flexibility analysis is not required.

This rule is not a major rule under the SBREFA (5 U.S.C. 804(2)). It would not have a significant impact on a substantial number of small entities.

a. This rule would not have an annual effect on the economy of $100 million or more.

b. This rule would not cause a major increase in costs or prices for consumers, individual industries, Federal, State, Tribal, or local government agencies, or geographic regions.

c. This rule would not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

Unfunded Mandates Reform Act

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we have determined the following:

a. This rule would not affect small governments. A small government agency plan is not required. Amending the definition of ''hybrid'' at 50 CFR 21.3 would not affect small government activities.

b. This rule would not produce a Federal mandate of $100 million or greater in any year. This proposal is not a significant regulatory action.

Takings

This proposed rule does not contain a provision for taking of private property. In accordance with Executive Order 12630, a takings implication assessment is not required.

Federalism

This rule does not have sufficient Federalism effects to warrant preparation of a Federalism assessment

under Executive Order 13132. It would not interfere with the States' abilities to manage themselves or their funds. No significant economic impacts are expected to result from the proposed change in the definition of ''hybrid'' at 50 CFR 21.3.

Civil Justice Reform

In accordance with Executive Order 12988, the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

Paperwork Reduction Act of 1995

This proposed rule does not contain any new information collections or recordkeeping requirements for which approval from the Office of Management and Budget (OMB) is required under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). 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.

National Environmental Policy Act

We have analyzed this proposed rule in accordance with the National Environmental Policy Act (NEPA), 42 U.S.C. 432–437(f), and Part 516 of the U.S. Department of the Interior Manual (516 DM). The proposed regulation change would have no environmental impact.

Socioeconomic. The proposed regulation change would have no discernible socioeconomic impacts.

Migratory bird populations. The proposed regulation change would not affect native migratory bird populations.

Endangered and threatened species. The proposed regulation change would not affect endangered or threatened species or habitats important to them.

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 512 DM 2, we have determined that there are no potential effects on Federally recognized Indian Tribes from the proposed regulation change. The proposed regulation change would not interfere with Tribes' abilities to manage themselves or their funds, or to regulate migratory bird activities on tribal lands.

Energy Supply, Distribution, or Use (Executive Order 13211)

This proposed rule would not affect energy supplies, distribution, or use. This action would not be a significant energy action, and no Statement of Energy Effects is required.

Compliance With Endangered Species Act Requirements

Section 7 of the Endangered Species Act (ESA) of 1973, as amended (16 U.S.C. 1531 *et seq.*), requires that ''The Secretary [of the Interior] shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter'' (16 U.S.C. 1536(a)(1)). It further states that the Secretary must ''insure that any action authorized, funded, or carried out * * * is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat'' (16 U.S.C. 1536(a)(2)). The proposed regulation change would not affect listed species.

Clarity of this Regulation

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(a) Be logically organized;

(b) Use the active voice to address readers directly;

(c) Use clear language rather than jargon;

(d) Be divided into short sections and sentences; and

(e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

List of Subjects in 50 CFR Part 21

Exports, Hunting, Imports, Reporting and recordkeeping requirements, Transportation, Wildlife.

Proposed Regulation Promulgation

For the reasons described in the preamble, we propose to amend subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 21—MIGRATORY BIRD PERMITS

1. The authority for part 21 continues to read as follows:

Authority: Migratory Bird Treaty Act, 40 Stat. 755 (16 U.S.C. 703); Public Law 95–616, 92 Stat. 3112 (16 U.S.C. 712(2)); Public Law 106–108, 113 Stat. 1491, Note following 16 U.S.C. 703.

2. Amend § 21.3 by revising the definition of ''hybrid'' to read as follows:

§ 21.3 Definitions.

* * * * *

Hybrid means offspring of any two different species listed in § 10.13 of subchapter B of this chapter, and any progeny of those birds; or offspring of any bird of a species listed in § 10.13 of subchapter B of this chapter and any bird of a species not listed in § 10.13 of subchapter B of this chapter, and any progeny of those birds.

* * * * *

Dated: October 28, 2011.

Michael J. Bean,

Acting Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2011–28942 Filed 11–7–11; 8:45 a.m.]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 21

[Docket No. FWS–R9–MB–2011–0033; 91200–1231–9BPP]

RIN 1018–AX82

Migratory Bird Permits; Double-Crested Cormorant Management in the United States

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service (USFWS), are requesting public comments to guide the preparation of a Supplemental Environmental Impact Statement or Environmental Assessment on the development of revised regulations governing the management of double-crested cormorants. Under current regulations, cormorant damage management activities are conducted annually at the local level by individuals or agencies operating under USFWS depredation permits, the existing Aquaculture Depredation Order, or the existing Public Resource Depredation Order. The depredation orders are scheduled to expire on June

30, 2014. This analysis will update the 2003 Final Environmental Impact Statement (FEIS): *Double-crested cormorant management in the United States* (USFWS 2003).

DATES: Electronic comments on this notice via *http://www.regulations.gov* must be submitted by midnight Eastern Time on February 6, 2012. Comments submitted by mail must be postmarked on or before February 6, 2012.

ADDRESSES: You may submit comments by either one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments on Docket No. FWS–R9–MB–2011–0033.
- *U.S. Mail or hand delivery:* Public Comments Processing, Attn: FWS–R9–MB–2011–0033; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 North Fairfax Drive, Suite 222; Arlington, VA 22203–1610.

We will not accept email or faxes. We will post all comments on *http://www.regulations.gov*. This generally means that we will post any personal information that you provide. See the Public Comments section below for more information.

FOR FURTHER INFORMATION CONTACT: Terry Doyle, Wildlife Biologist, Division of Migratory Bird Management, 703–358–1799.

SUPPLEMENTARY INFORMATION: We seek comments to help us determine future national policy for effective management of double-crested cormorant (DCCO, *Phalacrocorax auritus*) populations within the United States. Primary management objectives surrounding DCCOs are at times in conflict. They include meeting conservation obligations under the Migratory Bird Treaty Act (MBTA) (16 U.S.C. 703 *et seq.*) and other Federal laws, while enabling management of human-wildlife conflicts related to the expansion of DCCO populations, particularly in the Great Lakes and southeastern United States. Developing a comprehensive national policy requires consideration of the decision process at each of the geographic scales relevant to DCCO management. Management decisions are made at the local level (including individual lakes, breeding colonies, aquaculture facilities, and roosts), at the State level, regional or national scales, and across international borders. Under the current regulations, control activities are proposed and conducted annually at the local level by individuals or agencies operating under depredation permits (50 CFR 21.41), the Aquaculture Depredation Order (AQDO, 50 CFR 21.47), or the Public Resource Depredation Order (PRDO, 50 CFR 21.48). U.S. Fish and Wildlife Service (USFWS) Regional Directors make annual decisions on whether to allow these activities. Ultimately, the USFWS Director will decide, through the National Environmental Policy Act (NEPA) process, on a national management strategy by June 30, 2014, at which time the existing depredation orders are scheduled to expire.

The analysis will be prepared in cooperation with the U.S. Department of Agriculture, Animal and Plant Health Inspection Service, Wildlife Services (APHIS–WS). The decision to prepare a Supplemental Environmental Impact Statement or Environmental Assessment will be based on responses to this notice and: (1) The National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 *et seq.*), (2) regulations of the Council on Environmental Quality for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508), (3) U.S. Department of the Interior regulations implementing NEPA (43 CFR part 46), and (4) USFWS implementing provisions (516 DM 8).

Background

Ecological Context

Double-crested cormorant populations, especially those breeding in the Great Lakes States and provinces and wintering in the southeastern United States, have increased rapidly since the mid-1970s, and may have reached or exceeded carrying capacity in the Great Lakes. Before that time, DCCOs were considered a rare breeder in the Great Lakes, with the first confirmed nesting documented in 1913 (Wires and Cuthbert 2006). The reasons for the rapid expansion are unknown, but likely involved several factors, including U.S. Federal protection under the MBTA in 1972, the elimination of DDT, the expansion of the aquaculture industry and construction of reservoirs in the Southeast, and alterations of the Great Lakes fish communities.

By the mid 1990s, DCCO populations were perceived to have a negative impact on the aquaculture industry and on natural resources at many locations across North America. Double-crested cormorants have been implicated in several human-DCCO conflict issues including depredation of aquaculture stocks and local sport and commercial fisheries, as well as conflicts with other conservation interests such as damage to sensitive vegetation and other colonial nesting bird species (Fielder 2010, Glahn and Brugger 1995, Hebert et al. 2005, Rudstam et al. 2004, Somers et al. 2007).

In certain areas, evidence suggests that DCCOs have contributed to declines in walleye, yellow perch, and smallmouth bass, whereas in other areas no such evidence exists for the decline of sport fishery stocks (Seefelt and Gillingham 2006). The implication of DCCOs as a causative factor in these declines is confounded, however, by uncertainties regarding the effect of other ecosystem changes (e.g., exotic species introductions, lower nutrient loading, or decreases in alternate prey) and how these changes interact with each other and with DCCO population dynamics.

Legal, Regulatory, and Management Context

The USFWS has statutory authority to manage migratory bird populations in the United States, under the MBTA (16 U.S.C. 703–712) and the Conventions with Canada (1916 as amended in 1996), Mexico (1936 as amended in 1972), Japan (1972), and Russia (1976). We have interstate regulatory authority over cormorants and permit take by individuals and agencies. All the Conventions, except the one with Mexico, specifically mention allowing the lethal take of birds and eggs to protect injury to agricultural interests, persons, or property. The Federal regulation at 50 CFR 21.1 provides limited exceptions to protections afforded by the MBTA, such as the establishment of depredation orders.

In response to rapidly increasing wintering populations in the southeastern United States, breeding populations of DCCOs in the Great Lakes region, and concerns about potential impacts, we adopted two depredation orders that facilitate the control of depredating DCCOs. The Aquaculture Depredation Order (AQDO) was established in 1998 to assist with the control of DCCOs at aquaculture facilities in 13 States. In 2003, we modified the AQDO and established a Public Resource Depredation Order (PRDO) to protect additional public resources including fish, wildlife, plants, and their habitats from DCCO impacts in 24 States (USFWS 2003). Both depredation orders were recently authorized to remain in effect through June 2014 (USFWS 2009a and USFWS 2009b). Prior to establishment of the depredation orders, depredation permits were the primary tool used to resolve DCCO conflicts. Permits are still used to resolve conflicts related to human health and safety and economic losses to private property in all States,

including those operating under the depredation orders.

Double-crested cormorants in the United States are managed at selected sites on the breeding and wintering grounds and during migration to alleviate damage and lessen economic, social, and ecological conflicts. Management actions are conducted locally each year and include various forms of harassment, shooting, nest and egg destruction, and egg oiling. Under the PRDO, agencies (State fish and wildlife agencies, Federally recognized Tribes, and APHIS–WS) submit annual written proposals to the USFWS Regional Migratory Bird Permit Office (RMBPO) describing the locations and levels of proposed management actions. The Regional Director may prevent any activities that pose a threat to the long-term sustainability of DCCOs or any other migratory bird species. Often, decisions are made through interactive communications between the action agencies and USFWS. In some cases, USFWS asks action agencies to clarify their request or provide additional rationale for a decision. Inter-agency coordination also occurs through the NEPA process when environmental assessments are developed for DCCO management within individual States.

No such interaction occurs under the AQDO. However, aquaculture producers may operate under the AQDO only in conjunction with an established nonlethal harassment program as certified by APHIS–WS as outlined in WS Directive 2.330. This certification is documented on WS Form 37, which APHIS–WS is required to share with the USFWS when requested. Aquaculture producers submit an annual report of take by location and date, as does APHIS–WS for take at roosts in the vicinity of aquaculture facilities.

We retain the authority to revoke privileges to operate under the PRDO or AQDO if we believe the depredation orders have not been adhered to, or if the long-term sustainability of DCCO populations is threatened. Since 2004, total annual take of DCCOs in the United States has averaged 27 percent of the amount projected in the 2003 FEIS, for depredation permits, expanded AQDO, and PRDO (USFWS 2003).

Preliminary Objectives

We have identified the following objectives that will be used to evaluate the alternatives. We identified three fundamental objectives:

(1) To meet our legal obligations under the MBTA, Bald and Golden Eagle Protection Act (BGEPA) (16 U.S.C. 668), Endangered Species Act (ESA) (16 U.S.C. 1531 *et seq.*), and other Federal laws;

(2) To minimize conflicts related to DCCO impacts and resultant management actions; and

(3) To minimize the costs of implementing regulations.

Each alternative will be measured against the following criteria, or means objectives, to determine how it facilitates achieving the fundamental objectives:

(1) Maintain sustainable DCCO populations;

(2) Minimize negative impacts to other migratory birds and threatened and endangered species;

(3) Maximize the ability to manage DCCO conflicts;

(4) Maximize the social acceptance of DCCO management actions;

(5) Minimize the cost of implementation by action agencies; and

(6) Minimize the cost of USFWS oversight.

Preliminary Alternatives

We considered several alternative management actions in the 2003 EIS (USFWS 2003) including:

(1) No Action;

(2) Non-lethal Management;

(3) Increased Local Damage Control;

(4) Public Resource Depredation Order;

(5) Regional Population Reduction; and

(6) Regulated Hunting.

That environmental review resulted in the selection of the alternative establishing the PRDO and modifying the AQDO (USFWS 2003). In addition to considering the management alternatives identified above, the following actions may be included and addressed in the new NEPA analysis:

(1) Renewing the depredation orders as currently written (with or without an expiration date);

(2) Modifying the current depredation orders;

(3) Allowing the depredation orders to expire; or

(4) Adopting a different alternative that may or may not have been considered in the 2003 EIS.

Public Comments

We seek comments and suggestions from the public, concerned government agencies, Tribes, industry, the scientific community, and other interested parties regarding the problem, objectives, and alternatives that we have described and identified. Explaining your reasons will help us evaluate your comments. Of particular interest are answers to the following questions:

(1) Have we accurately described the problem? If not, how could it be better described?

(2) Are there fundamental or means objectives regarding DCCO management missing from the list above that we should consider?

(3) Should the current fundamental or means objectives be modified? If so, how?

(4) How would you rank the relative importance of the identified fundamental and means objectives? Please provide your rationale.

(5) Are there any other alternatives that should be evaluated? If so, please describe them in sufficient detail so that they can be evaluated.

(6) Should any of the identified alternatives be modified? If so, how?

(7) How would you rank the preliminary list of alternatives? Please provide your rationale.

As examples of the level of detail needed to evaluate alternatives, we present the specifics of two alternatives that will likely be evaluated: The current and an alternative version of both the AQDO and PRDO. In many cases, the alternative versions attempt to resolve ambiguities in existing regulations.

TABLE 1—CURRENT AQUACULTURE DEPREDATION ORDER (AQDO) PROVISIONS, AND AN EXAMPLE OF AN ALTERNATIVE VERSION OF THE AQDO WITH MODIFIED PROVISIONS

Provision in 50 CFR 21.47	Current	Modified
(b) Area of coverage	Commercial freshwater aquaculture facilities and State and Federal fish hatcheries in 13 States (Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Minnesota, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, and Texas).	(1) Should saltwater facilities be included? (2) Should we modify the coverage by eliminating States that have not used the AQDO (e.g., Oklahoma, South Carolina, and Tennessee) and consider adding other States?

TABLE 1—CURRENT AQUACULTURE DEPREDATION ORDER (AQDO) PROVISIONS, AND AN EXAMPLE OF AN ALTERNATIVE VERSION OF THE AQDO WITH MODIFIED PROVISIONS—Continued

Provision in 50 CFR 21.47	Current	Modified
(c)(2) APHIS–WS	Authorized to take DCCOs at roosts in the vicinity of aquaculture facilities.	Define vicinity as being within a reasonable distance of the facility such that DCCOs at the roost site are likely to be responsible for depredation.
(c)(3) Agents	Agents are authorized	Should we require training for agents?
(d)(1) Certification	Producer certified by APHIS–WS	(1) Certification renewed on a regular basis. (2) APHIS–WS required to submit WS Form 37s to Regional Migratory Bird Permit Office (RMBPO).
(d)(2) Methods of take	Firearms including rifles Nontoxic shot	(1) Define firearms. (2) Should we change this to nontoxic ammunition?
(d)(6) Carcass disposal	Donate, bury, incinerate. Not to be sold	Should we allow the option to leave birds in ponds?
(d)(7) Incidental take	Report to RMBPO immediately	Report to RMBPO within 2 days.
(d)(8) Endangered Species Act provisions	Provisions for wood stork and bald eagle	Provisions for wood stork.
(d)(9) Recordkeeping		(1) Clarify calendar year. (2) Reports due to the RMBPO by January 31st of the following year.
(f) Expiration	June 30, 2014	Should we have an expiration date? If so, when?
Other: Bald and Golden Eagle Protection Act provisions.	None	Add provisions for bald eagle protection.

TABLE 2—CURRENT PUBLIC RESOURCE DEPREDATION ORDER (PRDO) PROVISIONS, AND AN EXAMPLE OF AN ALTERNATIVE VERSION OF THE PRDO WITH MODIFIED PROVISIONS

Provision in 50 CFR 21.48	Current	Modified
(b) Area of coverage	Lands and freshwaters in 24 States (Alabama, Arkansas, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, New York, North Carolina, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Vermont, West Virginia, Wisconsin).	(1) Should saltwater systems be included? (2) Should we modify the coverage by eliminating States that have not used the PRDO (e.g., Florida, Illinois, Indiana, Kansas, Kentucky, Louisiana, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, and West Virginia) and consider adding other States?
(c)(1) Action agencies	State fish and wildlife agencies, Federally recognized Tribes, and State Directors of APHIS–WS.	Should we add National Fish Hatcheries, National Wildlife Refuges, and National Parks operating on their own land?
(c)(1) Public resources	Fish (including hatchery stock at Federal, State, and Tribal hatcheries), wildlife, plants, and their habitats.	(1) Define specifically as natural resources managed and conserved by public agencies for public benefit. (2) Should we add resource allocation among anglers, forage fish, and DCCOs as a public resource? (3) Should we remove nonnative species from consideration as a public resource?
(c)(2) Agents	Allowed	(1) Should we require training for agents? (2) Should we eliminate agents?
(d)(2) Methods of take	Egg oiling, egg and nest destruction, cervical dislocation, firearms, and CO_2 asphyxiation. Nontoxic shot.	(1) Define firearms. (2) Should we change this to nontoxic ammunition?
(d)(4) Landowner permission	Yes	Does this need clarification for birds taken off shore of private property?
(d)(6) Carcass disposal	Donate, bury, incinerate. Not to be sold	(1) Add properly conducted composting. (2) Should we allow the option to leave carcasses on site when disturbance to co-nesters is an issue?
(d)(7) Incidental take	Report to RMBPO immediately	Report to RMBPO within 2 days.
(d)(8) Endangered Species Act provisions	Provisions for wood stork, bald eagle, piping plover, and interior least tern.	(1) Provisions for wood stork, piping plover, and interior least tern. (2) Should we add provisions for snowy plover where it is threatened?
(d)(9)(i) Notification	Required 30-day written notice to RMBPO in advance of actions taking more than 10 percent of a breeding colony.	(1) Change "breeding colony" to "established breeding colony". (2) Define breeding colony. (3) Define established breeding colony.

TABLE 2—CURRENT PUBLIC RESOURCE DEPREDATION ORDER (PRDO) PROVISIONS, AND AN EXAMPLE OF AN ALTERNATIVE VERSION OF THE PRDO WITH MODIFIED PROVISIONS—Continued

Provision in 50 CFR 21.48	Current	Modified
		(4) Define threshold percent from potential biological removal (PBR) criteria. (5) Clarify whether part of the threshold percent can be taken within 30 days notice.
(d)(9)(ii) Approval	Regional Director can prevent if long-term sustainability of DCCOs or any other migratory bird species is threatened.	In addition, RMBPO acknowledges receipt.
(d)(10) Recordkeeping	Number of nests oiled by date and location	(1) Define location: (a) During breeding season use colony location. (b) During nonbreeding season use next larger scale (e.g., bay, lake, area, etc.). (2) Add number of nests destroyed, empty nests, and otherwise untreated nests, by date and location.
(d)(11) Reporting period	(1) October 1 to September 30 reporting period. (2) Due December 31.	(1) Report on calendar year. (2) Due March 15th of the following year.
(d)(12) Requirements if reducing or eliminating a local breeding population.	(1) Evaluate effects of management activities on DCCOs at the control site. (2) Evaluate, by means of collecting data or using best available information, effects of management activities on the public resources being protected and on nontarget species.	(1) Define ''local breeding population.'' (2) Distinguish and define ''established'' local breeding population. (3) Should we require data collection and eliminate using best available information?
(f) Expiration	June 30, 2014	Should we have an expiration date? If so, when?
Other: Justification		Agreement between USFWS Regions on standards, especially regarding impact to fish.
Definitions		Define regional population.
Timing of control		Should we require a moratorium on shooting adults when nestlings are present?
Bald and Golden Eagle Protection Act provisions.		Add provisions for bald eagle protection.
State-wide coordination groups		Should this be required if there is more than one action agency in a State?

In addition, APHIS–WS and some State fish and wildlife agencies have continued to express interest in the Regional Population Regulation alternative (formerly referred to as Regional Population Reduction), though we considered and rejected that alternative in the 2003 EIS. To assist us in further evaluating that alternative, we are requesting information that will help us answer the following questions:

(1) Define ''regional.''

a. What scale?

b. What geographic area?

(2) How will population objectives be established?

a. Breeding population?

b. Wintering population?

(3) How will birds breeding in Canada be incorporated?

(4) How will allowable take be allocated by State?

(5) How will allocated take be distributed, and how will this affect take by aquaculture producers?

(6) Where does the funding come from to implement this alternative?

(7) What are the implications of taking birds that are not directly causing damage? Does this alternative just shift the public pressure to the national level?

(8) What are the implications if this alternative does not have the desired effect and local conflicts continue to occur?

You may submit your comments and supporting materials only by one of the methods listed in the **ADDRESSES** section. We will not consider comments sent by email or fax, or written comments sent to an address other than the one listed in the **ADDRESSES** section.

If you submit a comment via *http://www.regulations.gov,* your entire comment—including any personal identifying information—will be posted on the Web site. If you submit a hardcopy comment that includes personal identifying information, you may request that we withhold this information from public review, but we cannot guarantee that we will be able to do so. We will post all hardcopy comments on *http://www.regulations.gov.*

Comments and materials we receive, as well as supporting documentation we used in preparing this notice, will be available for public inspection at *http://www.regulations.gov,* or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service (see **FOR FURTHER INFORMATION CONTACT**).

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Dated: October 17, 2011.

Eileen Sobeck,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2011–28755 Filed 11–7–11; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 110831547–1639–01]

RIN 0648–BB26

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Comprehensive Ecosystem-Based Amendment 2 for the South Atlantic Region

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes to implement the Comprehensive Ecosystem-Based Amendment 2 (CE–BA 2) to implement the following South Atlantic fishery management plan (FMP) amendments: Amendment 1 to the FMP for Pelagic *Sargassum* Habitat of the South Atlantic Region (*Sargassum* FMP); Amendment 7 to the FMP for Coral, Coral reefs, and Live/Hard Bottom Habitats of the South Atlantic Region (Coral FMP); and Amendment 25 to the FMP for the Snapper-Grouper Fishery of the South Atlantic Region (Snapper-Grouper FMP), as prepared and submitted by the South Atlantic Fishery Management Council (Council); as well as Amendment 21 to the FMP for Coastal Migratory Pelagic (CMP) Resources (CMP FMP) as prepared and submitted by the South Atlantic and Gulf of Mexico Fishery Management Councils. If implemented, this rule would modify the fishery management unit for octocorals in the South Atlantic exclusive economic zone (EEZ), establish an annual catch limit (ACL) for octocorals, modify management in special management zones (SMZs) off South Carolina, and modify sea turtle and small tooth sawfish release gear specifications in the South Atlantic region. Through CE–BA 2, NMFS also proposes to designate new Essential Fish Habitat (EFH) and EFH–Habitat Areas of Particular Concern (EFH–HAPCs) for the Snapper-Grouper, Coral and *Sargassum* FMPs. The intended effects of this rule are to specify an ACL for octocorals, implement management measures to ensure overfishing does not occur for these species but that optimum yield may be achieved, and to conserve and protect habitat in the South Atlantic region.

DATES: Written comments on this proposed rule must be received no later than 5 p.m., Eastern time, on November 25, 2011.

ADDRESSES: You may submit comments, identified by NOAA–NMFS–2011–0219, by any one of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal e-Rulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Karla Gore, Southeast Regional Office, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701.

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,* click on ''submit a comment,'' then enter ''NOAA–NMFS–2011–0219'' in the keyword search and click on ''search.'' To view posted comments during the comment period, enter ''NOAA–NMFS–2011–0219'' in the keyword search and click on ''search.'' NMFS will accept anonymous comments (enter N/A in the required field if you wish to remain anonymous). You may submit attachments to electronic comments in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

Comments received through means not specified in this rule will not be accepted.

Electronic copies of CE–BA 2, which includes an environmental assessment, Regulatory Impact Review, Initial Regulatory Flexibility Act Analysis (IRFA), and a Fishery Impact Statement may be obtained from the Southeast Regional Office Web site at *http://sero.nmfs.noaa.gov/sf/CE-BAAmendment2.htm.*

FOR FURTHER INFORMATION CONTACT: Karla Gore, Southeast Regional Office, NMFS, telephone: (727) 824–5305, email: *Karla.Gore@noaa.gov.*

SUPPLEMENTARY INFORMATION: The fisheries for CMP species; coral, coral reefs, and live/hard bottom habitats; pelagic *Sargassum;* and snapper-grouper off the southern Atlantic states are managed under their respective FMPs. The FMPs were prepared by the Council(s) and are implemented under the authority of the Magnuson-Stevens Fishery Conservation and Management

Act (Magnuson-Stevens Act) by regulations at 50 CFR part 622.

Background

The 2006 revisions to the Magnuson-Stevens Act require that in 2011, FMPs for the fisheries determined by the Secretary of Commerce to not be subject to overfishing must establish ACLs for these species at a level that prevents overfishing from occurring, and does not exceed the fishing level recommendation of the respective Council's Scientific and Statistical Committee or other established peer review processes.

An ACL is the level of annual catch of a stock or stock complex that is set to prevent overfishing from occurring. Accountability measures (AMs) are used to ensure an ACL is not exceeded, and are used when the ACL is met or exceeded. ACLs may incorporate management and scientific uncertainty, and take into account the amount of data available and level of vulnerability to overfishing for each species.

Management Measures Contained in This Proposed Rule

If implemented, this rule would modify the fishery management unit for octocorals in the South Atlantic EEZ, establish an ACL of zero for the remaining octocorals, limit harvest of snapper-grouper species and CMP resources in the SMZs off South Carolina to the bag limit, and modify sea turtle and small tooth sawfish release gear specifications based on freeboard height of commercial South Atlantic snapper-grouper vessels. CE–BA 2 also proposes to designate new EFH and EFH–HAPCs to include the deepwater Marine Protected Areas (MPAs) for snapper-grouper species, designate Deepwater Coral HAPCs as EFH–HAPCs, and designate the top 33 ft (10 m) of the water column in the South Atlantic EEZ bounded by the Gulfstream as EFH for pelagic *Sargassum.*

Octocoral Fishery Management Unit

This rule would modify the fishery management unit (FMU) for octocorals under the Coral FMP to include octocorals in the EEZ off North Carolina, South Carolina, and Georgia only. Federal management of octocorals in the EEZ off Florida would no longer be included under the Coral FMP. No entities have a valid Federal permit which is required to harvest octocorals in Federal waters, and the Council determined that Federal conservation and management of octocorals in the EEZ off Florida is no longer necessary. Florida's Fish and Wildlife Conservation Commission (FWC) is currently responsible for the majority of the management, implementation, and enforcement of the octocorals fishery, because the majority of octocoral harvest occurs in Florida state waters by Florida registered vessels. If this rule is implemented, Florida and the FWC would have the authority to extend management of octocorals into Federal waters. The Gulf Council has developed the Generic Annual Catch Limits/Accountability Measures Amendment (Generic ACL Amendment) which includes an action to remove octocorals from the FMP for Coral and Coral Reefs of the Gulf of Mexico. The availability of the Generic ACL Amendment was announced in the **Federal Register** on September 26, 2011 (76 FR 59373). Florida and the FWC have indicated their intent to extend their management over harvest of octocorals by Florida registered vessels throughout the entire EEZ off Florida if both the CE–BA2 and Gulf Generic ACL Amendment actions are approved.

Octocoral ACL and Prohibited Corals

This rule would specify an ACL of zero for the octocorals remaining in the FMU off Georgia, South Carolina, and North Carolina. Current regulations include a 50,000 colony quota for octocorals in the Gulf of Mexico (Gulf) and South Atlantic region and a prohibition to harvest octocorals in the EEZ north of Florida. Additionally, the Coral FMP prohibits harvest of coral reefs, and, specifically, stony corals, black corals, fire coral, hydrocorals and two species of seafans in the South Atlantic EEZ, and therefore these species have a functional ACL of zero. Additionally, the harvest prohibition serves as a functional AM to manage the ACL.

SMZ Management off South Carolina

This rule would limit the harvest and possession of South Atlantic snapper-grouper species and CMP species in the SMZs off South Carolina to the recreational bag limit. Current regulations prohibit taking snapper-grouper in the SMZs off South Carolina with a powerhead, and this rule would also prohibit fishermen from harvesting commercial quantities of snapper-grouper and CMP species in these SMZs. This action responds to concerns from the recreational sector about the potential for commercial exploitation of these species in the SMZs off of South Carolina. Modifying management of the SMZs to restrict commercial fishing effort to the bag limit for snapper-grouper and CMP species would eliminate harvest of commercial quantities of snapper-grouper and CMP species and would ensure the original intent of the SMZs is realized.

Sea Turtle and Smalltooth Sawfish Release Gear Requirements

This rule would modify the sea turtle and smalltooth sawfish release gear requirements. Fishermen have expressed concern that the current sea turtle handling and release gear requirements are intended for larger longline vessels using heavy tackle and are ineffective and unwieldy for smaller snapper-grouper hook-and-vessels. This action would modify the requirements based on freeboard height of the vessels. Fishermen would still be required to post and comply with the release guidelines outlined in the NMFS document entitled, ''Careful Release Protocols for Sea Turtle Release with Minimal Injury,'' however, the specifications of the release gear would be modified as follows: Vessels with a freeboard height of 4 ft (1.2 m) or less would be required to carry and use a short-handled dehooker for ingested and external hooks; long-nose or needle-nose pliers; bolt-cutters; monofilament line cutters; cushion/support device; a dipnet; and at least two types of mouth openers/mouth gags. Vessels with a freeboard height of greater than 4 ft (1.2 m), or any vessel using longline gear, would be required to carry and use a long-handled line cutter; a long-handled dehooker for ingested and external hooks; a short-handled dehooker for ingested and external hooks; a long-handled device to pull an ''inverted V''; long-nose or needle-nose pliers; bolt-cutters; monofilament line cutters; cushion/support device; a dipnet; and at least two types of mouth openers/mouth gags. This equipment would need to meet the specifications described in proposed Appendix E to 50 CFR part 622 (which can be found at the end of this rule).

EFH and EFH–HAPCs

CE–BA 2 also proposes amending South Atlantic FMPs as needed to designate new or modify existing EFH and EFH–HAPCs. CE–BA 2 would amend the Snapper-Grouper FMP to designate the deepwater MPAs as EFH–HAPCs. These deepwater MPAs were previously established under Amendment 14 to the South Atlantic Snapper-Grouper FMP and include the Snowy Grouper Wreck MPA, Northern South Carolina MPA, Edisto MPA, Charleston Deep Artificial Reef MPA, Georgia MPA, North Florida MPA, St. Lucie Hump MPA, and East Hump MPA. The Coral FMP would be amended to designate deep-water coral HAPCs (CHAPCs) as EFH–HAPCs.

These CHAPCs were established under the Comprehensive Ecosystem-Based Amendment 1 and include Cape Lookout Coral HAPC, Cape Fear Coral HAPC, Blake Ridge Diapir Coral HAPC, Stetson-Miami Terrace Coral HAPC, and Pourtalés Terrace Coral HAPC. CE–BA2 would also designate EFH–HAPCs for blueline and golden tilefish. To meet the Magnuson-Stevens Act requirement that all managed species have EFH designated, CE–BA 2 would amend the *Sargassum* FMP to designate the top 33 ft (10m) of the water column in the South Atlantic EEZ bounded by the Gulfstream, as EFH for pelagic *Sargassum.* Identifying EFH for pelagic *Sargassum* would enable the Council to protect EFH more effectively and take timely action when necessary. Describing EFH for pelagic *Sargassum* is a step towards preventing decreases in biological productivity of pelagic *Sargassum* and other managed or prey species dependent on pelagic *Sargassum.* The addition of this information does not require any changes in regulatory language.

Availability of CE–BA 2

Additional background and rationale for the measures discussed above are contained in CE–BA 2. The availability of CE–BA 2 was announced in the **Federal Register** on September 26, 2011 (76 FR 59371). Written comments on CE–BA 2 must be received by 5 p.m., eastern time, on November 25, 2011. All comments received during their respective comment periods will be addressed in the preamble to the final rule.

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this rule is consistent with CE–BA 2, other provisions of the Magnuson-Stevens Act, and other applicable law, subject to further consideration after public comment.

This rule has been determined to be not significant for purposes of Executive Order 12866.

NMFS prepared an IRFA, as required by section 603 of the Regulatory Flexibility Act, for this rule. The IRFA describes the economic impact that this rule, if adopted, would have on small entities. A copy of the full analysis is available from NMFS (see **ADDRESSES**). A summary of the IRFA follows.

The Magnuson-Stevens Act provides the statutory basis for this rule. No duplicative, overlapping, or conflicting Federal rules have been identified. The preamble of this rule provides a statement of the need for and objectives of this rule, and it is not repeated here.

This proposed action would apply to commercial vessels that harvest octocorals in Federal waters, harvest snapper-grouper in Federal waters throughout the South Atlantic, or harvest snapper-grouper or CMP species in the SMZs off South Carolina. A Federal permit is required to harvest octocorals and snapper-grouper in Federal waters. There are two types of Federal commercial snapper-grouper permits, an unlimited permit, which is transferable and allows the harvest of unlimited quantities of snapper-grouper species, unless constrained by single species trip limits, and a limited permit, which is not transferable and limits vessels to 225 lb (102 kg) of snapper-grouper per trip. For the species included in the CMP fishery, a Federal permit is required to harvest commercial quantities of king mackerel and Spanish mackerel (separate permits for each species).

No entities have a valid Federal permit required to harvest octocorals in Federal waters. On March 29, 2011, there were 598 non-expired or renewable unlimited snapper-grouper commercial permits and 138 limited snapper-grouper permits, or a total of 736 snapper-grouper commercial permits. Although unlimited permits are transferable, potentially resulting in more vessels operating in the fishery than the number of permits, the number of permits is assumed to represent the number of full-time equivalent vessels operating in the fishery. As a result, the number of permits is assumed equal to the number of vessels and the vessel is assumed to be the representative unit for an entity.

Similar information is not available for permits associated with vessels with home ports in South Carolina. However, over the period 2005–2009, the average annual number of vessels with home ports in South Carolina that possessed the appropriate Federal commercial permit was 38 vessels for king mackerel, 15 vessels for Spanish mackerel, and 72 vessels for snapper-grouper (unlimited and limited permits combined). Additional vessels from other states may also harvest finfish in the SMZs off South Carolina and may be affected by the proposed action but, for the purpose of this analysis, the majority of vessels that fish in the SMZs off South Carolina are assumed to come from South Carolina ports.

For the period 2005–2009, the total average annual ex-vessel revenues from all snapper-grouper harvests was approximately $13.8 million (2009 dollars), or approximately $16,000 per vessel (averaged over 847 vessels, which was the average annual number of vessels with snapper-grouper permits over this period; if averaged over the current number of permits, 736, based on the assumption that average annual revenues have been maintained despite declining participation in the fishery, the average per vessel increases to approximately $19,000). These totals do not include revenues from other species harvested by these vessels, but snapper-grouper are assumed to be the primary species harvested by these vessels. Although more recent data are not available, over the period 2003–2007, snapper-grouper accounted for approximately 61 percent of total revenues by vessels with snapper-grouper harvests. If this percentage is used to adjust the per-vessel averages of snapper-grouper revenues provided above to account for revenues from other species, the resultant averages increase to approximately $26,000 (847 vessels) and $31,000 (736 vessels).

The average annual revenue for vessels that fish in the SMZs off South Carolina is unknown. However, for the period 2005–2009, the total average annual ex-vessel revenues from all snapper-grouper harvests landed in South Carolina was approximately $3.6 million (2009 dollars), or approximately $50,000 per vessel (averaged over 72 vessels). As with the information on snapper-grouper harvests for the entire South Atlantic, these totals do not include revenues from other species harvested by these vessels, but snapper-grouper are assumed to be the primary species harvested by these vessels. If the average revenue per vessel is adjusted to account for revenues from other species using the percentage used in the previous paragraph (61 percent), then the average ex-vessel revenue per vessel would increase to approximately $82,000.

Similar information for South Carolina vessels harvesting CMP species is not available. However, for the entire South Atlantic, over approximately the same period (2004–2009; the king mackerel and Spanish mackerel fishing years do not follow the calendar year, so the data covered the fishing years 2004–2005 through 2008–2009, thereby encompassing part of 2004 and part of 2009), the total average annual ex-vessel revenues from all species for vessels harvesting king mackerel was approximately $23.3 million (2009 dollars), or approximately $32,000 per vessel. For vessels harvesting Spanish mackerel, the total average annual ex-vessel value was approximately $9.7 million (2009 dollars), or approximately $28,000 per vessel. Unlike in the

snapper-grouper fishery, in which snapper-grouper are the primary species harvested by fishermen who harvest snapper-grouper, fishermen who harvest king mackerel or Spanish mackerel derived, on average during the years examined, less than 20 percent of their total fishing revenues from king mackerel or Spanish mackerel.

The Small Business Administration has established size criteria for all major industry sectors in the U.S. including fish harvesters. A business involved in fish harvesting is classified as a small business if it is independently owned and operated, is not dominant in its field of operation (including its affiliates), and has combined annual receipts not in excess of $4.0 million (NAICS code 114111, finfish fishing) for all its affiliated operations worldwide. Based on the average revenue estimates provided above, all commercial vessels expected to be directly affected by this rule are determined for the purpose of this analysis to be small business entities.

This rule would not establish any new reporting, record-keeping, or other compliance requirements.

As previously discussed, this rule, if implemented, would apply to all vessels with Federal commercial snapper-grouper permits that fish anywhere in the South Atlantic, and all vessels with Federal snapper-grouper, king mackerel, or Spanish mackerel permits that fish in the SMZs off South Carolina. Any expected direct effects of this rule on vessels with snapper-grouper permits that do not fish in the SMZs off South Carolina would be limited to the effects of the proposed regulation that would modify the protected species release gear requirements, which would maintain current requirements for vessels with more than 4 ft (1.2 m) freeboard height and lessen the requirements for vessels with freeboard height of 4 ft (1.2 m) or less, thereby effectively only changing the requirements for vessels with lower freeboard height. The number of vessels with Federal snapper-grouper permits with freeboard height of 4 ft (1.2 m) or less is unknown. Nevertheless, this component of the rule would allow voluntary change, rather than mandate specific change, and no explicit burden would be imposed on any entity. As a result, because of the voluntary nature of the regulation, a substantial number of entities would not be expected to be affected by this component of the rule.

This rule, if implemented, would be expected to primarily affect entities with the required Federal permit for snapper-grouper or CMP species that commercially fish in the SMZs off South Carolina. NMFS assumes the majority of such entities own vessels with home ports in South Carolina, though vessels with home ports in other states may also be affected if they fish in the SMZs off South Carolina. The number of potentially affected South Carolina vessels is estimated to be 38 vessels with a king mackerel permit, 15 vessels with a Spanish mackerel permit, and 72 vessels with a snapper-grouper permit. Although these totals encompass all appropriately permitted vessels with home ports in South Carolina, these totals represent less than 3 percent of the vessels with home ports in the South Atlantic states (all of Florida, Georgia, South Carolina, and North Carolina) with king mackerel commercial permits, less than 1 percent of the vessels with Spanish mackerel commercial permits, and less than 9 percent of the vessels with snapper-grouper permits. The total number of king mackerel and Spanish mackerel vessels with home ports in Florida included vessels in both the Gulf and South Atlantic regions. Assuming half of the Florida king mackerel and Spanish mackerel vessels are from home ports in the Gulf region and are excluded from the total to produce a more representative South Atlantic total, the number of affected vessels still encompasses only approximately 4 percent of South Atlantic vessels with king mackerel permits and less than 2 percent of South Atlantic vessels with Spanish mackerel permits. The number of affected vessels would also decline if not all South Carolina snapper-grouper or CMP vessels fish in the SMZs, which NMFS expects to be the case because of congestion and the belief that the problem of the harvest of commercial quantities of fish in the SMZs is largely limited to vessels using spear gear (hand spear or spear guns), which is not the dominant gear used by vessels in the snapper-grouper fishery. As a result, only a small number of vessels in the appropriate fleets would be expected to be directly affected by this rule.

Because no fishermen possess the required valid Federal permit needed to harvest octocorals in the EEZ and there are very few recorded octocoral harvests from the EEZ off Georgia, South Carolina, or North Carolina, the proposed regulations pertaining to octocoral would not be expected to have any economic affect on any small entities.

It is not possible with available data to determine the amount or value of commercial harvests in excess of the recreational bag limits that would be affected by the rule. Neither the vessels that fish in the SMZs nor the amount or value of harvest taken from the SMZs can be identified. Further, affected vessels may be able to compensate for reduced harvest from the SMZs with harvest from other areas, though the harvest cost would be expected to increase. Because it is not possible to address these issues with available data, it is not possible to determine if the proposed regulation would be expected to significantly reduce profits for any small entities. Due to the inability to determine either the number of vessels that would be affected by this component of the rule, though the discussion above suggests the number of affected vessels may not be substantial, or the magnitude of expected effects, public comment is solicited on the potential number of affected entities and magnitude of economic effects.

The proposed release gear requirements equate to status quo conditions for vessels in the snapper-grouper fishery with more than 4 ft (1.2 m) of freeboard height and a lessening of the requirements for vessels with 4 ft (1.2 m) or less freeboard height. Because all vessels in the snapper-grouper fishery are assumed to meet current requirements, no vessel would be compelled to make any new gear purchases. Any change in gear costs would be voluntary, *e.g.,* the replacement of current usable gear, or represent a cost reduction in the case of replacement of broken, worn out, or lost gear with cheaper gear meeting the specifications of the reduced requirements. As a result, the proposed release gear requirements would not be expected to significantly reduce profits for any small entities.

As previously discussed, the only action in this rule that may be expected to have a significant direct adverse economic effect on the profits of any small entities is the proposed limitation on harvest of snapper-grouper and CMP species in the SMZs off South Carolina to the recreational bag limit. Two alternatives to the proposed limitation were considered. The first alternative, the no action alternative, would not have placed any new restrictions on commercial harvests in the SMZs and, as a result, would be expected to reduce the economic impacts on small business entities. This alternative would not, however, achieve the Council's objectives of reducing user conflict, improving recreational fishing opportunities, allowing for equitable utilization by a larger number of fishermen, and protecting the reef communities from overly-efficient fishing practices.

The second alternative to the proposed action would have simply

prohibited the use of spearfishing gear (hand spears and spear guns) in the SMZs off South Carolina. While this alternative, if implemented, would reduce the expected economic effects on commercial vessels that use hand line or rod and reel to harvest snapper-grouper, king mackerel, or Spanish mackerel in the SMZs, the economic effects on vessels that use spearfishing gear would be expected to increase. This alternative would exclude an entire gear sector, affecting both commercial and recreational anglers who use this gear. As a result, while this alternative would be expected to reduce user conflict, might improve recreational fishing opportunities for hook-and-line anglers, and would be expected to protect the reef communities from efficient gear, this alternative would not achieve the Council's objectives of equitable utilization of the resources by a larger number of fishermen.

List of Subjects in 50 CFR Part 622

Fisheries, Fishing, Puerto Rico, Reporting and recordkeeping requirements, Virgin Islands.

Dated: November 2, 2011.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 622 is proposed to be amended as follows:

PART 622—FISHERIES OF THE CARIBBEAN, GULF, AND SOUTH ATLANTIC

1. The authority citation for part 622 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*

2. In § 622.1, paragraph (b), Table 1, the entry for ''FMP for Coral, Coral Reefs, and Live/Hard Bottom Habitats of the South Atlantic Region'' is revised and footnote 7 is added to read as follows:

§ 622.1 Purpose and scope.

* * * * *

(b) * * *

TABLE 1—FMPS IMPLEMENTED UNDER PART 622

FMP title	Responsible fishery management council(s)	Geographical area
*	*	*
FMP for Coral, Coral Reefs, and Live/Hard Bottom Habitats of the South Atlantic Region.	SAFMC	South Atlantic.[7]
*	*	*

[7] Octocorals are managed by the FMP or regulated by this part only in the EEZ off North Carolina, South Carolina, and Georgia.

2. In § 622.10, paragraphs (c)(1)(ii) and (iii), are revised to read as follows:

§ 622.10 Conservation measures for protected resources.

* * * * *

(c) * * *

(1) * * *

(ii) Such owner or operator must also comply with the sea turtle bycatch mitigation measures, including gear requirements and sea turtle handling requirements, specified in Appendix E to this part.

(iii) Those permitted vessels with a freeboard height of 4 ft (1.2 m) or less must have on board and must use a dipnet, cushioned/support device, short-handled dehooker, long-nose or needle-nose pliers, bolt cutters, monofilament line cutters, and at least two types of mouth openers/mouth gags. This equipment must meet the specifications described in Appendix E to this part. Those permitted vessels with a freeboard height of greater than 4 ft (1.2 m) must have on board a dipnet, cushioned/support device, long-handled line clipper, a short-handled and a long-handled dehooker, a long-handled device to pull an inverted ''V'', long-nose or needle-nose pliers, bolt cutters, monofilament line cutters, and at least two types of mouth openers/mouth gags. This equipment must meet the specifications described in Appendix E to this part.

* * * * *

3. In § 622.32, paragraph (b)(3)(viii) is added to read as follows:

§ 622.32 Prohibited and limited harvest species.

* * * * *

(b) * * *

(3) * * *

(viii) Octocoral may not be harvested or possessed in or from the portion of the South Atlantic EEZ off North Carolina, South Carolina, and Georgia, and any octocoral collected must be released immediately with a minimum of harm.

* * * * *

4. In § 622.35, in paragraph (e)(2), the first entry in the table is revised to read as follows:

§ 622.35 Atlantic EEZ seasonal and/or area closures.

* * * * *

(e) * * *

(2) * * *

In SMZs specified in the following paragraphs of § 622.35	These restrictions apply
(e)(1)(i) through (x), (e)(1)(xx), and (e)(1)(xxii) through (xxxix).	Use of a powerhead to take South Atlantic snapper-grouper is prohibited. Possession of a powerhead and a mutilated South Atlantic snapper-grouper in, or after having fished in, one of these SMZs constitutes *prima facie* evidence that such fish was taken with a powerhead in the SMZ. Harvest or possession of a coastal migratory pelagic fish or a South Atlantic snapper-grouper is limited to the bag-limits specified in § 622.39(c)(1) and (d)(1), respectively.
*	*

5. In § 622.42, paragraph (b) is revised to read as follows:

§ 622.42 Quotas.

* * * * *

(b) *Gulf allowable octocoral.* The quota for all persons who harvest

allowable octocoral in the Gulf EEZ is 50,000 colonies. A colony is a continuous group of coral polyps forming a single unit.

* * * * *

6. Appendix E is added to part 622 to read as follows:

Appendix E to Part 622—Specifications for Sea Turtle Mitigation Gear and Sea Turtle Handling and Release Requirements

A. *Sea turtle mitigation gear.*

1. *Long-handled line clipper or cutter.* Line cutters are intended to cut high test monofilament line as close as possible to the hook, and assist in removing line from entangled sea turtles to minimize any remaining gear upon release. NMFS has established minimum design standards for the line cutters. The LaForce line cutter and the Arceneaux line clipper are models that meet these minimum design standards, and may be purchased or fabricated from readily available and low-cost materials. One long-handled line clipper or cutter and a set of replacement blades are required to be onboard. The minimum design standards for line cutters are as follows:

(a) *A protected and secured cutting blade.* The cutting blade(s) must be capable of cutting 2.0–2.1 mm (0.078 in.–0.083 in.) monofilament line (400-lb test) or polypropylene multistrand material, known as braided or tarred mainline, and must be maintained in working order. The cutting blade must be curved, recessed, contained in a holder, or otherwise designed to facilitate its safe use so that direct contact between the cutting surface and the sea turtle or the user is prevented. The cutting instrument must be securely attached to an extended reach handle and be easily replaceable. One extra set of replacement blades meeting these standards must also be carried on board to replace all cutting surfaces on the line cutter or clipper.

(b) *An extended reach handle.* The line cutter blade must be securely fastened to an extended reach handle or pole with a minimum length equal to, or greater than, 150 percent of the freeboard, or a minimum of 6 ft (1.83 m), whichever is greater. It is recommended, but not required, that the handle break down into sections. There is no restriction on the type of material used to construct this handle as long as it is sturdy and facilitates the secure attachment of the cutting blade.

2. *Long-handled dehooker for internal hooks.* A long-handled dehooking device is intended to remove internal hooks from sea turtles that cannot be boated. It should also be used to engage a loose hook when a turtle is entangled but not hooked, and line is being removed. The design must shield the barb of the hook and prevent it from re-engaging during the removal process. One long-handled device to remove internal hooks is required onboard. The minimum design standards are as follows:

(a) *Hook removal device.* The hook removal device must be constructed of approximately 3/16-inch (4.76 mm) to 5/16-inch (7.94 mm) 316 L stainless steel or similar material and have a dehooking end no larger than 1 7/8-inches (4.76 cm) outside diameter. The device must securely engage and control the leader while shielding the barb to prevent the hook from re-engaging during removal. It may not have any unprotected terminal points (including blunt ones), as these could cause injury to the esophagus during hook removal. The device must be of a size appropriate to secure the range of hook sizes and styles used in the South Atlantic snapper-grouper fishery.

(b) *Extended reach handle.* The dehooking end must be securely fastened to an extended reach handle or pole with a minimum length equal to or greater than 150 percent of the freeboard, or a minimum of 6 ft (1.83 m), whichever is greater. It is recommended, but not required, that the handle break down into sections. The handle must be sturdy and strong enough to facilitate the secure attachment of the hook removal device.

3. *Long-handled dehooker for external hooks.* A long-handled dehooker is required for use on externally-hooked sea turtles that cannot be boated. The long-handled dehooker for internal hooks described in paragraph 2. of this Appendix E would meet this requirement. The minimum design standards are as follows:

(a) *Construction.* A long-handled dehooker must be constructed of approximately 3/16-inch (4.76 mm) to 5/16-inch (7.94 mm) 316 L stainless steel rod and have a dehooking end no larger than 1 7/8-inches (4.76 cm) outside diameter. The design should be such that a fish hook can be rotated out, without pulling it out at an angle. The dehooking end must be blunt with all edges rounded. The device must be of a size appropriate to secure the range of hook sizes and styles used in the South Atlantic snapper-grouper fishery.

(b) *Extended reach handle.* The handle must be a minimum length equal to the freeboard of the vessel or 6 ft (1.83 m), whichever is greater.

4. *Long-handled device to pull an ''inverted V''.* This tool is used to pull a ''V'' in the fishing line when implementing the ''inverted V'' dehooking technique, as described in the document entitled ''Careful Release Protocols for Sea Turtle Release With Minimal Injury,'' for disentangling and dehooking entangled sea turtles. One long-handled device to pull an ''inverted V'' is required onboard. If a 6-ft (1.83 m) J-style dehooker is used to comply with paragraph 4. of this Appendix E, it will also satisfy this requirement. Minimum design standards are as follows:

(a) *Hook end.* This device, such as a standard boat hook, gaff, or long-handled J-style dehooker, must be constructed of stainless steel or aluminum. The semicircular or ''J'' shaped end must be securely attached to a handle. A sharp point, such as on a gaff hook, is to be used only for holding the monofilament fishing line and should never contact the sea turtle.

(b) *Extended reach handle.* The handle must have a minimum length equal to the freeboard of the vessel, or 6 ft (1.83 m), whichever is greater. The handle must be sturdy and strong enough to facilitate the secure attachment of the gaff hook.

5. *Dipnet.* One dipnet is required onboard. Dipnets are to be used to facilitate safe handling of sea turtles by allowing them to be brought onboard for fishing gear removal, without causing further injury to the animal. Turtles must not be brought onboard without the use of a dipnet or hoist. The minimum design standards for dipnets are as follows:

(a) *Size of dipnet.* The dipnet must have a sturdy net hoop of at least 31 inches (78.74 cm) inside diameter and a bag depth of at least 38 inches (96.52 cm) to accommodate turtles below 3 ft (0.914 m) carapace length. The bag mesh openings may not exceed 3 inches (7.62 cm) by 3 inches (7.62 cm). There must be no sharp edges or burrs on the hoop, or where it is attached to the handle. There is no requirement for the hoop to be circular as long as it meets the minimum specifications.

(b) *Extended reach handle.* The dipnet hoop must be securely fastened to an extended reach handle or pole with a minimum length equal to, or greater than, 150 percent of the freeboard, or at least 6 ft (1.83 m), whichever is greater. The handle must be made of a rigid material strong enough to facilitate the sturdy attachment of the net hoop and be able to support a minimum of 100 lb (34.1 kg) without breaking or significant bending or distortion. It is recommended, but not required, that the extended reach handle break down into sections.

6. *Cushion/support device.* A standard automobile tire (free of exposed steel belts), a boat cushion, a large turtle hoist, or any other comparable cushioned elevated surface, is required for supporting a turtle in an upright orientation while the turtle is onboard. The cushion/support device must be appropriately sized to fully support a range of turtle sizes.

7. *Short-handled dehooker for internal hooks.* One short-handled device for removing internal hooks is required onboard. This dehooker is designed to remove ingested hooks from boated sea turtles. It can also be used on external hooks or hooks in the front of the mouth. Minimum design standards are as follows:

(a) *Hook removal device.* The hook removal device must be constructed of approximately 3/16-inch (4.76 mm) to 5/16-inch (7.94 mm) 316 L stainless steel, and must allow the hook to be secured and the barb shielded without re-engaging during the removal process. It must be no larger than 1 7/8-inches (4.76 cm) outside diameter. It may not have any unprotected terminal points (including blunt ones), as this could cause injury to the esophagus during hook removal. A sliding PVC bite block must be used to protect the beak and facilitate hook removal if the turtle bites down on the dehooking device. The bite block should be constructed of a 3/4-inch (1.91 cm) inside diameter high impact plastic cylinder (*e.g.,* Schedule 80 PVC) that is 4 to 6 inches (10.2 to 15.2 cm) long to allow for 5 inches (12.7 cm) of slide along the shaft. The device must be of a size appropriate to secure the range of hook sizes and styles used in the South Atlantic snapper-grouper fishery.

(b) *Handle length.* The handle should be approximately 16 to 24 inches (40.64 cm to 60.69 cm) in length, with approximately a 4 to 6-inch (10.2 to 15.2-cm) long tube T-

handle of approximately 1 inch (2.54 cm) in diameter.

8. *Short-handled dehooker for external hooks.* One short-handled dehooker for external hooks is required onboard. The short-handled dehooker for internal hooks required to comply with paragraph 7. of this Appendix E will also satisfy this requirement. Minimum design standards are as follows:

(a) *Hook removal device.* The dehooker must be constructed of approximately 3/16-inch (4.76 cm) to 5/16-inch (7.94 cm) 316 L stainless steel, and the design must be such that a hook can be rotated out without pulling it out at an angle. The dehooking end must be blunt, and all edges rounded. The device must be of a size appropriate to secure the range of hook sizes and styles used in the South Atlantic snapper-grouper fishery.

(b) *Handle length.* The handle should be approximately 16 to 24 inches (40.64 to 60.69 cm) long with approximately a 5-inch (12.7 cm) long tube T-handle, wire loop handle or similar, of approximately 1 inch (2.54 cm) in diameter.

9. *Long-nose or needle-nose pliers.* One pair of long-nose or needle-nose pliers is required on board. Required long-nose or needle-nose pliers can be used to remove deeply embedded hooks from the turtle's flesh that must be twisted during removal or for removing hooks from the front of the mouth. They can also hold PVC splice couplings, when used as mouth openers, in place. Minimum design standards are as follows:

(a) *General.* They must be approximately 12 inches (30.48 cm) in length, and should be constructed of stainless steel material.

(b) [Reserved]

10. *Bolt cutters.* One pair of bolt cutters is required on board. Required bolt cutters may be used to cut hooks to facilitate their removal. They should be used to cut off the eye or barb of a hook, so that it can safely be pushed through a sea turtle without causing further injury. They should also be used to cut off as much of the hook as possible, when the remainder of the hook cannot be removed. Minimum design standards are as follows:

(a) *General.* They must be approximately 14 to 17 inches (35.56 to 43.18 cm) in total length, with approximately 4-inch (10.16 cm) long blades that are 2¼ inches (5.72 cm) wide, when closed, and with approximately 10 to 13-inch (25.4 to 33.02-cm) long handles. Required bolt cutters must be able to cut hard metals, such as stainless or carbon steel hooks, up to ¼-inch (6.35 mm) diameter.

(b) [Reserved]

11. *Monofilament line cutters.* One pair of monofilament line cutters is required on board. Required monofilament line cutters must be used to remove fishing line as close to the eye of the hook as possible, if the hook is swallowed or cannot be removed. Minimum design standards are as follows:

(a) *General.* Monofilament line cutters must be approximately 7½ inches (19.05 cm) in length. The blades must be 1 inch (4.45 cm) in length and ⅝ inches (1.59 cm) wide, when closed.

(b) [Reserved]

12. *Mouth openers/mouth gags.* Required mouth openers and mouth gags are used to open sea turtle mouths, and to keep them open when removing internal hooks from boated turtles. They must allow access to the hook or line without causing further injury to the turtle. Design standards are included in the item descriptions. At least two of the seven different types of mouth openers/gags described below are required:

(a) *A block of hard wood.* Placed in the corner of the jaw, a block of hard wood may be used to gag open a turtle's mouth. A smooth block of hard wood of a type that does not splinter (*e.g.,* maple) with rounded edges should be sanded smooth, if necessary, and soaked in water to soften the wood. The dimensions should be approximately 11 inches (27.94 cm) by 1 inch (2.54 cm) by 1 inch (2.54 cm). A long-handled, wire shoe brush with a wooden handle, and with the wires removed, is an inexpensive, effective and practical mouth-opening device that meets these requirements.

(b) *A set of three canine mouth gags.* Canine mouth gags are highly recommended to hold a turtle's mouth open, because the gag locks into an open position to allow for hands-free operation after it is in place. These tools are only for use on small and medium sized turtles, as larger turtles may be able to crush the mouth gag. A set of canine mouth gags must include one of each of the following sizes: Small (5 inches) (12.7 cm), medium (6 inches) (15.24 cm), and large (7 inches) (17.78 cm). They must be constructed of stainless steel. The ends must be covered with clear vinyl tubing, friction tape, or similar, to pad the surface.

(c) *A set of two sturdy dog chew bones.* Placed in the corner of a turtle's jaw, canine chew bones are used to gag open a sea turtle's mouth. Required canine chews must be constructed of durable nylon, zylene resin, or thermoplastic polymer, and strong enough to withstand biting without splintering. To accommodate a variety of turtle beak sizes, a set must include one large (5½–8 inches (13.97 cm–20.32 cm) in length), and one small (3½–4½ inches (8.89 cm–11.43 cm) in length) canine chew bones.

(d) *A set of two rope loops covered with protective tubing.* A set of two pieces of poly braid rope covered with light duty garden hose or similar flexible tubing each tied or spliced into a loop to provide a one-handed method for keeping the turtle's mouth open during hook and/or line removal. A required set consists of two 3-ft (0.91 m) lengths of poly braid rope (⅜-inch (9.52 mm) diameter suggested), each covered with an 8-inch (20.32 cm) section of ½ inch (1.27 cm) or ¾ inch (1.91 cm) tubing, and each tied into a loop. The upper loop of rope covered with hose is secured on the upper beak to give control with one hand, and the second piece of rope covered with hose is secured on the lower beak to give control with the user's foot.

(e) *A hank of rope.* Placed in the corner of a turtle's jaw, a hank of rope can be used to gag open a sea turtle's mouth. A 6-ft (1.83 m) lanyard of approximately 3/16-inch (4.76 mm) braided nylon rope may be folded to create a hank, or looped bundle, of rope. Any size soft-braided nylon rope is allowed, however it must create a hank of approximately 2–4 inches (5.08 cm–10.16 cm) in thickness.

(f) *A set of four PVC splice couplings.* PVC splice couplings can be positioned inside a turtle's mouth to allow access to the back of the mouth for hook and line removal. They are to be held in place with the needle-nose pliers. To ensure proper fit and access, a required set must consist of the following Schedule 40 PVC splice coupling sizes: 1 inch (2.54 cm), 1¼ inch (3.18 cm), 1½ inch (3.81 cm), and 2 inches (5.08 cm).

(g) *A large avian oral speculum.* A large avian oral speculum provides the ability to hold a turtle's mouth open and to control the head with one hand, while removing a hook with the other hand. The avian oral speculum must be 9-inches (22.86 cm) long, and constructed of 3/16-inch (4.76 mm) wire diameter surgical stainless steel (Type 304). It must be covered with 8 inches (20.32 cm) of clear vinyl tubing (5/16-inch (7.9 mm) outside diameter, 3/16-inch (4.76 mm) inside diameter), friction tape, or similar to pad the surface.

B. *Sea turtle handling and release requirements.* Sea turtle bycatch mitigation gear, as specified in paragraphs A.1. through 4. of this Appendix E, must be used to disengage any hooked or entangled sea turtles that cannot be brought onboard. Sea turtle bycatch mitigation gear, as specified in paragraphs A.5. through 12. of this Appendix E, must be used to facilitate access, safe handling, disentanglement, and hook removal or hook cutting of sea turtles that can be brought onboard, where feasible. Sea turtles must be handled, and bycatch mitigation gear must be used, in accordance with the careful release protocols and handling/release guidelines specified in § 622.10(c)(1), and in accordance with the onboard handling and resuscitation requirements specified in § 223.206(d)(1) of this title.

1. *Boated turtles.* When practicable, active and comatose sea turtles must be brought on board, with a minimum of injury, using a dipnet as specified in paragraph A.5. of this Appendix E. All turtles less than 3 ft (.91 m) carapace length should be boated, if sea conditions permit.

(a) A boated turtle should be placed on a cushioned/support device, as specified in paragraph A.6. of this Appendix E, in an upright orientation to immobilize it and facilitate gear removal. Then, it should be determined if the hook can be removed without causing further injury. All externally embedded hooks should be removed, unless hook removal would result in further injury to the turtle. No attempt to remove a hook should be made if it has been swallowed and the insertion point is not visible, or if it is determined that removal would result in further injury. If a hook cannot be removed, as much line as possible should be removed from the turtle using monofilament cutters as specified in paragraph A.11. of this Appendix E, and the hook should be cut as close as possible to the insertion point before releasing the turtle, using bolt cutters as specified in paragraph A.10. of this Appendix E. If a hook can be removed, an effective technique may be to cut off either the barb, or the eye, of the hook using bolt

cutters, and then to slide the hook out. When the hook is visible in the front of the mouth, a mouth-opener, as specified in paragraph A.12. of this Appendix E, may facilitate opening the turtle's mouth and a gag may facilitate keeping the mouth open. Short-handled dehookers for internal hooks, or long-nose or needle-nose pliers, as specified in paragraphs A.7. and A.8. of this Appendix E, respectively, should be used to remove visible hooks from the mouth that have not been swallowed on boated turtles, as appropriate. As much gear as possible must be removed from the turtle without causing further injury prior to its release. Refer to the careful release protocols and handling/release guidelines required in § 622.10(c)(1), and the handling and resuscitation requirements specified in § 223.206(d)(1) of this title, for additional information.

(b) [Reserved]

2. *Non-boated turtles.* If a sea turtle is too large, or hooked in a manner that precludes safe boating without causing further damage or injury to the turtle, sea turtle bycatch mitigation gear specified in paragraphs A.1. through 4. of this Appendix E must be used to disentangle sea turtles from fishing gear and disengage any hooks, or to clip the line and remove as much line as possible from a hook that cannot be removed, prior to releasing the turtle, in accordance with the protocols specified in § 622.10(c)(1).

(a) Non-boated turtles should be brought close to the boat and provided with time to calm down. Then, it must be determined whether or not the hook can be removed without causing further injury. All externally embedded hooks must be removed, unless hook removal would result in further injury to the turtle. No attempt should be made to remove a hook if it has been swallowed, or if it is determined that removal would result in further injury. If the hook cannot be removed and/or if the animal is entangled, as much line as possible must be removed prior to release, using a line cutter as specified in paragraph A.1. of this Appendix E. If the hook can be removed, it must be removed using a long-handled dehooker as specified in paragraphs A.2. and A.3. of this Appendix E. Without causing further injury, as much gear as possible must be removed from the turtle prior to its release. Refer to the careful release protocols and handling/release guidelines required in § 622.10(c)(1), and the handling and resuscitation requirements specified in § 223.206(d)(1) for additional information.

(b) [Reserved]

[FR Doc. 2011–28924 Filed 11–7–11; 8:45 am]

BILLING CODE 3510–22–P

Notices

Federal Register

Vol. 76, No. 216

Tuesday, November 8, 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.

CHEMICAL SAFETY AND HAZARD INVESTIGATION BOARD

Sunshine Act Meeting

In connection with its investigation into three iron dust flash fires at the Hoeganaes facility in Gallatin, TN., the U.S. Chemical Safety and Hazard Investigation Board (CSB) announces that it will hold a public meeting on November 16, 2011, in Gallatin to collect additional information to aide in its ongoing investigation of the incidents. Two workers were killed in the first iron dust incident on January 31, 2011, and the second iron dust incident on March 29, 2011 injured another employee. The third incident, a hydrogen explosion and resulting iron dust flash fires, claimed three lives and injured two others on May 27, 2011. The meeting will begin at 6 p.m. at the EPIC Event Center, 392 and 394 West Main St., Gallatin, TN 37066.

The meeting is free and open to the public. Pre-registration is not required, but to assure adequate seating, attendees are encouraged to pre-register by emailing their names and affiliations to *publicmeeting@csb.gov* by November 10, 2011.

At the meeting, CSB staff will discuss with the Board the results of their investigation to date into these incidents. In addition, a panel of outside experts and others will be invited to speak on a number of issues related to the investigation.

All staff presentations are preliminary and are intended solely to allow the Board to consider in a public forum various issues and factors involved in this case. No factual analyses, conclusions or findings presented by staff should be considered final.

After the conclusion of Hoeganaes case study discussion, the Board will conclude the public meeting by considering certain board business matters that have been calendared during board votes during FY 2011. Such matters involve the resolution of proposed status changes to recommendations made in the Imperial Sugar investigation, other board affairs issues, and consideration and vote on the CSB Human Capital Plan.

Please notify CSB if a translator or interpreter is needed, at least 5 business days prior to the public meeting. For more information, please contact the Chemical Safety and Hazard Investigation Board at (202) 261–7600, or visit our Web site at: *http://www.csb.gov.*

Dated: November 3, 2011.

John Lau,

Acting Managing Director.

[FR Doc. 2011–29092 Filed 11–4–11; 4:15 pm]

BILLING CODE 6350–01–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the emergency provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Telecommunications and Information Administration (NTIA).

Title: Broadband Technology Opportunities Program (BTOP) Quarterly and Annual Performance Progress Reports.

OMB Control Number: 0660–0037.

Form Number(s): None.

Type of Request: Emergency submission (revision to a currently approved information collection).

Number of Respondents: 121.

Average Hours per Response: 5.94.

Burden Hours: 727.

Needs and Uses: The American Recovery and Reinvestment Act of 2009 (Recovery Act) appropriated funds for BTOP to support the deployment of broadband infrastructure, enhance and expand public computer centers, encourage sustainable adoption of broadband service, and develop and maintain a nationwide public map of broadband service capability and availability.

The Recovery Act mandates that funds distributed under its authority be subject to an unprecedented level of transparency and accountability. This includes an increased level of monitoring and oversight to ensure that Recovery Act funds are used for their authorized purposes; steps are in place to prevent waste, fraud or abuse; and BTOP projects avoid unnecessary delay and cost-overruns and meet targets and goals. In addition to increased levels of monitoring and oversight, BTOP projects must adhere to mandatory timelines requiring them to demonstrate that each project will be substantially completed within two years of the grant's issuance date. To enable NTIA to properly achieve these objectives and verify that BTOP projects are meeting established targets and goals within the mandated timeframes, NTIA has developed and utilized Performance Progress Reports (PPRs) to capture quarterly and annual reports for each project type (Infrastructure, Public Computer Center, and Sustainable Broadband Adoption). Each PPR provides updates on fundamental project milestones and key performance indicators that allow NTIA to measure project progress and ensure proper monitoring and compliance with program rules.

NTIA reviewed PPRs, submitted on September 30, 2011, and assessed the individual responses provided by BTOP grant recipients and concluded that several key questions on the existing annual Infrastructure PPR need to be clarified if NTIA is to receive the appropriate level of detail necessary to ensure BTOP projects are meeting established targets and goals within mandated timeframes. NTIA is also requesting updated mapping information in order to better monitor the current status and impact of broadband deployment in each of the funded project areas. The annual Infrastructure PPR will be revised to capture more detailed information related to: Community Anchor Institutions; Points of Presence; and Network Maps.

Affected Public: Business or other for-profit organizations.

Frequency: Annually.

Respondent's Obligation: Mandatory.

OMB Desk Officer: Nicholas Fraser, (202) 395–5887.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance

Officer, (202) 482–0266, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent by November 30, 2011 to Nicholas Fraser, OMB Desk Officer, FAX number (202) 395–7285, or via the Internet at *Nicholas_A._Fraser@omb.eop.gov.*

Dated: November 2, 2011.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2011–28776 Filed 11–7–11; 8:45 am]

BILLING CODE 3510–06–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: Fishermen's Contingency Fund.

OMB Control Number: 0648–0082.

Form Number(s): NOAA Forms 88–164 and 88–166.

Type of Request: Regular submission (extension of a current information collection).

Number of Respondents: 100.

Average Hours per Response: application, 10 hours; 15-day report, 5 minutes.

Burden Hours: 1,008.

Needs and Uses: This request is for extension of a current information collection.

United States (U.S.) commercial fishermen may file claims for compensation for losses of or damages to fishing gear or vessels, plus 50 percent of resulting economic losses, attributable to oil and gas activities on the U.S. Outer Continental Shelf. To obtain compensation, applicants must comply with requirements set forth in 50 CFR part 296. The requirements include a report within 15 days of the date the vessel first returns to port after the incident, to gain a presumption of eligible causation, and an application form.

The report form (NOAA Form 88–166) requests identifying information such as the claimant's name, address, phone number, and social security number. It also requests information pertaining to the casualty, such as the location of the obstruction, the date and time of the casualty, identification of the vessel involved, and the date the vessel first returned to port after the casualty.

The application (NOAA Form 88–164) consists of a property loss section and a section for economic loss. The property loss section requests the same identifying information contained in the initial report. It also requests information such as the amount and type of damage claimed, description of the casualty and likely causes, efforts to recover gear, description of proofs of ownership, estimates of repair or replacement costs, and identification of witnesses. The economic loss section requests information pertaining to economic loss and consequential damages resulting from the casualty. This includes the length of trips and income from those trips prior to the casualty, number of gear units lost, date replacement gear was ordered and received or the date repairs were commenced and completed. This section also requests information regarding consequential damages such as extra fuel consumption or claim preparation fees. The application also includes inventory schedules which lists the amounts of gear involved in the casualty, its purchase date, purchase cost, and repair or replacement cost. The application also includes an affidavit by which the claimant attests to the truthfulness of the claim.

Affected Public: Business or other for-profit organizations.

Frequency: On occasion.

Respondent's Obligation: Required to obtain or retain benefits.

OMB Desk Officer: OIRA_Submission@omb.eop.gov.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *OIRA_Submission@omb.eop.gov.*

Dated: November 2, 2011.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2011–28797 Filed 11–7–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

Bureau of the Census

[Docket Number 111013624–1626–01]

Annual Retail Trade Survey

AGENCY: Bureau of the Census, Department of Commerce.

ACTION: Notice of Determination.

SUMMARY: The United States Department of Commerce's Bureau of the Census (Census Bureau) publishes this notice to announce that the Director of the Census Bureau has determined the need to conduct the 2011 Annual Retail Trade Survey (ARTS). ARTS covers employer firms with establishments located in the United States and classified in the Retail Trade and/or Accommodation and Food Services sectors as defined by the 2007 North American Industry Classification System (NAICS). Through this survey, the Census Bureau will collect data covering annual sales, annual e-commerce sales, year-end inventories held inside and outside the United States, total operating expenses, purchases, accounts receivables, and, for selected industries, merchandise line sales, and percent of e-commerce sales to customers located outside the United States. These data are collected to provide a sound statistical basis for the formation of policy by various government agencies. Results will be available for use for a variety of public and business needs such as economic and market analysis, company performance, and forecasting future demand.

ADDRESSES: The Census Bureau will provide report forms to businesses included in the survey. Additional copies are available upon written request to the Director, U.S. Census Bureau, Washington, DC 20233–0101.

FOR FURTHER INFORMATION CONTACT: Aneta Erdie, Service Sector Statistics Division, at (301) 763–4841 or by email at *aneta.erdie@census.gov.*

SUPPLEMENTARY INFORMATION: Sections 182, 224, and 225 of Title 13 of the United States Code authorize the Census Bureau to take surveys that are necessary to produce current data on the subjects covered by the major censuses. As part of this authorization, the Census Bureau conducts the ARTS to provide continuing and timely national statistical data on retail trade, and accommodation and food services activity for the period between economic censuses. ARTS is a continuation of similar retail trade surveys conducted each year since 1951

(except 1954). ARTS covers employer firms with establishments located in the United States and classified in the Retail Trade and/or Accommodation and Food Services sectors as defined by the 2007 North American Industry Classification System (NAICS). ARTS provides, on a comparable classification basis, annual sales, annual e-commerce sales, purchases, total operating expenses, accounts receivables, and year-end inventories held inside and outside the United States for 2011. The Census Bureau has determined that the conduct of this survey is necessary because these data are not available publicly on a timely basis from any other sources.

A new sample of firms will be selected for the 2011 ARTS. It is expected that approximately 60–70% of the companies that are asked to report will be doing so for the first time (and, consequently, 60–70% of the prior sample will no longer be asked to report). In order to link estimates from the new and prior samples, we will be asking companies to provide data for 2011 and 2010. The ARTS for 2012 and those for subsequent years will request one year of data until a new sample is once again introduced.

Firms are selected for the ARTS survey using a stratified random sample based on industry groupings and annual sales size. We will provide report forms to the firms covered by this survey in January 2012, and will require their responses within 60 days after receipt. Firms' responses to the ARTS survey are required by law(Title 13 U.S.C. Sections 182, 224, and 225). The sample of firms selected will provide, with measurable reliability, statistics on annual sales, annual e-commerce sales, purchases, total operating expenses, accounts receivables, and year-end inventories held both inside and outside the United States for 2011.

The data collected in this survey will be similar to that collected in the past and within the general scope and nature of those inquiries covered in the economic census. These data are collected to provide a sound statistical basis for the formation of policy by various government agencies. Results will be available for use for a variety of public and business needs including economic and market analysis, company performance, and forecasting future demand.

Notwithstanding any other provision of law, no person is required to respond to, nor shall a person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the Paperwork Reduction Act (PRA) unless that collection of information displays a current valid Office of Management and Budget (OMB) control number. In accordance with the PRA, 44 U.S.C. 3501–3521, OMB has approved the Annual Retail Trade Survey under OMB Control Number 0607–0013.

Based upon the foregoing, I have directed that an annual survey be conducted for the purpose of collecting these data.

Dated: November 2, 2011.

Robert M. Groves,

Director, Bureau of the Census.

[FR Doc. 2011–28881 Filed 11–7–11; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Proposed Information Collection; Comment Request; Request for the Appointment of a Technical Advisory Committee

AGENCY: Bureau of Industry and Security, Department of Commerce.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or before January 9, 2012.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Larry Hall, BIS ICB Liaison, (202) 482–4895, *Lawrence.Hall@bis.doc.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

This collection of information is required by the Export Administration Regulations and the Federal Advisory Committee Act. The Technical Advisory Committees (TACs) were established to advise and assist the U.S. Government on export control matters such as proposed revisions to export control lists, licensing procedures, assessments of the foreign availability of controlled products, and export control regulations. Under this collection, interested parties may submit a request to BIS to establish a new TAC. The Bureau of Industry and Security provides administrative support for these Committees.

II. Method of Collection

Submitted electronically or on paper.

III. Data

OMB Control Number: 0694–0100.

Form Number(s): None.

Type of Review: Regular submission (extension of a currently approved collection).

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 1.

Estimated Time per Response: 5 hours.

Estimated Total Annual Burden Hours: 5.

Estimated Total Annual Cost to Public: $0.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: November 2, 2011.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2011–28786 Filed 11–7–11; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–601]

Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, From the People's Republic of China: Extension of Time Limit for the Final Results of the Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

DATES: *Effective Date:* November 8, 2011.

FOR FURTHER INFORMATION CONTACT: Demitri Kalogeropoulos or Frances Veith, AD/CVD Operations, Office 8, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; *telephone:* (202) 482–2623 or (202) 482–4295, respectively.

SUPPLEMENTARY INFORMATION:

Background

On July 28, 2010, the Department of Commerce (''Department'') published the initiation of the administrative review of the antidumping duty order on tapered roller bearings and parts thereof, finished or unfinished, (''TRBs'') from the People's Republic of China (''PRC''). *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part,* 75 FR 44224 (July 28, 2010). On July 13, 2011, the Department published the preliminary results of the review. *See Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, From the People's Republic of China: Preliminary Results of the 2009–2010 Administrative Review of the Antidumping Duty Order and Intent To Rescind Administrative Review, in Part,* 76 FR 41207 (July 13, 2011). The 2009–2010 administrative review covers the period June 1, 2009, through May 31, 2010. The final results are currently due no later than November 10, 2011.

Extension of Time Limit for Final Results of Review

Pursuant to section 751(a)(3)(A) of the Tariff Act of 1930, as amended (''Act''), the Department shall make a final determination in an administrative review of an antidumping duty order within 120 days after the date on which the preliminary results are published. The Act further provides, however, that the Department may extend that 120-day period to 180 days if it determines it is not practicable to complete the review within the foregoing time.

The Department finds that it is not practicable to complete the final results of the 2009–2010 administrative review of TRBs from the PRC within the 120-day period. We find that we need additional time to fully analyze the complicated issues raised in the case and rebuttal briefs, specifically input consumption allocations and issues relating to a successor-in-interest determination. Therefore, in accordance with section 751(a)(3)(A) of the Act, the Department is extending the time period for completion of the final results of this review by 30 days to December 10, 2011. However, because December 10, 2011, falls on a Saturday, a non-business day, the final results will now be due no later than December 12, 2011, the next business day. *See Notice of Clarification: Application of ''Next Business Day'' Rule for Administrative Determination Deadlines Pursuant to the Tariff Act of 1930, As Amended,* 70 FR 24533 (May 10, 2005).

This notice is published in accordance with sections 751(a)(3)(A) and 777(i) of the Act.

Dated: November 2, 2011.

Christian Marsh,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2011–28915 Filed 11–7–11; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Papahanaumokuakea Marine National Monument Mokupapapa Discovery Center Exhibit Evaluation

AGENCY: National Oceanic and Atmospheric Administration (NOAA).

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or before January 9, 2012.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue NW, Washington, DC 20230 (or via the Internet at *dHynek@doc.gov).*

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Andy Collins, at (808)–694–3922 or *Andy.Collins@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

This request is for a revision and extension of a currently approved information collection. Mokupapapa Discovery Center (Center) is an outreach arm of Papahanaumokuakea Marine National Monument that reaches 60,000 people each year in Hilo, Hawai'i. The Center was created eight years ago to help raise support for the creation of a National Marine Sanctuary in the Northwestern Hawaiian Islands. Since that time, the area has been proclaimed a Marine National Monument and the main messages we are trying to share with the public have changed to better reflect the new monument status, UNESCO World Heritage status and the joint management by the three co-trustees of the Monument. We therefore are seeking to find out if people visiting our Center are receiving the new messages by conducting an optional exit survey which is the proposed revision to the collection.

II. Method of Collection

Surveys will be conducted by in-person interview as people exit the Center. Interviewers will record responses on paper, and later transfer them to an electronic database.

III. Data

OMB Control Number: 0648–0582.

Form Number: None.

Type of Review: Regular submission (revision and extension of a currently approved collection).

Affected Public: Individuals or households.

Estimated Number of Respondents: 250.

Estimated Time per Response: 7 minutes.

Estimated Total Annual Burden Hours: 29.

Estimated Total Annual Cost to Public: $0 in recordkeeping/reporting costs.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden

(including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: November 2, 2011.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2011–28811 Filed 11–7–11; 8:45 am]

BILLING CODE 3510–NK–P

DEPARTMENT OF EDUCATION

Application for New Awards; College Assistance Migrant Program

AGENCY: Office of Elementary and Secondary Education, Department of Education.

ACTION: Notice.

Overview Information

College Assistance Migrant Program (CAMP).

Notice inviting applications for new awards for fiscal year (FY) 2012.

Catalog of Federal Domestic Assistance (CFDA) Number: 84.149A.

DATES: *Applications Available:* November 8, 2011.

Deadline for Transmittal of Applications: January 18, 2012.

Deadline for Intergovernmental Review: March 20, 2012.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The purpose of CAMP is to provide academic and financial support to help migrant and seasonal farmworkers and their children complete their first year of college and continue in postsecondary education.

Priorities: This competition includes two competitive preference priorities and two invitational priorities. In accordance with 34 CFR 75.105(b)(2)(ii), Competitive Preference Priority 1 is from the Education Department General Administrative Regulations (EDGAR) (34 CFR 75.225). In accordance with 34 CFR 75.105(b)(2)(iv), Competitive Preference Priority 2 is from section 418A(e) of the Higher Education Act of 1965, as amended by section 408(3) of the Higher Education Opportunity Act (20 U.S.C. 1070d–2(e)). The third priority is an invitational priority for applications that promote science, technology, engineering, and mathematics (STEM) education. The fourth priority is an invitational priority for applications that propose to engage faith-based and community organizations in the delivery of services under this program.

Competitive Preference Priorities: For FY 2012 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 five points to an application that meets Competitive Preference Priority 1 and we award up to 15 additional points to an application, depending on how well the applicant meets Competitive Preference Priority 2. The maximum amount of competitive preference points an application can receive under this competition is 15 points.

These priorities are:

Competitive Preference Priority 1—Novice Applicant (5 Points)

The applicant must be a ''novice applicant'' as defined in 34 CFR 75.225(a). A novice applicant is defined as one who has: (i) Never received a grant or a subgrant under the CAMP program; (ii) never been a member of a group application, submitted in accordance with 34 CFR 75.127–75.129, that received a grant under the CAMP program; and (iii) not had an active discretionary grant from the Federal government in the five years before the deadline date for applications under the CAMP program (January 18, 2012).

Competitive Preference Priority 2—Prior Experience of Service Delivery (Up to 15 Points)

For applicants with an expiring CAMP project, the Secretary will consider the applicant's prior experience in implementing its expiring CAMP project, based on information contained in documents previously provided to the Department, such as annual performance reports, project evaluation reports, site visit reports, and the previously approved CAMP application.

Under this competition, we also are particularly interested in applications that address the following priorities.

Invitational Priorities: For FY 2012, 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—Science, Technology, Engineering and Mathematics Education

Projects that are designed to address one or more of the following priority areas:

(a) Providing students with increased access to rigorous and engaging coursework in STEM.

(b) Increasing the number and proportion of students prepared for postsecondary or graduate study and careers in STEM, with a specific focus on an increase in the number and proportion of students so prepared who are from groups traditionally underrepresented in STEM careers, including minorities, individuals with disabilities, and women.

Note: Applicants could consider increasing participants' access to studies in STEM through such activities as counseling and tutoring in ways that motivate participants to pursue postsecondary education in the areas of STEM. Similarly, applicants could consider increasing students' preparedness for study and careers in STEM through activities such as referrals to STEM-oriented work study, exposure to academic programs and careers in STEM-related fields, and providing support services. These could include services to improve participants' academic skills and knowledge so that they may pursue studies and careers in STEM-related fields.

Invitational Priority 2—Faith-Based and Community Organizations

Applications that propose to engage faith-based and community organizations in the delivery of services under this program.

Program Authority: 20 U.S.C. 1070d–2.

Applicable Regulations: (a) The Education Department General Education Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 82, 84, 85, 86, 97, and 99. (b) The regulations for this program in 34 CFR part 206. (c) The definitions of a *migratory agricultural worker* in 34 CFR 200.81(d), *migratory child* in 34 CFR 200.81(e), and *migratory fisher* in 34 CFR 200.81(f). (d) The regulations in 20 CFR 669.110 and 669.320.

Note: The regulations in 34 CFR part 86 apply to institutions of higher education (IHEs) only.

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: The Administration has requested $3,425,268 for new awards for this program for FY 2012. The actual level of funding, if any, depends on final congressional action. However, we are inviting applications to allow enough time to complete the grant process if Congress appropriates funds for this program.

Contingent upon the availability of funds and the quality of applications, we may make additional awards in FY 2013 from the list of unfunded applicants from this competition.

Estimated Range of Awards: $180,000 to $425,000.

Estimated Average Size of Awards: $410,000.

Maximum Award: We will reject any application that proposes a CAMP award exceeding $425,000 for any of the five single budget periods of 12 months. The Assistant Secretary for Elementary and Secondary Education may change the maximum amount through a notice published in the *Federal Register*.

Minimum Award: We will reject any application that proposes a CAMP award that is less than $180,000 for any of the five single budget periods of 12 months. The Assistant Secretary for Elementary and Secondary Education may change the minimum amount through a notice published in the **Federal Register**.

Estimated Number of Awards: 8 to 9.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 60 months.

III. Eligibility Information

1. *Eligible Applicants:* IHEs or private non-profit organizations (including faith-based organizations) that plan their projects in cooperation with an IHE and propose to operate some aspects of the project with the facilities of the IHE.

2. *Cost Sharing or Matching:* This program does not require cost sharing or matching. However, consistent with 34 CFR 75.700, which requires an applicant to comply with its approved application, an applicant that proposes non-Federal matching funds and is awarded a grant must provide those funds for each year that the funds are proposed.

3. *Other:* Projects funded under this competition are encouraged to budget for a two-day Office of Migrant Education annual meeting for CAMP directors in the Washington, DC, area during each year of the project period.

IV. Application and Submission Information

1. *Address to Request Application Package:* Tara Ramsey, U.S. Department of Education, Office of Migrant Education, 400 Maryland Avenue, SW., room 3E309, Washington, DC 20202–6135. Telephone: (202) 260–2063 or by email: *tara.ramsey@ed.gov*.

The application package content also can be viewed electronically at the following address: *http://www.ed.gov/programs/camp/applicant.html*.

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 compact disc) by contacting the program contact person listed in this section.

2. *Content and Form of Application Submission:* Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this competition.

Page Limit: The application narrative (Part IV of the application) is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. Panel readers will award points only for an applicant's response to a given selection criterion that is contained within the section of the application designated to address that particular selection criterion. Readers will not review, or award points for responses to a given selection criterion that are in any other section of the application or appendices. You must limit the application narrative [Part IV] to no more than 25 pages, 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.
- Double space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, references, and captions. However, you may single space all text in charts, tables, figures, and graphs. Charts, tables, figures, and graphs presented in the application narrative count toward the page limit.
- Use a font that is either 12 point or larger or no aller than 10 pitch (characters per inch) throughout the entire application package.
- 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.

The 25-page limit for the project narrative does not apply to the cover sheet; the budget section, including the narrative budget justification; the assurances and certifications; and the one-page abstract. However, the page limit does apply to all of the application narrative section.

Our reviewers will not read any pages of your application narrative that exceed the 25-page limit.

Appendices must be limited to 20 pages and must include the following: Resumes, and job descriptions of key personnel. Job descriptions must include duties and minimum qualifications. Items in the appendices will only be used by the program office for the purpose of approving any future personnel changes.

3. *Submission Dates and Times:*

Applications Available: November 8, 2011.

Deadline for Transmittal of Applications: January 18, 2012.

Applications for grants under this competition must be submitted electronically using the Grants.gov Apply site (Grants.gov). For information (including dates and times) about how to submit your application electronically, or in paper format by mail or hand delivery if you qualify for an exception to the electronic submission requirement, please refer to section IV. 7. *Other Submission Requirements* of this notice.

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice.

Deadline for Intergovernmental Review: March 20, 2012.

4. *Intergovernmental Review:* This competition 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 College Assistance Migrant Program, CFDA number 84.149A must be submitted electronically using the Governmentwide Grants.gov Apply site at www.Grants.gov. Through this site, you will be able to download a copy of the application package, complete it offline, and then upload and submit your application. You may not email an electronic copy of a grant application to us.

We will reject your application if you submit it in paper format unless, as described elsewhere in this section, you qualify for one of the exceptions to the electronic submission requirement and submit, no later than two weeks before the application deadline date, a written statement to the Department that you qualify for one of these exceptions. Further information regarding calculation of the date that is two weeks before the application deadline date is provided later in this section under *Exception to Electronic Submission Requirement.*

You may access the electronic grant application for the College Assistance Migrant Program at 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 84.149, not 84.149A).

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 email. 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 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: Tara Ramsey, U.S. Department of Education, 400 Maryland Avenue SW., room 3E309, LBJ, Washington, DC 20202–6135. Fax: (202) 205–0089.

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 84.149A, 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 84.149A, 550 12th Street SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8 a.m. and 4:30 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 competition are from 34 CFR 75.210 of EDGAR and are listed in the application package.

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, 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).

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 of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 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:* Under the Government Performance and Results Act of 1993 (GPRA), the Department developed the following performance measures to evaluate the overall effectiveness of the CAMP: (1) The percentage of CAMP participants completing the first academic year of their postsecondary program, and (2) the percentage of CAMP participants who, after completing the first academic year of college, continue their postsecondary education.

Applicants must propose annual targets for these measures in their applications. The national target for GPRA measure 1 for FY 2012 is that 86 percent of CAMP participants will complete the first academic year of their postsecondary program. The national target for GPRA measure 2 for 2012 is that 85 percent of CAMP participants will continue their postsecondary education after completing the first academic year of college. The national targets for subsequent years may be adjusted based on additional baseline data. The panel readers will score related selection criteria on the basis of how well an applicant addresses these GPRA measures. Therefore, applicants will want to consider how to demonstrate a sound capacity to provide reliable data on GPRA measures, including the project's annual performance targets for addressing the GPRA performance measures, as is required by the Office of Management and Budget approved annual performance report that is included in the application package. All grantees will be required to submit, as part of their annual performance report, information with respect to these performance measures.

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 Contact

FOR FURTHER INFORMATION CONTACT: Tara Ramsey, U.S. Department of Education, Office of Migrant Education, 400 Maryland Avenue SW., room 3E309, Washington, DC 20202–6135. Telephone Number: (202) 260–2063, or by email: *tara.ramsey@ed.gov.*

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 compact disc) on request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register.** Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *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: *http://www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Dated: November 3, 2011.

Michael Yudin,

Acting Assistant Secretary for Elementary and Secondary Education.

[FR Doc. 2011–28943 Filed 11–7–11; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Application for New Awards; High School Equivalency Program

AGENCY: Office of Elementary and Secondary Education, Department of Education.

ACTION: Notice.

Overview Information

High School Equivalency Program (HEP)

Notice inviting applications for new awards for fiscal year (FY) 2012.

Catalog of Federal Domestic Assistance (CFDA) Number: 84.141A.

DATES: Applications Available: November 8, 2011.

Deadline for Transmittal of Applications: January 18, 2012.

Deadline for Intergovernmental Review: March 20, 2012.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The purposes of HEP are to help migrant and seasonal farmworkers and members of their immediate family: (1) Obtain a general education diploma (GED) that meets the guidelines for high school equivalency established by the State in which the HEP project is conducted, and (2) gain employment or be placed in an institution of higher education (IHE) or other postsecondary education or training.

Priorities: This competition includes two competitive preference priorities and two invitational priorities. In accordance with 34 CFR 75.105(b)(2)(ii), Competitive Preference Priority 1 is from the Education Department General Administrative Regulations (EDGAR) (34 CFR 75.225). In accordance with 34 CFR 75.105(b)(2)(iv), Competitive Preference Priority 2 is from section

418A(e) of the Higher Education Act of 1965, as amended by section 408(3) of the Higher Education Opportunity Act (20 U.S.C. 1070d–2(e)). The third priority is an invitational priority for applications that promote science, technology, engineering and mathematics (STEM) education. The fourth priority is an invitational priority for applications that propose to engage faith-based and community organizations in the delivery of services under this program.

Competitive Preference Priorities: For FY 2012 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 five points to an application that meets Competitive Preference Priority 1, and we award up to 15 additional points to an application, depending on how well the applicant meets Competitive Preference Priority 2. The maximum amount of competitive preference points an application can receive under this competition is 15 points.

These priorities are:

Competitive Preference Priority 1—Novice Applicant (5 Points)

The applicant must be a ''novice applicant,'' as defined in 34 CFR 75.225(a). A novice applicant is defined as one who has: (i) Never received a grant or a subgrant under the HEP program; (ii) never been a member of a group application, submitted in accordance with 34 CFR 75.127–75.129, that received a grant under the HEP program; and (iii) not had an active discretionary grant from the Federal government in the five years before the deadline date for applications under the HEP program (January 18, 2012).

Competitive Preference Priority 2—Prior Experience of Service Delivery (Up to 15 Points)

For applicants with an expiring HEP project, the Secretary will consider the applicant's prior experience in implementing its expiring HEP project, based on information contained in documents previously provided to the Department, such as annual performance reports, project evaluation reports, site visit reports, and the previously approved HEP application.

Under this competition, we also are particularly interested in applications that address the following priorities.

Invitational Priorities: For FY 2012, 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—Science, Technology, Engineering and Mathematics Education

Projects that are designed to address one or more of the following priority areas:

(a) Providing students with increased access to rigorous and engaging coursework in STEM.

(b) Increasing the opportunities for high-quality preparation of, or professional development for, teachers or other educators of STEM subjects.

Note: Applicants could consider activities to better prepare program participants to transition into postsecondary education, such as preparing students to pass the sections of college entrance examinations in STEM-related subjects or counseling and tutoring services designed to motivate participants to pursue postsecondary education in STEM-related fields. Similarly, for demonstrating professional development, applicants could propose how they intend to increase the opportunities for high-quality professional development for project instructors in mathematics and related GED instruction. Opportunities for increasing professional development of GED instructors of STEM-related subjects could include, for example, participation in training on intensive science teaching techniques presented by a professionally credentialed expert in science education.

Invitational Priority 2—Faith-Based and Community Organizations

Applications that propose to engage faith-based and community organizations in the delivery of services under this program. *Program Authority:* 20 U.S.C. 1070d–2.

Applicable Regulations: (a) The Education Department General Education Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 82, 84, 85, 86, 97, and 99. (b) The regulations in 34 CFR part 206. (c) The definitions in 34 CFR 200.81. (d) The regulations in 20 CFR 669.110 and 669.320.

Note: The regulations in 34 CFR part 86 apply to IHEs only.

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: The Administration has requested $1,560,683 for new awards for this program for FY 2012. The actual level of funding, if any, depends on final congressional action. However, we are inviting applications to allow enough time to complete the grant process if Congress appropriates funds for this program.

Contingent upon the availability of funds and the quality of applications, we may make additional awards in FY 2013 from the list of unfunded applicants from this competition.

Estimated Range of Awards: $180,000 to $475,000.

Estimated Average Size of Awards: $432,000.

Maximum Award: We will reject any application that proposes a HEP award exceeding $475,000 for any of the five single budget periods of 12 months. The Assistant Secretary for Elementary and Secondary Education may change the maximum amount through a notice published in the **Federal Register**.

Minimum Award: We will reject any application that proposes a HEP award that is less than $180,000 for any of the five single budget periods of 12 months. The Assistant Secretary for Elementary and Secondary Education may change the minimum amount through a notice published in the **Federal Register**.

Estimated Number of Awards: 3 to 4.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 60 months.

III. Eligibility Information

1. *Eligible Applicants:* IHEs or private non-profit organizations (including faith-based organizations) that plan their projects in cooperation with an IHE and propose to operate some aspects of the project with the facilities of the IHE.

2. *Cost Sharing or Matching:* This program does not require cost sharing or matching. However, consistent with 34 CFR 75.700, which requires an applicant to comply with its approved application, an applicant that proposes non-Federal matching funds and is awarded a grant must provide those funds for each year that the funds are proposed.

3. *Other:* Projects funded under this competition are encouraged to budget for a two-day annual meeting for HEP Directors in the Washington, DC, area during each year of the project period.

IV. Application and Submission Information

1. *Address to Request Application Package:* Tara Ramsey, U.S. Department of Education, Office of Migrant Education, 400 Maryland Avenue SW., room 3E309, Washington, DC, 20202–6135. *Telephone:* (202) 260–2063 or by *email: tara.ramsey@ed.gov.*

The application package content also can be viewed electronically at the

following address: *http://www.ed.gov/programs/hep/applicant.html.*

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 compact disc) by contacting the program contact person listed in this section.

2. *Content and Form of Application Submission:*

Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this competition. Page Limit: The application narrative (Part IV of the application) is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. Panel readers will award points only for an applicant's response to a given selection criterion that is contained within the section of the application designated to address that particular selection criterion. Readers will not review, or award points for responses to a given selection criterion that is located in any other section of the application or the appendices. You must limit the application narrative [Part IV] to no more than 25 pages, 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.
- Double space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, references, and captions. However, you may single space all text in charts, tables, figures, and graphs. Charts, tables, figures, and graphs presented in the application narrative count toward the page limit.
- Use a font that is either 12 point or larger or no smaller than 10 pitch (characters per inch) throughout the entire application package.
- 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.

The 25-page limit for the project narrative does not apply to the cover sheet; the budget section, including the narrative budget justification; the assurances and certifications; or the one-page abstract. However, the page limit does apply to all of the application narrative section.

Our reviewers will not read any pages of your application narrative that exceed the 25-page limit.

Appendices must be limited to 20 pages and must include the following: Resumes and job descriptions of key personnel. Job descriptions must include duties and minimum qualifications. Items in the appendices will only be used by the program office for the purpose of approving any future personnel changes.

3. *Submission Dates and Times:* Applications Available: November 8, 2011. Deadline for Transmittal of Applications: January 18, 2012.

Applications for grants under this competition must be submitted electronically using the Grants.gov Apply site (Grants.gov). For information (including dates and times) about how to submit your application electronically, or in paper format by mail or hand delivery if you qualify for an exception to the electronic submission requirement, please refer to section IV. 7. *Other Submission Requirements* of this notice.

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice. Deadline for Intergovernmental Review: March 20, 2012.

4. *Intergovernmental Review:* This competition 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 High School Equivalency Program, CFDA number 84.141A, must be submitted electronically using the Governmentwide Grants.gov Apply site at www.Grants.gov. Through this site, you will be able to download a copy of the application package, complete it offline, and then upload and submit your application. You may not email an electronic copy of a grant application to us.

We will reject your application if you submit it in paper format unless, as described elsewhere in this section, you qualify for one of the exceptions to the electronic submission requirement and submit, no later than two weeks before

the application deadline date, a written statement to the Department that you qualify for one of these exceptions. Further information regarding calculation of the date that is two weeks before the application deadline date is provided later in this section under *Exception to Electronic Submission Requirement.*

You may access the electronic grant application for HEP 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 84.141, not 84.141A).

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 email. 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: Tara Ramsey, U.S. Department of Education, 400 Maryland Avenue SW., room 3E309, Washington, DC 20202–6135. *FAX:* (202) 205–0089.

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 84.141A, 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 84.141A, 550 12th Street, SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8 a.m. and 4:30 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 competition are from 34 CFR 75.210 of EDGAR and are listed in the application package.

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, 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).

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 of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 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:* Under the Government Performance and Results Act of 1993 (GPRA), the Department developed the following performance measures to evaluate the overall effectiveness of HEP: (1) The percentage of HEP program participants exiting the program having received a GED (GPRA 1), and (2) the percentage of HEP GED recipients who enter postsecondary education or training programs, upgraded employment, or the military (GPRA 2).

Applicants must propose annual targets for these measures in their applications. The national target for GPRA measure 1 for FY 2012 is that 69 percent of HEP program participants exiting the program having received a GED credential. The national target for GPRA measure 2 for FY 2012 is that 80 percent of HEP GED recipients will enter postsecondary education or training programs, upgraded employment, or the military. The national targets for subsequent years may be adjusted based on additional baseline data. The panel readers will score related selection criteria for applicants, in part, on the basis of how well an applicant addresses these GPRA measures. Therefore, applicants should consider their capacity to provide reliable data on these measures, including the project's annual performance targets for the GPRA measures, as required by the Office of Management and Budget approved annual performance report that is included in the application package. All

grantees will be required to submit, as part of their annual performance report, information with respect to these GPRA measures.

5. *Continuation Awards:* In making a continuation award, the Secretary considers, 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 Contact

FOR FURTHER INFORMATION CONTACT: Tara Ramsey, U.S. Department of Education, 400 Maryland Avenue SW., Room 3E309, LBJ, Washington, DC 20202–6135. *Telephone:* (202) 260–2063 or by *email: tara.ramsey@ed.gov*

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 compact disc) on request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *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: *http://www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Dated: November 3, 2011.

Michael Yudin,

Acting Assistant Secretary for Elementary and Secondary Education.

[FR Doc. 2011–28944 Filed 11–7–11; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Proposed Agency Information Collection

AGENCY: U.S. Department of Energy (DOE).

ACTION: Notice and request for comments.

SUMMARY: The Department of Energy (DOE) invites public comment on a proposed collection of information that DOE is developing for submission to the Office of Management and Budget (OMB) pursuant to the Paperwork Reduction Act of 1995. Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Comments regarding this proposed information collection must be received on or before January 9, 2012. If you anticipate difficulty in submitting comments within that period, contact the person listed in **ADDRESSES** as soon as possible.

ADDRESSES: Written comments may be sent to Monica Neukomm, EE–20/Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585 or by fax at (202) 586–9260 or by email at *Monica.Neukomm@EE.doe.gov.*

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Monica Neukomm, EE–20/Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585, *Monica.Neukomm@EE.doe.gov.*

SUPPLEMENTARY INFORMATION: This information collection request contains:

(1) *OMB No.* New.

(2) *Information Collection Request Title:* Department of Energy Better Buildings Challenge Information Collection Request.

(3) *Type of Request:* New.

(4) *Purpose:* The information being collected is needed to include participants in the Department of Energy (DOE) Better Buildings Challenge program. The Better Buildings Challenge is a voluntary leadership initiative intended to drive greater energy efficiency in the commercial and industrial marketplace to create real savings and real jobs. This will be accomplished by highlighting the ways participants overcome market barriers/persistent obstacles with replicable, marketplace solutions. The program will showcase real solutions and partner with industry leaders to better understand policy and technical opportunities. There are three types of information to be collected from ''Partners,'' the primary participant type, being: (1) Background data, including contact information, a partnership agreement form, logo(s), information needed to support public announcements, updates on participants' showcase projects, and an energy savings goal; (2) Portfolio-wide facility-level energy performance information; and (3) Information on market innovations they are including in their energy efficiency processes. Background information will primarily be used to develop Web site content that will be publically available. Portfolio-wide facility-level energy performance information will be used by DOE to measure the progress of participants in meeting the goals of the program, as well as to aggregate the change in energy performance and related metrics for the entire program. Information on market innovation will be used to highlight successful strategies participants use to overcome challenges, and will be publicly available. Additional information collected from ''Allies'' will primarily be background information that will be used to develop publically available Web site content.

(5) *Annual Estimated Number of Respondents:* 130.

(6) *Annual Estimated Number of Total Responses:* 710.

(7) *Annual Estimated Number of Burden Hours:* 465.

(8) *Annual Estimated Reporting and Recordkeeping Cost Burden:* $0.

Statutory Authority: Section 421 of the Energy Independence and Security Act of 2007 (42 U.S.C. 17081); Section 911 of the Energy Policy Act of 2005, as amended (42 U.S.C. 16191).

Issued in Washington, DC, on October 27, 2011.

Maria Vargas,

Director Better Buildings Challenge, Buildings Technology Program.

[FR Doc. 2011–28918 Filed 11–7–11; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

DOE/NSF Nuclear Science Advisory Committee

AGENCY: Department of Energy, Office of Science.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the DOE/NSF Nuclear Science Advisory Committee (NSAC). Federal Advisory Committee Act (Pub L. 92–463, 86 Stat. 770) requires that public notice of these meetings be announced in the **Federal Register**.

DATES: Thursday, December 1, 2011, 9 a.m.–5 p.m.

ADDRESSES: Hilton Washington DC North/Gaithersburg, 620 Perry Parkway, Gaithersburg, Maryland 20877, (301) 977–8900.

FOR FURTHER INFORMATION CONTACT: Brenda L. May, U.S. Department of Energy; SC–26/Germantown Building, 1000 Independence Avenue SW., Washington, DC 20585–1290; Telephone: (301) 903–0536.

SUPPLEMENTARY INFORMATION:

Purpose of Meeting: To provide advice and guidance on a continuing basis to the Department of Energy and the National Science Foundation on scientific priorities within the field of basic nuclear science research.

Tentative Agenda: Agenda will include discussions of the following:

Thursday, December 1, 2011.

- Perspectives from Department of Energy and National Science Foundation
- Update from the Department of Energy and National Science Foundation's Nuclear Physics Office's
- Update on the Neutron Charge Subcommittee Report
- Public Comment (10-minute rule)

Public Participation: The meeting is open to the public. If you would like to file a written statement with the Committee, you may do so either before or after the meeting. If you would like to make oral statements regarding any of these items on the agenda, you should contact Brenda L. May, (301) 903–0536 or email: *Brenda.May@science.doe.gov*. You must make your request for an oral statement at least five business days before the meeting. Reasonable provision will be made to include the scheduled oral statements on the agenda. The Chairperson of the Committee will conduct the meeting to facilitate the orderly conduct of business. Public comment will follow the 10-minute rule.

Minutes: The minutes of the meeting will be available on the U.S. Department of Energy's *Office of Nuclear Physics* Web site for viewing.

Issued in Washington, DC on November 1, 2011.

Carol A. Matthews,

Committee Management Officer.

[FR Doc. 2011–28923 Filed 11–7–11; 8:45 am]

BILLING CODE 6450–01–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: EG12–7–000.
Applicants: Manzana Wind LLC.
Description: Self-Certification of Exempt Wholesale Generator Status of Manzana Wind LLC.
Filed Date: 10/31/2011.
Accession Number: 20111031–5277.
Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: EG12–8–000.
Applicants: NaturEner Rim Rock Wind Energy, LLC.
Description: Notice of Self-Certification of Exempt Wholesale Generator Status of NaturEner Rim Rock Wind Energy, LLC.
Filed Date: 10/31/2011.
Accession Number: 20111031–5358.
Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–2906–004; ER10–2908–004; ER10–2911–004; ER10–2909–004; ER10–2910–004; ER10–2900–004; ER10–2899–004; ER10–2898–004; ER11–4393–001.
Applicants: Utility Contract Funding II, LLC, Power Contract Financing II, L.L.C., South Eastern Electric Development Corp., South Eastern Generating Corp., Morgan Stanley Capital Group Inc., MS Solar Solutions Corp., Power Contract Financing II, Inc., Naniwa Energy LLC,TAQA Gen X LLC.
Description: MS Utilities Notice of Change in Status under ER10–2906, *et al.*
Filed Date: 10/31/2011.
Accession Number: 20111031–5229.
Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: ER11–3522–003.
Applicants: Public Service Company of New Mexico.
Description: Public Service Company of New Mexico submits tariff filing per 35: PNM Queue Reform Compliance Filing to be effective 9/30/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5404.
Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: ER11–4055–001; ER10–2977–001; ER11–3987–002; ER10–1290–002; ER10–3211–002; ER10–2814–001; ER10–3026–001
Applicants: Copper Mountain Solar 1, LLC, Mesquite Power, LLC, Mesquite Solar 1, LLC, San Diego Gas & Electric Company, Sempra Energy Trading LLC, Sempra Generation, Termoelectrica U.S., LLC.
Description: Notice of Change in Status of Sempra Generation, *et al.*
Filed Date: 10/31/2011.
Accession Number: 20111031–5252.
Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: ER11–4176–002.
Applicants: California Independent System Operator Corporation.
Description: California Independent System Operator Corporation submits tariff filing per 35: 2011–10–31 CAISO's SPTC Compliance Filing to be effective 10/31/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5411.
Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: ER11–4199–000.
Applicants: Midwest Independent Transmission System Operator, Inc., ITC Midwest LLC.
Description: Midwest Independent Transmission System Operator, Inc. submits tariff filing per 35.19a(b): ITCM–City of Jackson Refund Report to be effective N/A.
Filed Date: 10/31/2011.
Accession Number: 20111031–5101.
Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: ER11–4286–001.
Applicants: Arizona Public Service Company.
Description: Arizona Public Service Company submits tariff filing per 35: Compliance filing to add title page for Service Agreement Nos. 308 and 51741 to be effective 7/8/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5005.
Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: ER11–4678–001.
Applicants: Vasco Winds, LLC.
Description: Vasco Winds, LLC submits tariff filing per 35.17(b): Vasco Winds, LLC Amendment to MBR Application and Request for Expedited Action to be effective 11/1/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5417.
Comment Date: 5 p.m. Eastern Time on Monday, November 14, 2011.

Docket Numbers: ER12–243–000.
Applicants: Pacific Gas and Electric Company.
Description: Pacific Gas and Electric Company submits tariff filing per 35.13(a)(2)(iii: DWR Letter Agreement for South Bay Removal to be effective 11/1/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5006.
Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: ER12–244–000.
Applicants: Pacific Gas and Electric Company.
Description: Pacific Gas and Electric Company submits tariff filing per 35.13(a)(2)(iii: CCSF IA—35th Quarterly Filing of Facilities Agreements to be effective 9/30/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5007.
Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: ER12–244–000.
Applicants: Pacific Gas and Electric Company.
Description: Pacific Gas and Electric Company submits tariff filing per: Errata to the CCSF IA 35th Quarterly Filing of Facilities Agreements to be effective N/A.
Filed Date: 10/31/2011.
Accession Number: 20111031–5011.
Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: ER12–245–000.
Applicants: Duke Energy Ohio, Inc., Duke Energy Kentucky, Inc., Duke Energy Indiana, Inc.
Description: Duke Energy Ohio, Inc. submits tariff filing per 35.15: Duke Ohio Cancellation Filing (Move to PJM) to be effective 1/1/2012.
Filed Date: 10/31/2011.
Accession Number: 20111031–5109.
Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: ER12–246–000.
Applicants: Entergy Arkansas, Inc.
Description: Entergy Arkansas, Inc. submits tariff filing per 35: MBRT Compliance Filing to be effective 4/20/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5127.
Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: ER12–247–000.
Applicants: Entergy Gulf States Louisiana, LLC.
Description: Entergy Gulf States Louisiana, LLC submits tariff filing per 35: EGSL MBRT Compliance Filing to be effective 4/20/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5135.
Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: ER12–248–000.
Applicants: Entergy Louisiana, LLC.
Description: Entergy Louisiana, LLC submits tariff filing per 35: ELL MBRT Compliance Filing to be effective 4/20/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5139.
Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: ER12–249–000.
Applicants: Entergy Mississippi, Inc.
Description: Entergy Mississippi, Inc. submits tariff filing per 35: EMI MBRT Compliance Filing to be effective 4/20/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5141.
Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: ER12–250–000.
Applicants: Entergy New Orleans, Inc.
Description: Entergy New Orleans, Inc. submits tariff filing per 35: ENO MBRT Compliance Filing to be effective 4/20/2011 under ER12–250 Filing Type: 80.
Filed Date: 10/31/2011.
Accession Number: 20111031–5144.
Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: ER12–251–000.
Applicants: Entergy Texas, Inc.
Description: Entergy Texas, Inc. submits tariff filing per 35: ETI MBRT Compliance Filing to be effective 4/20/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5146.
Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: ER12–252–000.
Applicants: Upper Peninsula Power Company.
Description: Upper Peninsula Power Company submits tariff filing per 35.13(a)(2)(iii: Metering Agent Agreement between WPPI, Alger Delta Cooperative & UPPCO to be effective 1/1/2012.
Filed Date: 10/31/2011.
Accession Number: 20111031–5162.
Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: ER12–253–000.
Applicants: Entergy Nuclear Generation Company.
Description: Entergy Nuclear Generation Company submits tariff filing per 35: Entergy Nuclear Generation Co. MBRT Compliance Filing to be effective 4/20/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5165.
Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: ER12–254–000.
Applicants: Entergy Nuclear Power Marketing, LLC.
Description: Entergy Nuclear Power Marketing, LLC submits tariff filing per 35: Entergy Nuclear Power Marketing MBRT Compliance Filing to be effective 4/20/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5166.
Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: ER12–255–000.
Applicants: Entergy Power, LLC.
Description: Entergy Power, LLC submits tariff filing per 35: Entergy Power LLC MBRT Compliance Filing to be effective 4/20/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5169.
Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: ER12–256–000.
Applicants: EWO Marketing, Inc.
Description: EWO Marketing, Inc. submits tariff filing per 35: EWO Marketing MBRT Compliance Filing to be effective 4/20/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5170.
Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: ER12–257–000.
Applicants: Entergy Nuclear FitzPatrick, LLC.
Description: Entergy Nuclear FitzPatrick, LLC submits tariff filing per 35: Entergy Nuclear FitzPatrick MBRT Compliance Filing to be effective 4/20/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5172.
Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: ER12–258–000.
Applicants: Entergy Nuclear Indian Point 2, LLC.
Description: Entergy Nuclear Indian Point 2, LLC submits tariff filing per 35: Entergy Nuclear Indian Point 2 MBRT Compliance Filing to be effective 4/20/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5173.
Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: ER12–259–000.
Applicants: Entergy Nuclear Indian Point 3, LLC.

Description: Entergy Nuclear Indian Point 3, LLC submits tariff filing per 35: Entergy Nuclear Indian Point 3 MBRT Compliance Filing to be effective 4/20/2011.

Filed Date: 10/31/2011.

Accession Number: 20111031–5176.

Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: ER12–260–000.

Applicants: Energy Plus Holdings LLC.

Description: Energy Plus Holdings LLC submits tariff filing per 35.13(a)(2)(iii: Notice of Change in Status and Tariff Amendment to be effective 10/31/2011.

Filed Date: 10/31/2011.

Accession Number: 20111031–5177.

Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: ER12–261–000.

Applicants: Independence Energy LLC.

Description: Independence Energy LLC submits tariff filing per 35.13(a)(2)(iii: Notice of Change in Status and Tariff Amendment to be effective 10/31/2011.

Filed Date: 10/31/2011.

Accession Number: 20111031–5179.

Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: ER12–262–000.

Applicants: Llano Estacado Wind, LLC.

Description: Llano Estacado Wind, LLC submits tariff filing per 35: Llano Escatado Wind MBRT Compliance Filing to be effective 4/20/2011.

Filed Date: 10/31/2011.

Accession Number: 20111031–5180.

Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: ER12–263–000.

Applicants: Northern Iowa Windpower, LLC.

Description: Northern Iowa Windpower, LLC submits tariff filing per 35: Northern Iowa Windpower MBRT Compliance Filing to be effective 4/20/2011.

Filed Date: 10/31/2011.

Accession Number: 20111031–5182.

Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: ER12–264–000.

Applicants: Entergy Nuclear Palisades, LLC.

Description: Entergy Nuclear Palisades, LLC submits tariff filing per 35: Entergy Nuclear Palisades MBRT Compliance Filing to be effective 4/20/2011.

Filed Date: 10/31/2011.

Accession Number: 20111031–5183.

Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: ER12–265–000.

Applicants: Entergy Nuclear Vermont Yankee, LLC.

Description: Entergy Nuclear Vermont Yankee, LLC submits tariff filing per 35: Entergy Nuclear Vermont Yankee MBRT Compliance Filing to be effective 4/20/2011.

Filed Date: 10/31/2011.

Accession Number: 20111031–5187.

Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: ER12–266–000.

Applicants: PJM Interconnection, LLC.

Description: PJM Interconnection, LLC submits tariff filing per 35.13(a)(2)(iii: Queue No. W2–038, Original Service Agreement No. 3096 to be effective 9/29/2011.

Filed Date: 10/31/2011.

Accession Number: 20111031–5202.

Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: ER12–267–000.

Applicants: New England Power Pool Participants Committee.

Description: New England Power Pool Participants Committee submits tariff filing per 35.13(a)(2)(iii: Nov 2011 Membership Filing to be effective 10/1/2011.

Filed Date: 10/31/2011.

Accession Number: 20111031–5204.

Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: ER12–268–000.

Applicants: Black Hills/Colorado Electric Utility Company, LP.

Description: Black Hills/Colorado Electric Utility Company, LP submits tariff filing per 35.13(a)(2)(iii: OATT Revised Attachment K to be effective 11/1/2011.

Filed Date: 10/31/2011.

Accession Number: 20111031–5212.

Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: ER12–269–000.

Applicants: PJM Interconnection, LLC, Potomac-Appalachian Highline Transmission.

Description: PJM Interconnection, LLC submits tariff filing per 35.13(a)(2)(iii: PATH submits revisions to PJM Tariff Attachment H–19B to be effective 1/1/2012.

Filed Date: 10/31/2011.

Accession Number: 20111031–5231.

Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: ER12–270–000.

Applicants: Buchanan Generation, LLC.

Description: Buchanan Generation, LLC submits tariff filing per 35: Revised MBR Tariff to be effective 10/31/2011.

Filed Date: 10/31/2011.

Accession Number: 20111031–5233.

Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: ER12–271–000.

Applicants: PJM Interconnection, LLC.

Description: PJM Interconnection, LLC submits tariff filing per 35.13(a)(2)(iii: Revions to PJM's Tariff Attachment DD.11—DR Compliance Bill Timing Changes to be effective 12/30/2011.

Filed Date: 10/31/2011.

Accession Number: 20111031–5236.

Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: ER12–272–000.

Applicants: Green Valley Hydro, LLC.

Description: Green Valley Hydro, LLC submits tariff filing per 35: Revised MBR Tariff to be effective 10/31/2011.

Filed Date: 10/31/2011.

Accession Number: 20111031–5238.

Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: ER12–273–000.

Applicants: Allegheny Energy Supply Company, LLC.

Description: Allegheny Energy Supply Company, LLC submits tariff filing per 35: Revised MBR Tariff to be effective 10/31/2011.

Filed Date: 10/31/2011.

Accession Number: 20111031–5239.

Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: ER12–274–000.

Applicants: Midwest Independent Transmission System Operator, Inc.

Description: Midwest Independent Transmission System Operator, Inc. submits tariff filing per 35.13(a)(2)(iii: 10–31–11 DEO/DEK Withdrawal to be effective 1/1/2012.

Filed Date: 10/31/2011.

Accession Number: 20111031–5240.

Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: ER12–275–000.

Applicants: Dynegy Oakland, LLC.

Description: Dynegy Oakland, LLC submits tariff filing per 35.13(a)(2)(iii: Annual RMR Section 205 Filing and RMR Schedule F Informational Filing to be effective 1/1/2012.

Filed Date: 10/31/2011.

Accession Number: 20111031–5241.

Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: ER12–276–000.

Applicants: The Toledo Edison Company.

Description: The Toledo Edison Company submits tariff filing per 35: Revised MBR Tariff to be effective 10/31/2011.

Filed Date: 10/31/2011.

Accession Number: 20111031–5242.
Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: ER12–277–000.
Applicants: Southwest Power Pool, Inc.
Description: Southwest Power Pool, Inc. submits tariff filing per 35.13(a)(2)(iii: Revisions to Schedule 1–A—Tariff Administration Service to be effective 1/1/2012.
Filed Date: 10/31/2011.
Accession Number: 20111031–5243.
Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: ER12–278–000.
Applicants: California Independent System Operator Corporation.
Description: California Independent System Operator Corporation submits tariff filing per 35.13(a)(2)(iii: 2011–10–31 Natural Gas Pipeline Sharing Amendment to be effective 12/31/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5244.
Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: ER12–279–000.
Applicants: Jersey Central Power & Light.
Description: Jersey Central Power & Light submits tariff filing per 35: Second Revised MBR Tariff to be effective 10/31/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5245.
Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: ER12–280–000.
Applicants: Interstate Power and Light Company.
Description: Interstate Power and Light Company submits tariff filing per 35.15: Cancellation of IPL, TVA and PPW LBAOCA to be effective 1/1/2012.
Filed Date: 10/31/2011.
Accession Number: 20111031–5248.
Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: ER12–281–000.
Applicants: Northampton Generating Company, L.P.
Description: Northampton Generating Company, L.P. submits tariff filing per 35.12: Northampton Generating Co. MBR Tariff to be effective 12/30/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5249.
Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: ER12–282–000.
Applicants: FirstEnergy Generation Corp.
Description: FirstEnergy Generation Corp. submits tariff filing per 35: Revised MBR Sales Tariff to be effective 10/31/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5250.
Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: ER12–283–000.
Applicants: FirstEnergy Solutions Corp.
Description: FirstEnergy Solutions Corp. submits tariff filing per 35: Revised Limitations Tariff to be effective 10/31/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5251.
Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: ER12–284–000.
Applicants: Monongahela Power Company.
Description: Monongahela Power Company submits tariff filing per 35: Revised MBR Tariff to be effective 11/1/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5259.
Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: ER12–285–000.
Applicants: Metropolitan Edison Company.
Description: Metropolitan Edison Company submits tariff filing per 35: Revised MBR Tariff to be effective 10/31/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5275.
Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: ER12–286–000.
Applicants: Ohio Edison Company.
Description: Ohio Edison Company submits tariff filing per 35: Revised MBR Tariff to be effective 10/31/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5281.
Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: ER12–287–000.
Applicants: Pennsylvania Power Company.
Description: Pennsylvania Power Company submits tariff filing per 35: Revised MBR Power Sales Tariff to be effective 11/1/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5283.
Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: ER12–288–000.
Applicants: The Cleveland Electric Illuminating Company.
Description: The Cleveland Electric Illuminating Company submits tariff filing per 35: Revised MBR Power Sales Tariff to be effective 10/31/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5286.
Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: ER12–289–000.
Applicants: New York Independent System Operator, Inc., Niagara Mohawk Power Corporation.
Description: New York Independent System Operator, Inc. submits tariff filing per 35.13(a)(2)(iii: Tri-Lakes Service Agreement between NiMo, NYPA, Lake Placid, and Tupper Lake to be effective 10/17/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5319.
Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: ER12–290–000.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: Midwest Independent Transmission System Operator, Inc. submits tariff filing per 35.13(a)(2)(iii: Attachment L–Section 7 re: MVP to be effective 1/1/2012.
Filed Date: 10/31/2011.
Accession Number: 20111031–5360.
Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: ER12–291–000.
Applicants: Florida Power & Light Company.
Description: Florida Power & Light Company submits tariff filing per 35: FPL Waiver Order Compliance Filing to be effective 4/20/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5362.
Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: ER12–292–000.
Applicants: NextEra Energy Duane Arnold, LLC.
Description: NextEra Energy Duane Arnold, LLC submits tariff filing per 35: NextEra Energy Duane Arnold, LLC Waiver Compliance Filing to be effective 4/20/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5372.
Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: ER12–293–000.
Applicants: NextEra Energy Point Beach, LLC.
Description: NextEra Energy Point Beach, LLC submits tariff filing per 35: NEE Point Beach Waiver order Compliance to be effective 4/20/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5375.
Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: ER12–294–000.
Applicants: NextEra Energy Seabrook, LLC.
Description: NextEra Energy Seabrook, LLC submits tariff filing per 35: NEE Seabrook, LLC Waiver Order Compliance Filing to be effective 4/20/2011.

Filed Date: 10/31/2011.
Accession Number: 20111031–5379.
Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: ER12–295–000.
Applicants: NaturEner Rim Rock Wind Energy, LLC.
Description: NaturEner Rim Rock Wind Energy, LLC submits tariff filing per 35.12: Application for Market-Based Rate Authority and Request for Related Waivers to be effective 12/15/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5409.
Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: ER12–296–000.
Applicants: Public Service Electric and Gas Company, PJM Interconnection, LLC.
Description: Public Service Electric and Gas Company submits tariff filing per 35.13(a)(2)(iii: PSEG submits revisions to PJM's Tariff Attach H–10A to include the NGR Project to be effective 1/1/2012.
Filed Date: 10/31/2011.
Accession Number: 20111031–5414.
Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: ER12–297–000.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: Midwest Independent Transmission System Operator, Inc. submits tariff filing per 35.13(a)(2)(iii: 10–31–11 Attachment O to be effective 1/1/2012.
Filed Date: 10/31/2011.
Accession Number: 20111031–5418.
Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: ER12–298–000.
Applicants: Westar Energy, Inc.
Description: Westar Energy, Inc. submits tariff filing per 35.13(a)(2)(iii: Caney River Wind Project, LLC, Balancing Area Services Agreement to be effective 10/1/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5419.
Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Take notice that the Commission received the following electric securities filings:

Docket Numbers: ES12–5–000.
Applicants: Mississippi Power Company.
Description: Application of Mississippi Power Company.
Filed Date: 10/31/2011.
Accession Number: 20111031–5413.
Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Take notice that the Commission received the following land acquisition reports:

Docket Numbers: LA11–3–000.
Applicants: BP Energy Company, BP West Coast Products LLC, Cedar Creek Wind Energy, LLC, Cedar Creek II, LLC, Flat Ridge Wind Energy, LLC, Fowler Ridge II Wind Farm LLC, Fowler Ridge III Wind Farm LLC, Fowler Ridge Wind Farm LLC, Goshen Phase II, LLC, Long Island Solar Farm LLC, Rolling Thunder I Power Partners, LLC, Watson Cogeneration Company, Whiting Clean Energy, Inc.
Description: Report of BP Energy Company, *et al.*
Filed Date: 10/31/2011.
Accession Number: 20111031–5117.
Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: LA11–3–000.
Applicants: Astoria Generating Company, L.P.
Description: Quarterly Land Acquisition Report of Astoria Generating Company, L.P.
Filed Date: 10/31/2011.
Accession Number: 20111031–5124.
Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: LA11–3–000.
Applicants: NRG Energy, Inc., Aqua Caliente Solar, LLC, Arthur Kill Power LLC, Astoria Gas Turbine Power LLC, Avenal Park LLC, Bayou Cove Peaking Power LLC, Big Cajun I Peaking Power LLC, Cabrillo Power I LLC, Cabrillo Power II LLC, Conemaugh Power LLC, Connecticut Jet Power LLC, Cottonwood Energy LP, Devon Power LLC, Dunkirk Power LLC, El Segundo Energy Center LLC, El Segundo Power, LLC, El Segundo Power II LLC, GenConn Devon LLC, GenConn Energy LLC, GenConn Middletown LLC, Green Mountain Energy Company, Huntley Power LLC, Indian River Power LLC, Keystone Power LLC, Long Beach Generation LLC, Long Beach Peakers LLC, Louisiana Generating LLC, Middletown Power LLC, Montville Power LLC, NEO Freehold-Gen LLC, Norwalk Power LLC, NRG Energy Center Dover LLC, NRG Energy Center Paxton LLC, NRG New Jersey Energy Sales LLC, NRG Power Marketing LLC, NRG Rockford LLC, NRG Rockland II LLC, NRG Solar Blythe LLC, NRG Sterlington Power LLC, Oswego Harbor Power LLC, Reliant Energy Northeast LLC, Saguaro Power Company, A Limited Partnership, Sand Drag LLC, Somerset Power LLC, Sun City Project LLC, Vienna Power LLC.
Description: Order 697–C Compliance Filing Regarding Site Control of NRG Power Marketing LLC, *et al.*
Filed Date: 10/31/2011.
Accession Number: 20111031–5193.
Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: LA11–3–000.
Applicants: Macho Springs Power I, LLC.
Description: Land Acquisition Report for Q3 2011 of Macho Springs Power I, LLC.
Filed Date: 10/31/2011.
Accession Number: 20111031–5223.
Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: LA11–3–000.
Applicants: Alabama Electric Marketing, LLC, Big Sandy Peaker Plant, LLC, California Electric Marketing, LLC, Crete Energy Venture, LLC, CSOLAR IV South, LLC, High Desert Power Project, LLC, Kiowa Power Partners, LLC, Lincoln Generating Facility, LLC, New Covert Generating Company, LLC, New Mexico Electric Marketing, LLC, Rolling Hills Generating, LLC, Tenaska Alabama Partners, L.P., Tenaska Gateway Partners Ltd., Tenaska Georgia Partners, L.P., Tenaska Power Services Co., Tenaska Virginia Partners, L.P., Tenaska Washington Partners, L.P., Texas Electric Marketing, LLC, TPF Generation Holdings, LLC, Wolf Hills Energy, LLC.
Description: Quarterly Land Aquisition Report of Alabama Electric Marketing, LLC, *et al.*
Filed Date: 10/31/2011.
Accession Number: 20111031–5340.
Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: LA11–3–000.
Applicants: Auburndale Peaker Energy Center, L.L.C., Bethpage Energy Center 3, LLC, Broad River Energy LLC, Calpine Bethlehem, LLC, Calpine Construction Finance Company, L.P., Calpine Energy Services, L.P., Calpine Gilroy Cogen, L.P., Calpine Greenleaf, Inc., Calpine Mid-Atlantic Generation, LLC, Calpine Mid-Atlantic Marketing, LLC, Calpine Mid Merit, LLC, Calpine New Jersey Generation, LLC, Calpine Newark, LLC, Calpine Oneta Power, LLC, Calpine Philadelphia Inc., Calpine Power America—CA, LLC, Calpine Power America—OR, LLC, Calpine Vineland Solar, LLC, Carville Energy LLC, CES Marketing V, L.P., CES Marketing IX, LLC, CES Marketing X, LLC, Columbia Energy LLC, CPN Bethpage 3rd Turbine, Inc., Creed Energy Center, LLC, Decatur Energy Center, LLC, Delta Energy Center, LLC, Geysers Power Company, LLC, Gilroy Energy Center, LLC, Goose Haven Energy Center, LLC, Hermiston Power, LLC, KIAC Partners, Los Esteros Critical Energy Facility, LLC, Los Medanos Energy Center, LLC, Mankato Energy Center, LLC, Metcalf Energy Center, LLC, Mobile Energy, LLC, Morgan Energy Center, LLC, Nissequogue Cogen Partners, Otay Mesa Energy Center, LLC,

Pastoria Energy Center, LLC, PCF2, LLC, Pine Bluff Energy, LLC, Power Contract Financing, L.L.C., Riverside Energy Center, LLC, RockGen Energy, LLC, Santa Rosa Energy Center, LLC, South Point Energy Center, LLC, TBG Cogen Partners, and Zion Energy LLC.

Description: Quarterly Land Acquisition Report of Auburndale Peaker Energy Center, LLC, *et al.*

Filed Date: 10/31/2011.

Accession Number: 20111031–5393.

Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: LA11–3–000.

Applicants: Ashtabula Wind, LLC, Ashtabula Wind II, LLC, Ashtabula Wind III, LLC, Backbone Mountain Windpower LLC, Badger Windpower, LLC, Baldwin Wind, LLC, Bayswater Peaking Facility, LLC, Blythe Energy, LLC, Butler Ridge Wind Energy Center, LLC, Calhoun Power Company I, LLC, Crystal Lake Wind, LLC, Crystal Lake Wind II, LLC, Crystal Lake Wind III, LLC, Day County Wind, LLC, Diablo Winds, LLC, Doswell Limited Partnership, Elk City Wind, LLC, Elk City II Wind, LLC, ESI Vansycle Partners, L.P., Florida Power & Light Co., FPL Energy Burleigh County Wind, LLC, FPL Energy Cabazon Wind, LLC, FPL Energy Cape, LLC, FPL Energy Cowboy Wind, LLC, FPL Energy Green Power Wind, LLC, FPL Energy Hancock County Wind, LLC, FPL Energy Illinois Wind, LLC, FPL, Energy Maine Hydro LLC, FPL Energy Marcus Hook, L.P., FPL Energy MH50 L.P., FPL Energy Montezuma Wind, LLC, FPL Energy Mower County, LLC, FPL Energy New Mexico Wind, LLC, FPL Energy North Dakota Wind, LLC, FPL Energy North Dakota Wind II, LLC, FPL Energy Oklahoma Wind, LLC, FPL Energy Oliver Wind I, LLC, FPL Energy Oliver Wind II, LLC, FPL Energy Sooner Wind, LLC, FPL Energy South Dakota Wind, LLC, FPL Energy Stateline II, Inc., FPL Energy Vansycle, LLC, FPL Energy Wyman, LLC, FPL Energy Wyman IV, LLC, FPL Energy Wyoming, LLC, FPLE Rhode Island State Energy, L.P., Garden Wind, LLC, Gray County Wind Energy, LLC, Hatch Solar Energy Center I, LLC, Hawkeye Power Partners, LLC, High Majestic Wind Energy Center, LLC, High Winds, LLC, Jamaica Bay Peaking Facility, LLC, Lake Benton Power Partners II, LLC, Langdon Wind, LLC, Logan Wind Energy LLC, Meyersdale Windpower LLC, Mill Run Windpower, LLC, Minco Wind, LLC, Minco Wind II, LLC, NEPM II, LLC, NextEra Energy Duane Arnold, LLC, NextEra Energy Montezuma II Wind, LLC, NextEra Energy Power Marketing, LLC, NextEra Energy Point Beach, LLC, NextEra Energy Seabrook, LLC, NextEra Energy Services Massachusetts, LLC, Northeast Energy Associates, A Limited Partnership, North Jersey Energy Associates, A Limited Partnership, Northern Colorado Wind Energy, LLC, Osceola Windpower, LLC, Osceola Windpower II, LLC, Paradise Solar Urban Renewal, LLC, Peetz Table Wind Energy, LLC, Pennsylvania Windfarms, Inc., Red Mesa Wind, LLC, Sky River LLC, Somerset Windpower, LLC, Story Wind, LLC, Vasco Winds, LLC, Victory Garden Phase IV, LLC, Waymart Wind Farm, L.P., Wessington Wind Energy Center, LLC, White Oak Energy, LLC, Wilton Wind II, LLC, Windpower Partners 1993, L.P.

Description: NextEra Energy Companies submit Third Quarter 2011 Site Control Quarterly Filing.

Filed Date: 10/31/2011.

Accession Number: 20111031–5423.

Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: LA11–3–000.

Applicants: East Coast Power Linden Holding, LLC, Cogen Technologies Linden Venture, L.P., Fox Energy Company, LLC, Birchwood Power Partners, L.P., Shady Hills Power Company, LLC, EFS Parlin Holdings, LLC, Inland Empire Energy Center, LLC

Description: GE Companies submit Third Quarter 2011 Site Control Quarterly Filing under LA11–3.

Filed Date: 10/31/2011.

Accession Number: 20111031–5425.

Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: LA11–3–000.

Applicants: Black Hills Power, Inc., Black Hills/Colorado Electric Utility Company, LP, Black Hills Wyoming, LLC, Cheyenne Light, Fuel and Power Company, Enserco Energy, Inc.

Description: Black Hills Utilities submit Third Quarter 2011 Site Control Quarterly Filing.

Filed Date: 10/31/2011.

Accession Number: 20111031–5427.

Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: November 1, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–28863 Filed 11–7–11; 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: EG12–5–000.

Applicants: AES New Creek, LLC.

Description: AES New Creek, LLC Notice of Self-Certification as Exempt Wholesale Generator.

Filed Date: 10/26/2011.

Accession Number: 20111026–5149.

Comment Date: 5 p.m. Eastern Time on Wednesday, November 16, 2011.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER11–3859–003; ER11–3863–002; ER11–3861–002; ER11–3864–003; ER11–3866–003; ER12–192–001; ER11–3867–003; ER11–3857–003.

Applicants: Milford Power Company, LLC, MASSPOWER, Liberty Electric Power, LLC, Empire Generating Co, LLC, ECP Energy I, LLC, EquiPower Resources Management, LLC, Dighton Power, LLC, Lake Road Generating Company, L.P.

Description: ECP MBR Sellers Notification of Change in Status.

Filed Date: 10/26/2011.

Accession Number: 20111026–5097.

Comment Date: 5 p.m. Eastern Time on Wednesday, November 16, 2011.

Docket Numbers: ER12–197–000.

Applicants: PJM Interconnection, LLC.

Description: PJM Interconnection, LLC submits tariff filing per 35.13(a)(2)(iii: Original Service Agreement No. 3085—Queue No. W3–156 to be effective 9/26/2011.

Filed Date: 10/26/2011.

Accession Number: 20111026–5100.

Comment Date: 5 p.m. Eastern Time on Wednesday, November 16, 2011.

Docket Numbers: ER12–198–000.

Applicants: Roseburg Forest Products.

Description: Roseburg Forest Products submits tariff filing per 35.1: FERC

Electric MBR Tariff Baseline Filing to be effective 10/26/2011.

Filed Date: 10/26/2011.

Accession Number: 20111026–5102.

Comment Date: 5 p.m. Eastern Time on Wednesday, November 16, 2011.

Docket Numbers: ER12–199–000.

Applicants: Coram California Development, L.P.

Description: Coram California Development, L.P. submits tariff filing per 35.12: Coram California Development LP's Initial Market-Based Rate Tariff to be effective 2/1/2012.

Filed Date: 10/26/2011.

Accession Number: 20111026–5114.

Comment Date: 5 p.m. Eastern Time on Wednesday, November 16, 2011.

Docket Numbers: ER12–200–000.

Applicants: PJM Interconnection, LLC.

Description: PJM Interconnection, LLC submits tariff filing per 35.13(a)(2)(iii: Original Service Agreement No. 3089—Queue No. W3–029 to be effective 9/29/2011.

Filed Date: 10/26/2011.

Accession Number: 20111026–5127.

Comment Date: 5 p.m. Eastern Time on Wednesday, November 16, 2011.

Docket Numbers: ER12–201–000.

Applicants: Southern California Edison Company.

Description: Southern California Edison Company submits tariff filing per 35.13(a)(1): 2012 RSBAA Update Filing to be effective 1/1/2012.

Filed Date: 10/26/2011.

Accession Number: 20111026–5135.

Comment Date: 5 p.m. Eastern Time on Wednesday, November 16, 2011.

Docket Numbers: ER12–202–000.

Applicants: Southwestern Electric Power Company.

Description: Southwestern Electric Power Company submits tariff filing per 35.13(a)(2)(iii: 20111026 Prescott Revised PSA to be effective 12/17/2010.

Filed Date: 10/26/2011.

Accession Number: 20111026–5151.

Comment Date: 5 p.m. Eastern Time on Wednesday, November 16, 2011.

Docket Numbers: ER12–203–000.

Applicants: Southwestern Electric Power Company.

Description: Southwestern Electric Power Company submits tariff filing per 35.13(a)(2)(iii: 20111026 Minden Revised PSA to be effective 12/17/2010.

Filed Date: 10/26/2011.

Accession Number: 20111026–5153.

Comment Date: 5 p.m. Eastern Time on Wednesday, November 16, 2011.

Docket Numbers: ER12–204–000.

Applicants: Trupro Energy LLC.

Description: Trupro Energy LLC submits tariff filing per 35.12: Market-Based Rate Application to be effective 10/26/2011.

Filed Date: 10/26/2011.

Accession Number: 20111026–5154.

Comment Date: 5 p.m. Eastern Time on Wednesday, November 16, 2011.

Docket Numbers: ER12–205–000.

Applicants: California Independent System Operator Corporation.

Description: California Independent System Operator Corporation submits tariff filing per 35: 2011–10–26 CAISO Petition for Waiver of Tariff Provision to be effective N/A.

Filed Date: 10/26/2011.

Accession Number: 20111026–5166.

Comment Date: 5 p.m. Eastern Time on Wednesday, November 16, 2011.

Take notice that the Commission received the following qualifying facility filings:

Docket Numbers: QF12–16–000.

Applicants: Martin Operating Partnership L.P.

Description: Martin Operating Partnership L.P. submits FERC Form 556 Notice of Certification of Qualifying Facility Status for a Small Power Production or Cogeneration Facility.

Filed Date: 10/26/2011.

Accession Number: 20111026–5015.

Comment Date: None Applicable.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: October 27, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–28869 Filed 11–7–11; 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: EG11–117–000.

Applicants: Louisiana Generating LLC.

Description: Louisiana Generating LLC's Amendment of Notice of Self-Certification of Exempt Wholesale Generator Status.

Filed Date: 10/13/2011.

Accession Number: 20111013–5167.

Comment Date: 5 p.m. Eastern Time on Thursday, November 03, 2011.

Docket Numbers: EG12–6–000.

Applicants: Coram California Development, L.P.

Description: Coram California Development, L.P. Notice of Self-Certification of Exempt Wholesale Generator Status.

Filed Date: 10/28/2011.

Accession Number: 20111028–5115.

Comment Date: 5 p.m. Eastern Time on Friday, November 18, 2011.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER11–3384–002.

Applicants: PJM Interconnection, L.L.C.

Description: PJM Interconnection, L.L.C. submits tariff filing per 35: Compliance filing in ER11–3384 per Order dated October 6, 2011 to be effective 4/16/2011.

Filed Date: 10/28/2011.

Accession Number: 20111028–5084.

Comment Date: 5 p.m. Eastern Time on Friday, November 18, 2011.

Docket Numbers: ER11–4160–000.

Applicants: ITC Midwest LLC.

Description: ITC Midwest LLC submits tariff filing per 35.19a(b): Filing of a Refund Report to be effective N/A.

Filed Date: 10/28/2011.

Accession Number: 20111028–5119.

Comment Date: 5 p.m. Eastern Time on Friday, November 18, 2011.

Docket Numbers: ER11–4374–001.

Applicants: Portland General Electric Company.

Description: Portland General Electric Company submits tariff filing per 35.17(b): Volume 12 Amendment Filing to be effective 10/24/2011.

Filed Date: 10/28/2011.

Accession Number: 20111028–5101.

Comment Date: 5 p.m. Eastern Time on Friday, November 18, 2011.

Docket Numbers: ER12–229–000.

Applicants: ISO New England Inc.
Description: ISO New England Inc. submits tariff filing per 35.13(a)(2)(iii: OATT Related to the Capacity Cost Rate Component to be effective 1/1/2012.
Filed Date: 10/28/2011.
Accession Number: 20111028–5053.
Comment Date: 5 p.m. Eastern Time on Friday, November 18, 2011.

Docket Numbers: ER12–230–000.
Applicants: Wisconsin Public Service Corporation.
Description: Wisconsin Public Service Corporation submits tariff filing per 35.15: Cancellation of Manitowoc Service Agreement under the W–2A Tariff to be effective 1/1/2012.
Filed Date: 10/28/2011.
Accession Number: 20111028–5054.
Comment Date: 5 p.m. Eastern Time on Friday, November 18, 2011.

Docket Numbers: ER12–231–000.
Applicants: Wisconsin Public Service Corporation.
Description: Wisconsin Public Service Corporation submits tariff filing per 35.13(a)(2)(iii: Revised UPPCO Service Agreement Under W–2A Tariff to be effective 1/1/2012.
Filed Date: 10/28/2011.
Accession Number: 20111028–5055.
Comment Date: 5 p.m. Eastern Time on Friday, November 18, 2011.

Docket Numbers: ER12–232–000.
Applicants: Northern States Power Company, a Wisconsin corporation
Description: Northern States Power Company, a Wisconsin corporation submits tariff filing per 35.13(a)(2)(iii: 2011_10–28_NSPW_DPC E&P Agrmt-314 to be effective 7/30/2010.
Filed Date: 10/28/2011.
Accession Number: 20111028–5087.
Comment Date: 5 p.m. Eastern Time on Friday, November 18, 2011.

Docket Numbers: ER12–232–001.
Applicants: Northern States Power Company, a Wisconsin corporation
Description: Northern States Power Company, a Wisconsin corporation submits tariff filing per 35.17(b): 2011_10–28_NSPW–DPC E&P Agrmt_314–2 to be effective 3/31/2011.
Filed Date: 10/28/2011.
Accession Number: 20111028–5178.
Comment Date: 5 p.m. Eastern Time on Friday, November 18, 2011.

Docket Numbers: ER12–233–000.
Applicants: Wolverine Power Supply Cooperative, Inc.
Description: Wolverine Power Supply Cooperative, Inc. submits tariff filing per 35.13(a)(2)(iii: Amended and Restated Wholesale Power Contract with Midwest Energy Cooperative to be effective 12/31/9998.
Filed Date: 10/28/2011.
Accession Number: 20111028–5118.
Comment Date: 5 p.m. Eastern Time on Friday, November 18, 2011.

Docket Numbers: ER12–234–000.
Applicants: Pacific Gas and Electric Company.
Description: Pacific Gas and Electric Company submits tariff filing per 35.15: Notices of Termination for the Cantua and Giffen E&P Agreements to be effective 9/26/2011.
Filed Date: 10/28/2011.
Accession Number: 20111028–5128.
Comment Date: 5 p.m. Eastern Time on Friday, November 18, 2011.

Docket Numbers: ER12–235–000.
Applicants: Southwest Power Pool, Inc.
Description: Southwest Power Pool, Inc. submits tariff filing per 35.13(a)(2)(iii: Revisions to Attachment AE Locational Imbalance Price Corrections to be effective 12/28/2011.
Filed Date: 10/28/2011.
Accession Number: 20111028–5129.
Comment Date: 5 p.m. Eastern Time on Friday, November 18, 2011.

Docket Numbers: ER12–236–000.
Applicants: Southern California Edison Company.
Description: Southern California Edison Company submits tariff filing per 35.13(a)(1): 2012 TRBAA Update Filing to be effective 1/1/2012.
Filed Date: 10/28/2011
Accession Number: 20111028–5131.
Comment Date: 5 p.m. Eastern Time on Friday, November 18, 2011.

Docket Numbers: ER12–237–000.
Applicants: PJM Interconnection, L.L.C.
Description: PJM Interconnection, L.L.C. submits tariff filing per 35.13(a)(2)(iii: Revisions to PJM's OA Section 7.5.1 re the conduct of the Finance Committee to be effective 1/1/2012.
Filed Date: 10/28/2011.
Accession Number: 20111028–5142.
Comment Date: 5 p.m. Eastern Time on Friday, November 18, 2011.

Docket Numbers: ER12–238–000.
Applicants: PPL Energy Supply, LLC.
Description: PPL Energy Supply, LLC submits tariff filing per 35.15: Cancellation of October 24, 2011 Filing to be effective 10/28/2011.
Filed Date: 10/28/2011.
Accession Number: 20111028–5148.
Comment Date: 5 p.m. Eastern Time on Friday, November 18, 2011.

Docket Numbers: ER12–239–000.
Applicants: Southern California Edison Company.
Description: Abandonment of the Arizona Segment of DPV2 Filing of Southern California Edison Company.
Filed Date: 10/28/2011.
Accession Number: 20111028–5153.
Comment Date: 5 p.m. Eastern Time on Friday, November 18, 2011.

Docket Numbers: ER12–240–000.
Applicants: PPL Energy Supply, LLC.
Description: PPL Energy Supply, LLC submits tariff filing per 35.12: Market-Based Rate Application of PPL Energy Supply, LLC to be effective 11/29/2011.
Filed Date: 10/28/2011.
Accession Number: 20111028–5167.
Comment Date: 5 p.m. Eastern Time on Friday, November 18, 2011.

Docket Numbers: ER12–241–000.
Applicants: PJM Interconnection, L.L.C.
Description: Report of PJM Interconnection, L.L.C. PJM submits for filing the initial allocation of Financial Transmission Rights for Duke Energy Ohio and Duke Energy Kentucky for period January 1, 2012 through May 31, 2012.
Filed Date: 10/28/2011.
Accession Number: 20111028–5172.
Comment Date: 5 p.m. Eastern Time on Friday, November 18, 2011.

Docket Numbers: ER12–242–000.
Applicants: MidAmerican Energy Company, Midwest Independent Transmission System Operator, Inc.
Description: MidAmerican Energy Company submits tariff filing per 35.13(a)(2)(iii: 10–28–11 MidAmerican Attachment O to be effective 1/1/2012.
Filed Date: 10/28/2011.
Accession Number: 20111028–5177.
Comment Date: 5 p.m. Eastern Time on Friday, November 18, 2011.

Take notice that the Commission received the following land acquisition reports:

Docket Numbers: LA11–3–000.
Applicants: Niagara Generation, LLC.
Description: Land Acquisition Report (3Q 2011).
Filed Date: 10/28/2011.
Accession Number: 20111028–5074.
Comment Date: 5 p.m. Eastern Time on Friday, November 18, 2011.

Docket Numbers: LA11–3–000.
Applicants: Spring Canyon Energy LLC, Judith Gap Energy LLC, Invenergy TN LLC, Wolverine Creek Energy LLC, Grays Harbor Energy LLC, Forward Energy LLC, Grand Ridge 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 II LLC, Grand Ridge Energy III LLC, Grand Ridge Energy IV LLC, Grand Ridge Energy V LLC, Vantage Wind Energy LLC, Stony Creek Energy LLC, Gratiot County Wind LLC, Gratiot County Wind II LLC.

Description: Generation Site Report Third Quarter 2011 of Spring Canyon Energy LLC, *et al.*

Filed Date: 10/28/2011.

Accession Number: 20111028–5109.

Comment Date: 5 p.m. Eastern Time on Friday, November 18, 2011.

Docket Numbers: LA11–3–000.

Applicants: High Prairie Wind Farm II, LLC, Lost Lakes Wind Farm LLC, Pioneer Prairie Wind Farm I, LLC, Rail Splitter Wind Farm, LLC.

Description: Land Acquisition Report of High Prairie Wind Farm II, LLC, *et al.*

Filed Date: 10/28/2011.

Accession Number: 20111028–5146.

Comment Date: 5 p.m. Eastern Time on Friday, November 18, 2011.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: October 31, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–28871 Filed 11–7–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

November 2, 2011.

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: RP12–117–000.

Applicants: ETC Tiger Pipeline, LLC.

Description: Tiger Semi-Annual Fuel Filing 002 to be effective 12/1/2011.

Filed Date: 11/01/2011.

Accession Number: 20111101–5011.

Comment Date: 5 p.m. ET on 11/14/2011.

Docket Numbers: RP12–118–000.

Applicants: Algonquin Gas Transmission, LLC.

Description: ConEd 2011–11–01 Release to Infinite Energy to be effective 11/1/2011.

Filed Date: 11/01/2011.

Accession Number: 20111101–5079.

Comment Date: 5 p.m. ET on 11/14/2011.

Docket Numbers: RP12–119–000.

Applicants: Equitrans, L.P.

Description: ITS Form of Service Agreement Revision to be effective 12/1/2011.

Filed Date: 11/01/2011.

Accession Number: 20111101–5109.

Comment Date: 5 p.m. ET on 11/14/2011.

Docket Numbers: RP12–120–000.

Applicants: Gulf South Pipeline Company, LP.

Description: ONEOK 34951 to BP Energy 39030 Capacity Release Negotiated Rate Agreement to be effective 11/1/2011.

Filed Date: 11/01/2011.

Accession Number: 20111101–5129.

Comment Date: 5 p.m. ET on 11/14/2011.

Docket Numbers: RP12–124–000.

Applicants: Equitrans, L.P.

Description: Equitrans, L.P. Operational Purchases and Sales Report for the twelve month period ended August 31, 2011.

Filed Date: 11/01/2011.

Accession Number: 20111101–5167.

Comment Date: 5 p.m. ET on 11/14/2011.

Docket Numbers: RP12–125–000.

Applicants: ANR Pipeline Company.

Description: Negotiated Rate Agreements 11–1–11 to be effective 11/1/2011.

Filed Date: 11/01/2011.

Accession Number: 20111101–5190.

Comment Date: 5 p.m. ET on 11/14/2011.

Docket Numbers: RP12–126–000.

Applicants: Iroquois Gas Transmission System, L.P.

Description: 11/01/11 Negotiated Rates—BG Energy Merchants, LLC (HUB) to be effective 11/1/2011.

Filed Date: 11/01/2011.

Accession Number: 20111101–5192.

Comment Date: 5 p.m. ET on 11/14/2011.

Docket Numbers: RP12–127–000.

Applicants: Viking Gas Transmission Company.

Description: PAL Modification to be effective 12/1/2011.

Filed Date: 11/01/2011.

Accession Number: 20111101–5216.

Comment Date: 5 p.m. ET on 11/14/2011.

Docket Numbers: RP12–128–000.

Applicants: Algonquin Gas Transmission, LLC.

Description: Nonconforming Agreements—Update RP10–46 and RP10–179 to be effective 12/2/2011 under RP12–128 Filing Type: 570.

Filed Date: 11/02/2011.

Accession Number: 20111102–5052.

Comment Date: 5 p.m. ET on 11/14/2011.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

Filings in Existing Proceedings

Docket Numbers: RP05–164–018.

Applicants: Equitrans, L.P.

Description: Equitrans, L.P. Annual Report on Fuel and Lost and Unaccounted for gas volumes for the period September 2010 through August 2011.

Filed Date: 11/01/2011.

Accession Number: 20111101–5226.

Comment Date: 5 p.m. ET on 11/14/2011.

Docket Numbers: RP12–111–001.

Applicants: Algonquin Gas Transmission, LLC.

Description: Amendment to ConEd 2011–11–01 Releases #3 to be effective 11/1/2011.

Filed Date: 11/01/2011.

Accession Number: 20111101–5107.

Comment Date: 5 p.m. ET on 11/14/2011.

Any person desiring to protest in any the above proceedings must file in accordance with Rule 211 of the Commission's Regulations (18 CFR 385.211) on or before 5 p.m. Eastern time on the specified comment date.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, and service can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: November 2, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–28873 Filed 11–7–11; 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: ER11–4198–000.
Applicants: Midwest Independent Transmission System Operator, Inc., ITC Midwest LLC.
Description: Midwest Independent Transmission System Operator, Inc. submits tariff filing per 35.19a(b): ITCM–Lost Lakes E&P Refund Report to be effective N/A.
Filed Date: 10/28/2011.
Accession Number: 20111028–5045.
Comment Date: 5 p.m. Eastern Time on Friday, November 18, 2011.

Docket Numbers: ER11–4695–001.
Applicants: Hafslund Energy Trading LLC.
Description: Hafslund Energy Trading LLC submits tariff filing per 35.17(b): Hafslund supplement to be effective 9/29/2011.
Filed Date: 10/27/2011.
Accession Number: 20111027–5131.
Comment Date: 5 p.m. Eastern Time on Thursday, November 17, 2011.

Docket Numbers: ER11–4729–001.
Applicants: APN Starfirst, LP.
Description: APN Starfirst, LP submits tariff filing per 35: Market Based Rate Filing (Compliance) to be effective 10/1/2011.
Filed Date: 10/27/2011.
Accession Number: 20111027–5135.
Comment Date: 5 p.m. Eastern Time on Thursday, November 17, 2011.

Docket Numbers: ER12–215–000.
Applicants: Southern California Edison Company.
Description: Southern California Edison Company submits tariff filing per 35.13(a)(2)(iii: SCE 2012 Update ETC Reliability Services Rate to be effective 1/1/2012.
Filed Date: 10/27/2011.
Accession Number: 20111027–5130.
Comment Date: 5 p.m. Eastern Time on Thursday, November 17, 2011.

Docket Numbers: ER12–216–000.
Applicants: Appalachian Power Company.
Description: Appalachian Power Company submits tariff filing per 35.13(a)(2)(iii: 20111027 Musser Revised PSA to be effective 10/21/2011.
Filed Date: 10/27/2011.
Accession Number: 20111027–5147.
Comment Date: 5 p.m. Eastern Time on Thursday, November 17, 2011.

Docket Numbers: ER12–217–000.
Applicants: Appalachian Power Company.
Description: Appalachian Power Company submits tariff filing per 35.13(a)(2)(iii: 20111027 CBEC Revised PSA to be effective 10/21/2011.
Filed Date: 10/27/2011.
Accession Number: 20111027–5148.
Comment Date: 5 p.m. Eastern Time on Thursday, November 17, 2011.

Docket Numbers: ER12–218–000.
Applicants: Appalachian Power Company.
Description: Appalachian Power Company submits tariff filing per 35.13(a)(2)(iii: 20111027 Radford Revised PSA to be effective 10/21/2011.
Filed Date: 10/27/2011.
Accession Number: 20111027–5149.
Comment Date: 5 p.m. Eastern Time on Thursday, November 17, 2011.

Docket Numbers: ER12–219–000.
Applicants: Madison Gas and Electric Company.
Description: Madison Gas and Electric Company submits tariff filing per 35.13(a)(2)(iii: MGE, WPL Certificate of Concurrence to be effective 9/26/2011.
Filed Date: 10/27/2011.
Accession Number: 20111027–5150.
Comment Date: 5 p.m. Eastern Time on Thursday, November 17, 2011.

Docket Numbers: ER12–220–000.
Applicants: Appalachian Power Company.
Description: Appalachian Power Company submits tariff filing per 35.13(a)(2)(iii: 20111027 Salem Revised PSA to be effective 10/21/2011.
Filed Date: 10/27/2011.
Accession Number: 20111027–5155.
Comment Date: 5 p.m. Eastern Time on Thursday, November 17, 2011.

Docket Numbers: ER12–221–000.
Applicants: Appalachian Power Company.
Description: Appalachian Power Company submits tariff filing per 35.13(a)(2)(iii: 20111027 VPI Revised PSA to be effective 10/21/2011.
Filed Date: 10/27/2011.
Accession Number: 20111027–5161.
Comment Date: 5 p.m. Eastern Time on Thursday, November 17, 2011.

Docket Numbers: ER12–222–000.
Applicants: Appalachian Power Company.
Description: Appalachian Power Company submits tariff filing per 35.13(a)(2)(iii: 20111027 ODEC Revised PSA to be effective 10/21/2011.
Filed Date: 10/27/2011.
Accession Number: 20111027–5163.
Comment Date: 5 p.m. Eastern Time on Thursday, November 17, 2011.

Docket Numbers: ER12–223–000.
Applicants: Entergy Gulf States Louisiana, LLC.
Description: Entergy Gulf States Louisiana, LLC submits tariff filing per 35.13(a)(2)(iii: EGSL–SRMPA Interim Service Agreement to be effective 11/1/2011.
Filed Date: 10/27/2011.
Accession Number: 20111027–5164.
Comment Date: 5 p.m. Eastern Time on Thursday, November 17, 2011.

Docket Numbers: ER12–224–000.
Applicants: Stream Energy Columbia, LLC.
Description: Stream Energy Columbia, LLC submits tariff filing per 35.12: Market-Based Rate Application to be effective 10/27/2011.
Filed Date: 10/27/2011.
Accession Number: 20111027–5166.
Comment Date: 5 p.m. Eastern Time on Thursday, November 17, 2011.

Docket Numbers: ER12–225–000.
Applicants: Stream Energy New Jersey, LLC.
Description: Stream Energy New Jersey, LLC submits tariff filing per 35.12: Market-Based Rate Application to be effective 10/27/2011.
Filed Date: 10/27/2011.
Accession Number: 20111027–5167.
Comment Date: 5 p.m. Eastern Time on Thursday, November 17, 2011.

Docket Numbers: ER12–226–000.
Applicants: Asset and Energy Cost Saving Cooperative.
Description: Kipcon, Inc requests that the Commission cancel their market based rate tariff.
Filed Date: 10/07/2011.
Accession Number: 20111007–0024.
Comment Date: 5 p.m. Eastern Time on Monday, November 7, 2011.

Docket Numbers: ER12–227–000.
Applicants: Southwest Power Pool, Inc.
Description: Southwest Power Pool, Inc. submits tariff filing per 35.13(a)(2)(iii: Energy Imbalance Market Offer Cap Update—2012 to be effective 1/1/2012.
Filed Date: 10/28/2011.
Accession Number: 20111028–5043.
Comment Date: 5 p.m. Eastern Time on Friday, November 18, 2011.

Docket Numbers: ER12–228–000.
Applicants: California Power Exchange Corporation.
Description: California Power Exchange Corporation submits tariff filing per 35.13(a)(2)(iii: California Power Exchange FERC Rate Schedule No. 1 for Rate Period 20 to be effective 1/1/2012.
Filed Date: 10/28/2011.
Accession Number: 20111028–5046.
Comment Date: 5 p.m. Eastern Time on Friday, November 18, 2011.

Take notice that the Commission received the following electric securities filings:

Docket Numbers: ES12–4–000.

Applicants: Portland General Electric Company.

Description: Application of Portland General Electric Company for Short Term Debt Authority.

Filed Date: 10/27/2011.

Accession Number: 20111027–5183.

Comment Date: 5 p.m. Eastern Time on Thursday, November 17, 2011.

Take notice that the Commission received the following land acquisition reports:

Docket Numbers: LA11–3–000.

Applicants: Chestnut Flats Wind, LLC, Sandy Ridge Wind, LLC.

Description: Land Acquisition Report of Chestnut Flats Wind, LLC and Sandy Ridge Wind, LLC.

Filed Date: 10/27/2011.

Accession Number: 20111027–5181.

Comment Date: 5 p.m. Eastern Time on Thursday, November 17, 2011.

Take notice that the Commission received the following public utility holding company filings:

Docket Numbers: PH12–3–000.

Applicants: Brookfield Asset Management Inc.

Description: Notice of Material Change in Facts of Brookfield Asset Management Inc.

Filed Date: 10/28/2011.

Accession Number: 20111028–5037.

Comment Date: 5 p.m. Eastern Time on Friday, November 18, 2011.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: October 28, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–28867 Filed 11–7–11; 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: ER12–18–000.

Applicants: Wisconsin Public Service Corporation.

Description: Wisconsin Public Service Corporation submits tariff filing per: Supplemental WPSC and WEPCO BAAOCA filing to be effective N/A.

Filed Date: 10/27/2011.

Accession Number: 20111027–5080.

Comment Date: 5 p.m. Eastern Time on Tuesday, November 1, 2011.

Docket Numbers: ER12–19–000.

Applicants: Upper Peninsula Power Company.

Description: Upper Peninsula Power Company submits tariff filing per: Supplemental UPPCO and WEPCO Coordination Agreement Filing to be effective N/A.

Filed Date: 10/27/2011.

Accession Number: 20111027–5084.

Comment Date: 5 p.m. Eastern Time on Tuesday, November 1, 2011.

Docket Numbers: ER12–207–000.

Applicants: Midwest Independent Transmission System Operator, Inc., ITC Midwest LLC

Description: Midwest Independent Transmission System Operator, Inc. submits tariff filing per 35.13(a)(2)(iii: Cancellation of ITC–Lost Lakes to be effective 10/28/2011.

Filed Date: 10/27/2011.

Accession Number: 20111027–5021.

Comment Date: 5 p.m. Eastern Time on Thursday, November 17, 2011.

Docket Numbers: ER12–209–000.

Applicants: Elektrisola, Inc.

Description: Elektrisola, Inc. submits tariff filing per 35.1: Baseline Filing to be effective 10/27/2011.

Filed Date: 10/27/2011.

Accession Number: 20111027–5053.

Comment Date: 5 p.m. Eastern Time on Thursday, November 17, 2011.

Docket Numbers: ER12–210–000.

Applicants: Midwest Independent Transmission System Operator, Inc.

Description: Midwest Independent Transmission System Operator, Inc. submits tariff filing per 35.13(a)(2)(iii: G034–J171 Amended GIA to be effective 10/28/2011.

Filed Date: 10/27/2011.

Accession Number: 20111027–5082.

Comment Date: 5 p.m. Eastern Time on Thursday, November 17, 2011.

Docket Numbers: ER12–211–000.

Applicants: Wabash Valley Power Association, Inc.

Description: Notice of cancellation of Wabash Valley Power Association, Inc. Rate Schedule No. 32, a Power Supply Agreement with Midwest Energy Cooperative, to be effective January 1, 2011.

Filed Date: 10/27/2011.

Accession Number: 20111027–5106.

Comment Date: 5 p.m. Eastern Time on Thursday, November 17, 2011.

Docket Numbers: ER12–212–000.

Applicants: Midwest Independent Transmission System Operator, Inc.

Description: Midwest Independent Transmission System Operator, Inc. submits tariff filing per 35.13(a)(2)(iii: 10–27–11 ATC Depreciation Rates to be effective 1/1/2012.

Filed Date: 10/27/2011.

Accession Number: 20111027–5117.

Comment Date: 5 p.m. Eastern Time on Thursday, November 17, 2011.

Docket Numbers: ER12–213–000.

Applicants: ISO New England Inc., New England Power Pool Participants Committee.

Description: ISO New England Inc. submits tariff filing per 35.13(a)(2)(iii: Multi-Region NCPC Cost Allocation Changes to be effective 1/1/2012.

Filed Date: 10/27/2011.

Accession Number: 20111027–5118.

Comment Date: 5 p.m. Eastern Time on Thursday, November 17, 2011.

Docket Numbers: ER12–214–000.

Applicants: ALLETE, Inc., Midwest Independent Transmission System Operator, Inc.

Description: ALLETE, Inc. submits tariff filing per 35.13(a)(2)(iii: 10–27–11 ALLETE (MP) Attachment GG to be effective 1/1/2012.

Filed Date: 10/27/2011.

Accession Number: 20111027–5123.

Comment Date: 5 p.m. Eastern Time on Thursday, November 17, 2011.

Take notice that the Commission received the following electric securities filings:

Docket Numbers: ES11–46–000.

Applicants: PECO Energy Company.

Description: Supplemental Information of Exelon Corporation.

Filed Date: 10/27/2011.

Accession Number: 20111027–5066.

Comment Date: 5 p.m. Eastern Time on Monday, November 7, 2011.

Docket Numbers: ES11–47–000.

Applicants: Commonwealth Edison Company.

Description: Supplemental Information of Exelon Corporation.

Filed Date: 10/27/2011.

Accession Number: 20111027–5065.

Comment Date: 5 p.m. Eastern Time on Monday, November 7, 2011.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: October 27, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–28868 Filed 11–7–11; 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 corporate filings:

Docket Numbers: EC12–17–000.
Applicants: Niagara Mohawk Power Corporation.
Description: Application for Commission Authorization under Section 203 of the Federal Power Act, Request for Expedited Action and Request for Waivers of Niagara Mohawk Power Corporation.
Filed Date: 10/31/2011.
Accession Number: 20111031–5426.
Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Docket Numbers: EC12–18–000; ER12–304–000.
Applicants: San Diego Gas & Electric Company, NaturEner Rim Rock Wind Energy, LLC.
Description: Application of San Diego Gas & Electric Company and NaturEner Rim Rock Wind Energy, LLC for Authorizations under Sections 203 and 205 of the Federal Power Act et al.
Filed Date: 10/31/2011.
Accession Number: 20111031–5432.
Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER11–4298–000.
Applicants: ITC Midwest LLC.
Description: ITC Midwest LLC submits tariff filing per 35.19a(b): Filing of a Refund Report to be effective N/A.
Filed Date: 11/01/2011.
Accession Number: 20111101–5140.
Comment Date: 5 p.m. Eastern Time on Tuesday, November 22, 2011.

Docket Numbers: ER12–299–000.
Applicants: Startrans IO, LLC.
Description: Startrans IO, LLC submits tariff filing per 35.13(a)(2)(iii: Startrans IO 2012 update to the TRBAA in Appendix I to be effective 1/1/2012.
Filed Date: 11/01/2011.
Accession Number: 20111101–5073.
Comment Date: 5 p.m. Eastern Time on Tuesday, November 22, 2011.

Docket Numbers: ER12–300–000.
Applicants: Covanta Fairfax, Inc.
Description: Covanta Fairfax, Inc. submits tariff filing per 35.1: Power Purchase and Operating Agreement to be effective 11/1/2011.
Filed Date: 11/01/2011.
Accession Number: 20111101–5081.
Comment Date: 5 p.m. Eastern Time on Tuesday, November 22, 2011.

Docket Numbers: ER12–301–000.
Applicants: Southern California Edison Company.
Description: Southern California Edison Company submits tariff filing per 35.13(a)(2)(iii: Amendment to Extend Terms of Eldorado Co-Tenancy and Communication Agreements to be effective 1/1/2012.
Filed Date: 11/01/2011.
Accession Number: 20111101–5093.
Comment Date: 5 p.m. Eastern Time on Tuesday, November 22, 2011.

Docket Numbers: ER12–302–000.
Applicants: Alabama Power Company.
Description: Alabama Power Company submits tariff filing per 35.13(a)(2)(i): MUN–1 2012 Small Rate Increase to be effective 1/1/2012.
Filed Date: 11/01/2011.
Accession Number: 20111101–5096.
Comment Date: 5 p.m. Eastern Time on Tuesday, November 22, 2011.

Docket Numbers: ER12–303–000.
Applicants: Virginia Electric and Power Company, Dominion Marketing Affiliates.
Description: Request Of Virginia Electric And Power Company And Its Market-Regulated Power Sales Affiliates For Waivers Of Certain Affiliate Restrictions Requirement.
Filed Date: 11/01/2011.
Accession Number: 20111101–5106.
Comment Date: 5 p.m. Eastern Time on Tuesday, November 22, 2011.

Take notice that the Commission received the following electric securities filings:

Docket Numbers: ES12–6–000.

Applicants: AEP Generating Company.

Description: Application of AEP Generating C to Issue Securities Under Section 204 of the Federal Power Act.

Filed Date: 11/01/2011.

Accession Number: 20111101–5114.

Comment Date: 5 p.m. Eastern Time on Tuesday, November 22, 2011.

Take notice that the Commission received the following land acquisition reports:

Docket Numbers: LA11–3–000.

Applicants: Bluegrass Generation Company, LLC, DeSoto County Generating Company, LLC, Las Vegas Power Company, LLC, LS Power Marketing, LLC, LSP Safe Harbor Holdings, LLC, LSP University Park, LLC, Renaissance Power, LLC, Riverside Generating Company, LLC, Rocky Road Power, LLC, Tilton Energy LLC, University Park Energy, LLC, Wallingford Energy LLC

Description: Quarterly Land Acquisition Report of Bluegrass Generation Company, LLC, *et al.*

Filed Date: 10/31/2011.

Accession Number: 20111031–5429.

Comment Date: 5 p.m. Eastern Time on Monday, November 21, 2011.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

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Dated: November 01, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–28874 Filed 11–7–11; 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: ER10–3069–002; *ER10–3070–002.*
Applicants: Alcoa Power Generating Inc.
Description: Alcoa Power Generating Inc. and Alcoa Power Marketing LLC submit Supplement to their October 11, 2011 Market-Based Tariff Revisions.
Filed Date: 10/13/2011.
Accession Number: 20111013–5120.
Comment Date: 5 p.m. Eastern Time on Thursday, November 03, 2011.

Docket Numbers: ER11–4027–001; *ER11–4028–001*
Applicants: James River Genco, LLC, Portsmouth Genco, LLC.
Description: Notice of Non-Material Change in Status of James River Genco, LLC, et al.
Filed Date: 10/24/2011.
Accession Number: 20111024–5134.
Comment Date: 5 p.m. Eastern Time on Monday, November 14, 2011.

Docket Numbers: ER11–4428–001.
Applicants: Minco Wind II, LLC.
Description: Minco Wind II, LLC submits tariff filing per 35.17(b): Minco Wind II, LLC Amendment to MBR Application and Revision to Tariff to be effective 9/30/2011.
Filed Date: 10/24/2011.
Accession Number: 20111024–5106.
Comment Date: 5 p.m. Eastern Time on Monday, November 14, 2011.

Docket Numbers: ER12–186–000.
Applicants: PNE Energy Supply, LLC.
Description: PNE Energy Supply, LLC submits tariff filing per 35.12: Application for MBR Rates to be effective 11/30/2011.
Filed Date: 10/25/2011.
Accession Number: 20111025–5036.
Comment Date: 5 p.m. Eastern Time on Tuesday, November 15, 2011.

Docket Numbers: ER12–187–000.
Applicants: Public Service Company of Colorado.
Description: Public Service Company of Colorado submits tariff filing per 35.13(a)(2)(iii: 2011–10–25_Remove-WECC–RMS–Criteria to be effective 10/26/2011.
Filed Date: 10/25/2011.
Accession Number: 20111025–5075.
Comment Date: 5 p.m. Eastern Time on Tuesday, November 15, 2011.

Docket Numbers: ER12–188–000.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: Midwest Independent Transmission System Operator, Inc. submits tariff filing per 35.13(a)(2)(iii: J183 GIA to be effective 10/26/2011.
Filed Date: 10/25/2011.
Accession Number: 20111025–5081.
Comment Date: 5 p.m. Eastern Time on Tuesday, November 15, 2011.

Docket Numbers: ER12–189–000.
Applicants: ISO New England Inc.
Description: ISO New England 2012 Capital Budget Filing.
Filed Date: 10/25/2011.
Accession Number: 20111025–5096.
Comment Date: 5 p.m. Eastern Time on Tuesday, November 15, 2011.

Docket Numbers: ER12–190–000.
Applicants: Arizona Public Service Company.
Description: Arizona Public Service Company submits tariff filing per 35.13(a)(2)(iii: Compliance filing to include accepted depreciation rate in the APS OATT to be effective 10/1/2011.
Filed Date: 10/25/2011.
Accession Number: 20111025–5111.
Comment Date: 5 p.m. Eastern Time on Tuesday, November 15, 2011.

Take notice that the Commission received the following land acquisition reports:

Docket Numbers: LA11–3–000.
Applicants: Virginia Electric and Power Company, Dominion Energy Marketing, Inc., Dominion Nuclear Connecticut, Inc., Dominion Energy Kewaunee, Inc., Dominion Energy Brayton Point, Inc., Dominion Energy Manchester Street, Inc., Dominion Energy new England, Inc., Dominion Energy Salem Harbor, LLC, Dominion Retail, Inc., Elwood Energy, LLC, Fairless Energy, LLC, NedPower Mt. Storm, LLC, Kincaid Generation, LLC, State Line Energy, LLC, Fowler Ridge Wind Farm, LLC .
Description: Quarterly Land Acquisition Report of Dominion Resources Services, Inc.
Filed Date: 10/25/2011.
Accession Number: 20111025–5107.
Comment Date: 5 p.m. Eastern Time on Tuesday, November 15, 2011.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

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Dated: October 25, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–28872 Filed 11–7–11; 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:

Filings Instituting Proceedings

Docket Numbers: RP12–79–000.
Applicants: Entergy Arkansas, Inc. KGen Hot Spring LLC.
Description: Request of Entergy Arkansas, Inc. and KGen Hot Spring LLC for Temporary Waiver,
Filed Date: 10/31/2011.
Accession Number: 20111031–5142.
Comment Date: 5 p.m. Eastern Time on Monday, November 14, 2011.

Docket Numbers: RP12–80–000.
Applicants: Algonquin Gas Transmission, LLC.
Description: KeySpan 2011–11–01 release to BP Energy to be effective 11/1/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5147.
Comment Date: 5 p.m. Eastern Time on Monday, November 14, 2011.

Docket Numbers: RP12–81–000.
Applicants: Entergy Mississippi, Inc., KGen Hinds LLC.
Description: Request of Entergy Mississippi, Inc. and KGen Hinds LLC for Temporary Waiver.
Filed Date: 10/31/2011.
Accession Number: 20111031–5208.
Comment Date: 5 p.m. Eastern Time on Monday, November 14, 2011.

Docket Numbers: RP12–82–000.
Applicants: CenterPoint Energy Gas Transmission Company, LLC.
Description: CEGT LLC—Negotiated Rate—November 2011 to be effective 11/1/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5210.
Comment Date: 5 p.m. Eastern Time on Monday, November 14, 2011.

Docket Numbers: RP12–83–000.
Applicants: Algonquin Gas Transmission, LLC.

Description: ConEd 2011–11–01 Releases #2 to be effective 11/1/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5211.
Comment Date: 5 p.m. Eastern Time on Monday, November 14, 2011.

Docket Numbers: RP12–84–000.
Applicants: Northern Natural Gas Company.
Description: 20111031 Negotiated Rate to be effective 11/1/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5218.
Comment Date: 5 p.m. Eastern Time on Monday, November 14, 2011.

Docket Numbers: RP12–85–000.
Applicants: Gulf South Pipeline Company, LP.
Description: Pensacola 30432–15 Amendment to Negotiated Rate Agreement to be effective 11/1/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5222.
Comment Date: 5 p.m. Eastern Time on Monday, November 14, 2011.

Docket Numbers: RP12–86–000.
Applicants: Gulf South Pipeline Company, LP.
Description: Atmos 35226–47 Amendment to Negotiated Rate Agreement to be effective 11/1/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5226.
Comment Date: 5 p.m. Eastern Time on Monday, November 14, 2011.

Docket Numbers: RP12–87–000.
Applicants: Midcontinent Express Pipeline LLC..
Description: Fuel Tracking Filing to be effective 12/1/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5246.
Comment Date: 5 p.m. Eastern Time on Monday, November 14, 2011.

Docket Numbers: RP12–88–000.
Applicants: National Fuel Gas Supply Corporation.
Description: Rate Case (Oct 2011) to be effective 12/1/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5253.
Comment Date: 5 p.m. Eastern Time on Monday, November 14, 2011.

Docket Numbers: RP12–89–000.
Applicants: Texas Eastern Transmission, LP.
Description: ASA TETLP DEC 2011 FILING to be effective 12/1/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5261.
Comment Date: 5 p.m. Eastern Time on Monday, November 14, 2011.

Docket Numbers: RP12–90–000.
Applicants: Enbridge Offshore Pipelines (UTOS) LLC.
Description: Cancellation Filing to be effective 12/1/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5263.
Comment Date: 5 p.m. Eastern Time on Monday, November 14, 2011.

Docket Numbers: RP12–91–000.
Applicants: Transcontinental Gas Pipe Line Company, LLC.
Description: 2011 Penalty Refund Report to be effective N/A.
Filed Date: 10/31/2011.
Accession Number: 20111031–5271.
Comment Date: 5 p.m. Eastern Time on Monday, November 14, 2011.

Docket Numbers: RP12–92–000.
Applicants: Trailblazer Pipeline Company LLC.
Description: Negotiated Rate and Non-Conforming Agreements to be effective 11/1/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5278.
Comment Date: 5 p.m. Eastern Time on Monday, November 14, 2011.

Docket Numbers: RP12–93–000.
Applicants: Fayetteville Express Pipeline LLC.
Description: FEP Semi-Annual Fuel Filing 002 to be effective 12/1/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5285.
Comment Date: 5 p.m. Eastern Time on Monday, November 14, 2011.

Docket Numbers: RP12–94–000.
Applicants: Transcontinental Gas Pipe Line Company, LLC
Description: GSS LSS Tracker Filing 11–01–2011 to be effective 11/1/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5287.
Comment Date: 5 p.m. Eastern Time on Monday, November 14, 2011.

Docket Numbers: RP12–95–000.
Applicants: Natural Gas Pipeline Company of America LLC.
Description: Negotiated Rate Filing—Wisconsin Electric to be effective 11/1/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5288.
Comment Date: 5 p.m. Eastern Time on Monday, November 14, 2011.

Docket Numbers: RP12–96–000.
Applicants: Iroquois Gas Transmission System, L.P.
Description: 10/31/11 Negotiated Rates—NextEra Energy Power Mfg (HUB) to be effective 11/1/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5289.
Comment Date: 5 p.m. Eastern Time on Monday, November 14, 2011.

Docket Numbers: RP12–97–000.
Applicants: Iroquois Gas Transmission System, L.P.
Description: 10/31/11 Negotiated Rates—JP Morgan Ventures Energy Corp. (HUB) to be effective 11/1/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5290.
Comment Date: 5 p.m. Eastern Time on Monday, November 14, 2011.

Docket Numbers: RP12–98–000.
Applicants: Iroquois Gas Transmission System, L.P.
Description: 10/31/11 Negotiated Rates—United Energy Trading, LLC (HUB) to be effective 11/1/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5294.
Comment Date: 5 p.m. Eastern Time on Monday, November 14, 2011.

Docket Numbers: RP12–99–000.
Applicants: Iroquois Gas Transmission System, L.P.
Description: 10/31/11 Negotiated Rates—Occidental Energy Marketing, Inc. (HUB) to be effective 11/1/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5300.
Comment Date: 5 p.m. Eastern Time on Monday, November 14, 2011.

Docket Numbers: RP12–100–000.
Applicants: Iroquois Gas Transmission System, L.P.
Description: 10/31/11 Negotiated Rates—Sequent Energy Management (HUB) to be effective 11/1/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5306.
Comment Date: 5 p.m. Eastern Time on Monday, November 14, 2011.

Docket Numbers: RP12–101–000.
Applicants: Iroquois Gas Transmission System, L.P.
Description: 10/31/11 Negotiated Rates—Spark Energy Gas (HUB) to be effective 11/1/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5313.
Comment Date: 5 p.m. Eastern Time on Monday, November 14, 2011.

Docket Numbers: RP12–102–000.
Applicants: Iroquois Gas Transmission System, L.P.
Description: 10/31/11 Negotiated Rates—Cononco Phillips Company—RTS to be effective 11/1/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5326.
Comment Date: 5 p.m. Eastern Time on Monday, November 14, 2011.

Docket Numbers: RP12–103–000.
Applicants: Iroquois Gas Transmission System, L.P.
Description: 10/31/11 Negotiated Rates—Freepoint Commodities LLC—RTS to be effective 11/1/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5329.
Comment Date: 5 p.m. Eastern Time on Monday, November 14, 2011.

Docket Numbers: RP12–104–000.
Applicants: Iroquois Gas Transmission System, L.P.

Description: 10/31/11 Negotiated Rates—Tenaska Marketing Ventures—RTS to be effective 11/1/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5333.
Comment Date: 5 p.m. Eastern Time on Monday, November 14, 2011.

Docket Numbers: RP12–105–000.
Applicants: Iroquois Gas Transmission System, L.P.
Description: 10/31/11 Negotiated Rates—BG Energy Merchants, LLC—RTS to be effective 11/1/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5337.
Comment Date: 5 p.m. Eastern Time on Monday, November 14, 2011.

Docket Numbers: RP12–106–000.
Applicants: Iroquois Gas Transmission System, L.P.
Description: 10/31/11 Negotiated Rates—United Energy Trading LLC—RTS to be effective 11/1/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5341.
Comment Date: 5 p.m. Eastern Time on Monday, November 14, 2011.

Docket Numbers: RP12–107–000.
Applicants: Iroquois Gas Transmission System, L.P.
Description: 10/31/11 Negotiated Rates—Sequent Energy Management—RTS to be effective 11/1/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5349.
Comment Date: 5 p.m. Eastern Time on Monday, November 14, 2011.

Docket Numbers: RP12–108–000.
Applicants: Iroquois Gas Transmission System, L.P.
Description: 10/31/11 Negotiated Rates—Societe Generale Energy Corp.—RTS to be effective 11/1/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5357.
Comment Date: 5 p.m. Eastern Time on Monday, November 14, 2011.

Docket Numbers: RP12–109–000.
Applicants: Iroquois Gas Transmission System, L.P.
Description: 10/31/11 Negotiated Rates—Tenaska Marketing Ventures (HUB) to be effective 11/1/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5359.
Comment Date: 5 p.m. Eastern Time on Monday, November 14, 2011.

Docket Numbers: RP12–110–000.
Applicants: Transcontinental Gas Pipe Line Company, LLC.
Description: Statement of Negotiated Rates (SCEG) to be effective 11/1/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5361.
Comment Date: 5 p.m. Eastern Time on Monday, November 14, 2011.

Docket Numbers: RP12–111–000.
Applicants: Algonquin Gas Transmission, LLC.
Description: ConEd 2011–11–01 Releases #3 to be effective 11/1/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5369.
Comment Date: 5 p.m. Eastern Time on Monday, November 14, 2011.

Docket Numbers: RP12–112–000.
Applicants: Kinder Morgan Interstate Gas Transmission LLC
Description: Negotiated Rate 2011–10–31 Mieco to be effective 11/1/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5394.
Comment Date: 5 p.m. Eastern Time on Monday, November 14, 2011.

Docket Numbers: RP12–113–000.
Applicants: Wyoming Interstate Company, L.L.C.
Description: Quarterly FL&U Filing 10/31/11 to be effective 12/1/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5405.
Comment Date: 5 p.m. Eastern Time on Monday, November 14, 2011.

Docket Numbers: RP12–114–000.
Applicants: Golden Triangle Storage, Inc.
Description: GTS Administrative Revisions to FERC Gas Tariff to be effective 11/1/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5406.
Comment Date: 5 p.m. Eastern Time on Monday, November 14, 2011.

Docket Numbers: RP12–115–000.
Applicants: Guardian Pipeline, L.L.C.
Description: Non-conforming Agreements—Spark to be effective 11/1/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5410.
Comment Date: 5 p.m. Eastern Time on Monday, November 14, 2011.

Docket Numbers: RP12–116–000.
Applicants: Empire Pipeline, Inc.
Description: Non-Conforming Agreements (Tioga) to be effective 11/1/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5415.
Comment Date: 5 p.m. Eastern Time on Monday, November 14, 2011.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

Filings in Existing Proceedings

Docket Numbers: RP12–43–001.
Applicants: Natural Gas Pipeline Company of America LLC.
Description: Amendment to OXY Negotiated Rate Agreement to be effective 11/1/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5388.
Comment Date: 5 p.m. Eastern Time on Monday, November 14, 2011.

Docket Numbers: RP12–53–001.
Applicants: Gulf South Pipeline Company, LP.
Description: RP12–53–001, Amendment to Filing to be effective 11/1/2011.
Filed Date: 10/31/2011.
Accession Number: 20111031–5228.
Comment Date: 5 p.m. Eastern Time on Monday, November 14, 2011.

Any person desiring to protest in any the above proceedings must file in accordance with Rule 211 of the Commission's Regulations (18 CFR 385.211) on or before 5 p.m. Eastern time on the specified comment date.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, and service can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: November 1, 2011.

Nathaniel J. Davis, Sr.

Deputy Secretary

[FR Doc. 2011–28870 Filed 11–7–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER12–240–000]

PPL Energy Supply, 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 PPL Energy Supply, 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 assumptions of liability, is November 21, 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 email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: October 31, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–28864 Filed 11–7–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER12–224–000]

Stream Energy Columbia, 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 Stream Energy Columbia, 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 assumptions of liability, is November 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 email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: October 31, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–28866 Filed 11–7–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER12–225–000]

Stream Energy New Jersey, 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 Stream Energy New Jersey, 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 assumptions of liability, is November 21, 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 email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email

FERCOnlineSupport@ferc.gov. or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: October 31, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–28865 Filed 11–7–11; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[D–WVA–2011–0002; FRL–9488–8]

Delegation of Authority to the State of West Virginia To Implement and Enforce Additional or Revised National Emission Standards for Hazardous Air Pollutants and New Source Performance Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of delegation of authority.

SUMMARY: On August 29, 2011, EPA sent West Virginia a letter acknowledging that West Virginia's delegation of authority to implement and enforce NESHAP and NSPS had been updated, as provided for under the previously approved automatic delegation mechanisms. To inform regulated facilities and the public of West Virginia's updated delegation of authority to implement and enforce NESHAP and NSPS, EPA is making available a copy of EPA's letter to West Virginia through this notice.

DATES: On August 29, 2011, EPA sent West Virginia a letter acknowledging that West Virginia's delegation of authority to implement and enforce NESHAP and NSPS had been updated.

ADDRESSES: Copies of documents pertaining to this action are available for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103–2029. Copies of West Virginia's submittal are also available at the West Virginia Department of Environmental Protection, Division of Air Quality, 601 57th Street SE., Charleston, West Virginia 25304. Copies of West Virginia's notice to EPA that West Virginia has updated its incorporation by reference of federal NESHAP and NSPS, and of EPA's response, may also be found posted on EPA Region III's Web site at: *http://www.epa.gov/reg3artd/airregulations/delegate/wvdelegation.htm.*

FOR FURTHER INFORMATION CONTACT: Ray Chalmers, (215) 814–2061, or by email at *chalmers.ray@epa.gov.*

SUPPLEMENTARY INFORMATION: West Virginia notified EPA that West Virginia has updated its incorporation by reference of federal NESHAP and NSPS to include many such standards, to the extent referenced in 40 CFR Parts 60, 61, and 63, as of June 1, 2010. EPA responded by sending West Virginia a letter acknowledging that West Virginia now has the authority to implement and enforce the NESHAP and NSPS as specified by West Virginia in its notice to EPA, as provided for under previously approved automatic delegation mechanisms. To inform regulated facilities and the public of West Virginia's updated delegation of authority to implement and enforce NESHAP and NSPS, EPA is making available a copy of EPA's letter to West Virginia through this notice. All notifications, applications, reports and other correspondence required pursuant to the newly delegated standards must be submitted to both the U.S. EPA Region III and to the West Virginia Department of Environmental Protection. A copy of the letter which EPA sent to West Virginia on August 29, 2011 follows:

''John Benedict, Director
Division of Air Quality
West Virginia Department of
Environmental Protection
601 57th Street
Charleston, WV 25304

Dear Mr. Benedict:

The United States Environmental Protection Agency (EPA) has previously delegated to the State of West Virginia (West Virginia) the authority to implement and enforce various federal National Emissions Standards for Hazardous Air Pollutants (NESHAP) and New Source Performance Standards (NSPS), which are found at 40 C.F.R. Parts 60, 61 and 63.[1] In those actions EPA also delegated to West Virginia the authority to implement and enforce any future EPA NESHAP or NSPS on the condition that West Virginia legally adopt the future standards, make only allowed wording changes, and provide specified notice to EPA.

In a letter dated July 11, 2011, West Virginia informed the EPA that West Virginia had updated its incorporation by reference of federal NESHAP and NSPS to include many such standards, to the extent referenced in 40 CFR Parts 60, 61, and 63, effective June 1, 2010. West Virginia noted that it understood that it was automatically delegated the authority to implement these standards. West Virginia committed to enforcing the standards in conformance with the terms of EPA's previous delegations of authority. West Virginia made only allowed wording changes.

West Virginia provided copies of the revised West Virginia Legislative Rules which specify the NESHAP and NSPS which West Virginia has adopted by reference. These revised Legislative Rules are entitled 45 CSR 34—''Emission Standards for Hazardous Air Pollutants,'' and 45 CSR 16—''Standards of Performance for New Stationary Sources.'' These revised rules have an effective date of June 16, 2011.

Accordingly, EPA acknowledges that West Virginia now has the authority, as provided for under the terms of EPA's previous delegation actions, to implement and enforce the NESHAP and NSPS standards which West Virginia has adopted by reference in West Virginia's revised Legislative Rules 45 CSR 34 and 45 CSR 16, both effective on June 16, 2011.

Please note that on December 19, 2008, in Sierra Club v. EPA,[2] the United States Court of Appeals for the District of Columbia Circuit vacated certain provisions of the General Provisions of 40 C.F.R. Part 63 relating to exemptions for startup, shutdown, and malfunction (SSM). On October 16, 2009, the Court issued the mandate vacating these SSM exemption provisions, which are found at 40 C.F.R. §§ 63.6(f)(1) and (h)(1).

Accordingly, EPA no longer allows sources the SSM exemption as provided for in the vacated provisions at 40 C.F.R. §§ 63.6(f)(1) and (h)(1), even though EPA has not yet formally removed the SSM exemption provisions from the General Provisions of 40 CFR Part 63. Because West Virginia incorporated 40 C.F.R. Part 63 by reference, West Virginia should also no longer allow sources to use the former SSM exemption from the General Provisions of 40 C.F.R. Part 63 due to the Court's ruling in Sierra Club vs. EPA.

EPA appreciates West Virginia's continuing NESHAP and NSPS enforcement efforts, and also West Virginia's decision to take automatic delegation of additional and more recent NESHAP and NSPS by adopting them by reference.

If you have any questions, please contact me or Ms. Kathleen Cox, Associate Director, Office of Permits and Air Toxics, at (215) 814–2173.

October 27, 2011

Sincerely,

Diana Esher,

Director, Air Protection Division''

This notice acknowledges the update of West Virginia's delegation of authority to implement and enforce NESHAP and NSPS.

Dated: October 27, 2011.

David Arnold,

Acting Director, Air Protection Division, Region III.

[FR Doc. 2011–28898 Filed 11–7–11; 8:45 am]

BILLING CODE 6560–50–P

[1] EPA has posted copies of these actions at: *http://www.epa.gov/reg3artd/airregulations/delegate/wvdelegation.htm.*

[2] *Sierra Club* v. *EPA,* 551 F.3rd 1019 (D.C. Cir. 2008).

FARM CREDIT ADMINISTRATION

Farm Credit Administration Board; Sunshine Act; Regular Meeting

AGENCY: Farm Credit Administration.

SUMMARY: Notice is hereby given, pursuant to the Government in the Sunshine Act (5 U.S.C. 552b(e)(3)), of the regular meeting of the Farm Credit Administration Board (Board).

DATE AND TIME: The regular meeting of the Board will be held at the offices of the Farm Credit Administration in McLean, Virginia, on November 9, 2011, from 9 a.m. until such time as the Board concludes its business.

FOR FURTHER INFORMATION CONTACT: Dale L. Aultman, Secretary to the Farm Credit Administration Board, (703) 883–4009, TTY (703) 883–4056.

ADDRESSES: Farm Credit Administration, 1501 Farm Credit Drive, McLean, Virginia 22102–5090.

SUPPLEMENTARY INFORMATION: Parts of this meeting of the Board will be open to the public (limited space available), and parts will be closed to the public. In order to increase the accessibility to Board meetings, persons requiring assistance should make arrangements in advance. The matters to be considered at the meeting are:

Open Session

A. Approval of Minutes

- October 13, 2011

B. New Business

- Liquidity and Funding—Proposed Rule

C. Report

- OMS Quarterly Report

Closed Session*

- OSMO Quarterly Report

Dated: November 4, 2011.

Dale L. Aultman,

Secretary, Farm Credit Administration Board.

* Session Closed-Exempt pursuant to 5 U.S.C. 552b(c)(8) and (9).

[FR Doc. 2011–29040 Filed 11–4–11; 4:15 pm]

BILLING CODE 6705–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice of information collection to be submitted to OMB for review and approval under the Paperwork Reduction Act.

SUMMARY: In accordance with requirements of the Paperwork Reduction Act of 1995 (''PRA''), 44 U.S.C. 3501 *et seq.,* the FDIC may not conduct or sponsor, and the 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 FDIC, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on the renewal of existing information collections, as required by the PRA. On August 22, 2011 (76 FR 52326), the FDIC solicited public comment for a 60-day period on renewal of the following information collection: Account Based Disclosures in Connection with Federal Reserve Regulations E, CC, and DD (OMB No. 3064–0084). No comments were received. Therefore, the FDIC hereby gives notice of submission of its requests for renewal to OMB for review.

DATES: Comments must be submitted on or before December 8, 2011.

ADDRESSES: Interested parties are invited to submit written comments to the FDIC by any of the following methods:

- *http://www.FDIC.gov/regulations/laws/federal/notices.html*
- *Email: comments@fdic.gov* Include the name of the collection in the subject line of the message.
- *Mail:* Leneta G. Gregorie (202) 898–3719), Counsel, Room F–1084, Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC 20429.
- *Hand Delivery:* Comments may be hand-delivered to the guard station at the rear of the 17th Street Building (located on F Street), on business days between 7 a.m. and 5 p.m.

All comments should refer to the relevant OMB control number. A copy of the comments may also be submitted to the OMB desk officer for the FDIC: Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Leneta G. Gregorie, at the FDIC address above.

SUPPLEMENTARY INFORMATION:

Proposal To Renew the Following Currently Approved Collection of Information

1. Title: Account Based Disclosures in Connection with Federal Reserve Regulations E, CC, and DD.

OMB Number: 3064–0084.

Frequency of Response: On occasion.

Affected Public: State chartered banks that are not members of the Federal Reserve System.

Number of Respondents: 4,632.

Burden per Response: Varied

Annual Burden: Regulation E—2,664,895 hours; Regulation CC—471,551 hours; and Regulation DD—325,398 hours.

General Description of Collection: This FDIC information collection provides for the application of Regulations E (Electronic Fund Transfers), CC (Availability of Funds), and DD (Truth in Savings) to State nonmember banks. Regulations E, CC, and DD are issued by the Federal Reserve Board of Governors (FRB) to ensure, among other things, that consumers are provided adequate disclosures regarding accounts, including electronic fund transfer services, availability of funds, and fees and annual percentage yield for deposit accounts. Generally, the Regulation E disclosures are designed to ensure consumers receive adequate disclosure of basic terms, costs, and rights relating to electronic fund transfer (EFT) services provided to them so that they can make informed decisions. Institutions offering EFT services must disclose to consumers certain information, including: initial and updated EFT terms, transaction information, the consumer's potential liability for unauthorized transfers, and error resolution rights and procedures. Like Regulation E, Regulation CC has consumer protection disclosure requirements. Specifically, Regulation CC requires depository institutions to make funds deposited in transaction accounts available within specified time periods, disclose their availability policies to customers, and begin accruing interest on such deposits promptly. The disclosures are intended to alert customers that their ability to use deposited funds may be delayed, prevent unintentional (and costly) overdrafts, and allow customers to compare the policies of different institutions before deciding at which institution to deposit funds. Depository institutions must also provide an awareness disclosure regarding substitute checks. The regulation also requires notice to the depositary bank and to a customer of nonpayment of a check. Regulation DD also has similar consumer protection disclosure requirements that are intended to assist consumers in comparing deposit accounts offered by institutions, principally through the disclosure of fees, the annual percentage yield, and

other account terms. Regulation DD requires depository institutions to disclose yields, fees, and other terms concerning deposit accounts to consumers at account opening, upon request, and when changes in terms occur.

Depository institutions that provide periodic statements are required to include information about fees imposed, interest earned, and the annual percentage yield (APY) earned during those statement periods. It also contains rules about advertising deposit accounts. Although the FRB regulations require institutions to retain evidence of compliance with the disclosure requirements, the regulations do not specify the types of records that must be retained.

Request for Comment

Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the FDIC's functions, including whether the information has practical utility; (b) the accuracy of the estimates 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; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology. All comments will become a matter of public record.

Dated at Washington, DC, this 2nd day of November 2011.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2011–28812 Filed 11–7–11; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice of information collection to be submitted to OMB for review and approval under the Paperwork Reduction Act.

SUMMARY: In accordance with requirements of the Paperwork Reduction Act of 1995 (''PRA''), 44 U.S.C. 3501 *et seq.,* the FDIC may not conduct or sponsor, and the 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 FDIC, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on the renewal of existing information collections, as required by the PRA. On August 22, 2011 (76 FR 52326), the FDIC solicited public comment for a 60-day period on renewal of the following information collection: Notification of Performance of Bank Services. No comments were received. Therefore, the FDIC hereby gives notice of submission of its requests for renewal to OMB for review.

DATES: Comments must be submitted on or before December 8, 2011.

ADDRESSES: Interested parties are invited to submit written comments to the FDIC by any of the following methods:

- *http://www.FDIC.gov/regulations/laws/federal/notices.html.*
- *Email: comments@fdic.gov* Include the name of the collection in the subject line of the message.
- *Mail:* Leneta G. Gregorie (202) 898–3719), Counsel, Room F–1084, Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC 20429.
- *Hand Delivery:* Comments may be hand-delivered to the guard station at the rear of the 17th Street Building (located on F Street), on business days between 7 a.m. and 5 p.m.

All comments should refer to the relevant OMB control number. A copy of the comments may also be submitted to the OMB desk officer for the FDIC: Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Leneta G. Gregorie, at the FDIC address above.

SUPPLEMENTARY INFORMATION:

Proposal To Renew the Following Currently Approved Collection of Information

1. Title: Notification of Performance of Bank Services.

OMB Number: 3064–0029.

Form Number: FDIC 6120/06.

Frequency of Response: On occasion.

Affected Public: Business or other financial institutions.

Estimated Number of Respondents: 400

Estimated Time per Response: ½ hour.

Total Annual Burden: 200 hours.

General Description of Collection: Insured state nonmember banks are required to notify the FDIC, under section 7 of the Bank Service Corporation Act (12 U.S.C. 1867), of the relationship with a bank service corporation. Form 6120/06 (Notification of Performance of Bank Services) may be used by banks to satisfy the notification requirement.

Request for Comment

Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the FDIC's functions, including whether the information has practical utility; (b) the accuracy of the estimates 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; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology. All comments will become a matter of public record.

Dated at Washington, DC, this 2nd day of November 2011.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2011–28813 Filed 11–7–11; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Update to Notice of Financial Institutions for Which the Federal Deposit Insurance Corporation Has Been Appointed Either Receiver, Liquidator, or Manager

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Update listing of financial institutions in liquidation.

SUMMARY: Notice is hereby given that the Federal Deposit Insurance Corporation (Corporation) has been appointed the sole receiver for the following financial institutions effective as of the Date Closed as indicated in the listing. This list (as updated from time to time in the **Federal Register**) may be relied upon as ''of record'' notice that the Corporation has been appointed receiver for purposes of the statement of policy published in the July 2, 1992 issue of the **Federal Register** (57 FR 29491). For further information concerning the identification of any institutions which have been placed in liquidation, please visit the Corporation Web site at http://www.fdic.gov/bank/

individual/failed/banklist.html or contact the Manager of Receivership Oversight in the appropriate service center.

Dated: October 31, 2011.

Federal Deposit Insurance Corporation.

Pamela Johnson

Regulatory Editing Specialist.

INSTITUTIONS IN LIQUIDATION

[In alphabetical order]

FDIC Ref. No.	Bank name	City	State	Date closed
10409	All American Bank	Des Plaines	IL	10/28/2011

[FR Doc. 2011–28814 Filed 11–7–11; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL MARITIME COMMISSION

Notice of Agreements Filed

The Commission hereby gives notice of the filing of the following agreements under the Shipping Act of 1984. Interested parties may submit comments on the agreements to the Secretary, Federal Maritime Commission, Washington, DC 20573, within ten days of the date this notice appears in the **Federal Register**. Copies of the agreements are available through the Commission's Web site (*http://www.fmc.gov*) or by contacting the Office of Agreements at (202) 523–5793 or *tradeanalysis@fmc.gov*.

Agreement No.: 010099–053.

Title: International Council of Containership Operators.

Parties: A.P. Moller-Maersk A/S; China Shipping Container Lines Co., Ltd.; CMA CGM, S.A.; Compañía Chilena de Navegación Interoceánica S.A.; Compania SudAmericana de Vapores S.A.; COSCO Container Lines Co. Ltd; Crowley Maritime Corporation; Evergreen Marine Corporation (Taiwan), Ltd.; Hamburg-Süd KG; Hanjin Shipping Co., Ltd.; Hapag-Lloyd AG; Hyundai Merchant Marine Co., Ltd.; Kawasaki Kisen Kaisha, Ltd.; MISC Berhad; Mediterranean Shipping Co. S.A.; Mitsui O.S.K. Lines, Ltd.; Neptune Orient Lines, Ltd.; Nippon Yusen Kaisha; Orient Overseas Container Line, Ltd.; Pacific International Lines (Pte) Ltd.; United Arab Shipping Company (S.A.G.); Wan Hai Lines Ltd.; Yang Ming Transport Marine Corp.; and Zim Integrated Shipping Services Ltd.

Filing Party: John Longstreth, Esq.; K & L Gates LLP; 1601 K Street NW; Washington, DC 20006–1600.

Synopsis: The amendment would add STX Pan Ocean Co., Ltd. to the agreement.

Agreement No.: 011741–017.

Title: U.S. Pacific Coast-Oceania Agreement.

Parties: A.P. Moller-Maersk A/S; CMA CGM S.A.; Hamburg-Sud; and Hapag-Lloyd AG.

Filing Party: Wayne R. Rohde, Esq.; Cozen O'Connor; 1627 I Street NW. Suite 1100; Washington, DC 20006.

Synopsis: The amendment reflects the addition of a seventh vessel to the PSW string, increases the capacity of the vessels deployed, and increases the allocations of the parties. The parties request expedited review.

Agreement No.: 012042–005.

Title: MOL/ELJSA Slot Exchange Agreement.

Parties: Evergreen Line Joint Service Agreement and Mitsui O.S.K. Lines, Ltd.

Filing Party: Robert B. Yoshitomi, Esq.; Nixon Peabody, LLP; Gas Company Tower; 555 West Fifth Street 46th Floor; Los Angeles, CA 90013.

Synopsis: The amendment allows the parties to provide slots on their other services in the agreement trade.

Agreement No.: 012143.

Title: COSCON/PIL Space Charter and Sailing Agreement.

Parties: COSCO Container Lines Company, Ltd. and Pacific International Lines (PTE) Ltd.

Filing Party: Robert B. Yoshitomi, Esq.; Nixon Peabody LLP; 555 West Fifth Street 46th Floor; Los Angeles, CA 90013.

Synopsis: The agreement authorizes the parties to share vessel space in the trade between U.S. West Coast ports and ports in China and Vietnam.

Agreement No.: 012144.

Title: Grand Alliance/Maersk Slot Exchange Agreement.

Parties: Hapag-Lloyd AG, Nippon Yusen Kaisha, Orient Overseas Container Line Limited, A.P. Moller-Maersk A/S.

Filing Party: Wayne R. Rohde, Esquire, Cozen O'Connor LLP; 1627 I Street NW., Suite 1100; Washington, DC 20006–4007.

Synopsis: The agreement authorizes the parties to exchange space in the trade from Thailand and Vietnam to U.S. West Coast ports. The parties request expedited review.

Dated: November 3, 2011.

By Order of the Federal Maritime Commission.

Karen V. Gregory,

Secretary.

[FR Doc. 2011–28949 Filed 11–7–11; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

[Docket No. 11–19]

Notice of Inquiry; U.S. Inland Containerized Cargo Moving Through Canadian and Mexican Seaports

AGENCY: Federal Maritime Commission.

ACTION: Notice of Inquiry.

SUMMARY: The Federal Maritime Commission is issuing this Notice of Inquiry to solicit the public's views and information concerning factors that may cause or contribute to the shift of containerized cargo destined for U.S. inland points from U.S. to Canadian and Mexican seaports.

DATES: Comments are due on or before December 22, 2011.

ADDRESSES: Submit comments to: Karen V. Gregory, Secretary, Federal Maritime Commission, 800 North Capitol Street, NW., Washington, DC 20573–0001, or email non-confidential comments to: *Secretary@fmc.gov* (email comments as attachments preferably in Microsoft Word or PDF)

FOR FURTHER INFORMATION CONTACT: Karen V. Gregory, Secretary, Federal Maritime Commission, 800 N. Capitol Street, NW., Washington, DC 20573–0001, (202) 523–5725, *Fax* (202) 523–0014, *Email: Secretary@fmc.gov,* Rebecca A. Fenneman, General Counsel, Federal Maritime Commission, 800 N. Capitol Street, NW., Washington, DC 20573–0001, (202) 523–5740, *Fax* (202) 523–5738, *Email: GeneralCounsel@fmc.gov.*

SUPPLEMENTARY INFORMATION:

Background

The Federal Maritime Commission (FMC or Commission) has received requests from United States Senators Patty Murray and Maria Cantwell (both of Washington), Members of Congress

Rick Larsen, Jay Inslee, Norm Dicks, Adam Smith, Dave Reichert, Jaime Herrera Beutler and Jim McDermott (all of Washington), and Congresswoman Laura Richardson (California), to study the impacts and the extent to which the U.S. Harbor Maintenance Tax (HMT), other U.S. policies, and other factors may incentivize container cargo to shift from U.S. West Coast ports to those located in Canada and Mexico. These requests also asked the Commission to make legislative and regulatory recommendations to address this concern.

In recent years, there has been a steadily observed increase in the amount of U.S.-destined cargo moving through newly established west coast Canadian port Prince Rupert and the expanded Mexican port Lázaro Cárdenas. These same years saw investment in and promotion of Canadian and Mexican port and intermodal rail infrastructure, as well as changes to environmental requirements, security considerations, and customs inspection procedures.

The HMT has also been the subject of recent congressional interest. Originally enacted as part of the Comprehensive Water Resources Development Act of 1986, the HMT was devised to help fund harbor and channel maintenance by charging users of U.S. seaports at an *ad valorem* rate of 0.125%. *See* 26 U.S.C. 4461. The HMT is currently imposed only on imports and is payable at the time of unloading of the cargo in the U.S. port. *Id.* Cargo ultimately destined for U.S. inland points but entering at Canadian or Mexican seaports is not subject to the HMT.

In order to prepare the fullest response possible, the Commission now invites comment and information from all members of the interested public (whether they be located in the United States or elsewhere), including public port authorities, private marine terminal operators, ocean common carriers, ocean transportation intermediaries, supply chain experts, providers of rail and trucking services, state, local, provincial or national governments, importers, exporters and beneficial cargo owners. Comments that are specific and provide supporting data are most helpful.

1. Describe the differences, if any, in taxes, fees, laws, regulations, cargo handling, customs processes, related terminal/port procedure, infrastructure, or intermodal services between U.S. and Canadian or Mexican ports that may come into consideration when determining how to route cargo destined for U.S. inland points. Please be as specific as possible.

2. Provide your opinion and supporting data regarding the reasons vessel-operating common carriers serving the U.S., Canada and Mexico may prefer to make Mexican or Canadian ports their first North American ports of call.

3. Describe why ocean transportation intermediaries or importers may prefer to route their customers' inland U.S.-destined cargo via a Mexican or Canadian port.

4. Describe and, if possible, quantify the advantages and disadvantages a beneficial cargo owner may face when considering whether to route inland U.S.-destined cargo via a Mexican or Canadian port. Specifically, what role, if any, does the assessment of the Harbor Maintenance Tax (HMT) have on that determination? What are the other considerations? If there is a cost advantage due to lower total transportation costs (ocean, truck, rail), please quantify those differences and describe the source of any such cost differentials.

5. Please quantify the effect, if any, the change in cargo routing has had on employment in the United States.

6. Describe what volume or other incentives, bonuses or discounts, if any, are offered by ports, common carriers, terminal operators, or other entities for cargo moved through Canadian or Mexican ports and where these may be available to the shipping public.

7. Describe the advantages and/or disadvantages current transportation services via Canadian or Mexican ports may offer to U.S. exporters.

8. State your view on actions that the U.S. Government can take to improve competitiveness of U.S. ports. Of those actions, what are the most important or pressing?

Submit Comments:

Non-confidential filings may be submitted in hard copy or by email as an attachment (preferably in Microsoft Word or PDF) addressed to *secretary@fmc.gov* on or before December 22, 2011. Include in the subject line: ''U.S. Containerized Cargo Flows—Response to NOI.'' Confidential filings must be submitted in the traditional manner on paper, rather than by email. Comments submitted that seek confidential treatment must be submitted in hard copy by U.S. mail or courier. Confidential filings must be accompanied by a transmittal letter that identifies the filing as ''confidential'' and describes the nature and extent of the confidential treatment requested. When submitting comments in response to the Notice of Inquiry that contain confidential information, the confidential copy of the filing must consist of the complete filing and be marked by the filer as ''Confidential-Restricted,'' with the confidential material clearly marked on each page. When a confidential filing is submitted, an original and one additional copy of the public version of the filing must be submitted. The public version of the filing should exclude confidential materials, and be clearly marked on each affected page, ''confidential materials excluded.'' The Commission will provide confidential treatment to the extent allowed by law for those submissions, or parts of submissions, for which confidential treatment is requested. Questions regarding filing or treatment of confidential responses to this Notice of Inquiry should be directed to the Commission's Secretary, Karen V. Gregory, at the telephone number or email provided above.

By the Commission.

Karen V. Gregory,

Secretary.

[FR Doc. 2011–28878 Filed 11–7–11; 8:45 am]

BILLING CODE 6730–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–N–0444]

Gayle Rothenberg: Debarment Order

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is issuing an order under the Federal Food, Drug, and Cosmetic Act (the FD&C Act) permanently debarring Gayle Rothenberg, MD, from providing services in any capacity to a person that has an approved or pending drug product application. We base this order on a finding that Dr. Rothenberg was convicted of felonies under Federal law for conduct relating to the regulation of a drug product under the FD&C Act. Dr. Rothenberg was given notice of the proposed permanent debarment and an opportunity to request a hearing within the timeframe prescribed by regulation. Dr. Rothenberg failed to respond. Dr. Rothenberg's failure to respond constitutes a waiver of her right to a hearing concerning this action.

DATES: This order is effective November 8, 2011.

ADDRESSES: Submit applications for special termination of debarment to the Division of Dockets Management (HFA–305), Food and Drug Administration,

5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Kenny Shade,Office of Regulatory Affairs (HFC–230), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, (301) 796–4640.

SUPPLEMENTARY INFORMATION:

I. Background

Section 306(a)(2)(B) of the FD&C Act (21 U.S.C. 335a(a)(2)(B)) requires debarment of an individual if FDA finds that the individual has been convicted of a felony under Federal law for conduct relating to the regulation of any drug product under the FD&C Act.

On April 20, 2010, the U.S. District Court for the Southern District of Texas entered judgment against Dr. Rothenberg for one felony count of, with intent to defraud and mislead, misbranding a drug while held for sale after shipment in interstate commerce in violation of 21 U.S.C. 331(k), 333(a)(2), 352(i)(3) and 18 U.S.C. 2, and one felony count of intentionally and knowingly, in a matter within the jurisdiction of FDA, making a false statement to an agent of FDA in violation of 18 U.S.C. 1001.

FDA's finding that debarment is appropriate is based on the felony convictions referenced herein for conduct relating to the regulation of a drug product. The factual basis for this conviction is as follows: Dr. Rothenberg was a physician licensed by the State of Texas as a medical doctor with a specialty in the area of anesthesiology. Dr. Rothenberg served as the medical director and operated a medical clinic in the Southern District of Texas. The medical clinic provided and performed services related to the enhancement of the physical appearance of clients and included BOTOX injections.

From February to September 2004, Dr. Rothenberg and her office manager caused staff members to order a botulinum toxin type A (TRI-toxin) product from Toxin Research International, Inc. (TRI) that was not approved by FDA. Dr. Rothenberg informed staff members that a new BOTOX product would be used to treat patients. When the orders from TRI were received, the invoice accompanying the order as well as packaging and labeling on each vial indicated that the TRI-toxin was for research purposes only and not for human use. Dr. Rothenberg was aware that the product was not intended for human use; however, she performed injections and used the TRI-toxin on patients at her medical practice from February through September 2004. Dr. Rothenberg misrepresented to patients that they were receiving injections of authentic BOTOX and BOTOX Cosmetic when in fact she knew the patients were receiving injections of non-FDA approved TRI-toxin.

On January 20, 2005, agents of FDA traveled to Dr. Rothenberg's clinic and spoke to her about whether any TRI-toxin had been ordered and used on patients of the medical clinic. Dr. Rothenberg confirmed that the nonapproved product had been ordered but stated that it had only been administered to friends and family. On February 28, 2005, agents of FDA again traveled to Dr. Rothenberg's clinic and presented 10 invoices showing that the clinic had ordered the TRI-toxin. This time Dr. Rothenberg stated that the product had been used on patients without her knowledge and approval. Dr. Rothenberg indicated that approximately 210 patients received injections of the TRI-toxin during the period of February 4 and September 8, 2004. Agents of FDA reviewed billing statements from Dr. Rothenberg's clinic and determined that the clinic received approximately $98,000 from patients who received injections of the non-FDA approved TRI-toxin.

Dr. Rothenberg pleaded guilty to, with intent to defraud or mislead, misbranding a drug while held for sale after shipment in interstate commerce, in violation of Title 21 U.S.C. 331(k), 333(a)(2), 352(i)(3) and 18 U.S.C. 2, and to making a false statement to an agent of FDA in violation of 18 U.S.C. 1001.

As a result of her convictions, on August 22, 2011, FDA sent Dr. Rothenberg a notice by certified mail proposing to permanently debar her from providing services in any capacity to a person that has an approved or pending drug product application. The proposal was based on a finding, under section 306(a)(2)(B) of the FD&C Act, that Dr. Rothenberg was convicted of felonies under Federal law for conduct relating to the regulation of a drug product under the FD&C Act. The proposal also offered Dr. Rothenberg an opportunity to request a hearing, providing her 30 days from the date of receipt of the letter in which to file the request, and advised her that failure to request a hearing constituted a waiver of the opportunity for a hearing and of any contentions concerning this action. The proposal was received on August 30, 2011. Dr. Rothenberg failed to respond within the timeframe prescribed by regulation and has, therefore, waived her opportunity for a hearing and has waived any contentions concerning her debarment (21 CFR part 12).

II. Findings and Order

Therefore, the Director, Office of Enforcement, Office of Regulatory Affairs, under section 306(a)(2)(B) of the FD&C Act, under authority delegated to the Director (Staff Manual Guide 1410.35), finds that Gayle Rothenberg has been convicted of felonies under Federal law for conduct relating to the regulation of a drug product under the FD&C Act.

As a result of the foregoing finding, Dr. Rothenberg is permanently debarred from providing services in any capacity to a person with an approved or pending drug product application under sections 505, 512, or 802 of the FD&C Act (21 U.S.C. 355, 360b, or 382), or under section 351 of the Public Health Service Act (42 U.S.C. 262), effective (see **DATES**), (see section 306(c)(1)(B) and (c)(2)(A)(ii) of the FD&C Act and section 201(dd) of the FD&C Act (21 U.S.C. 321(dd))). Any person with an approved or pending drug product application who knowingly employs or retains as a consultant or contractor, or otherwise uses the services of Dr. Rothenberg, in any capacity during Dr. Rothenberg's debarment, will be subject to civil money penalties (section 307(a)(6) of the FD&C Act (21 U.S.C. 335b(a)(6))). If Dr. Rothenberg provides services in any capacity to a person with an approved or pending drug product application during her period of debarment she will be subject to civil money penalties (section 307(a)(7) of the FD&C Act). In addition, FDA will not accept or review any abbreviated new drug applications submitted by or with the assistance of Dr. Rothenberg during her period of debarment (section 306(c)(1)(B) of the FD&C Act).

Any application by Dr. Rothenberg for special termination of debarment under section 306(d)(4) of the FD&C Act should be identified with Docket No. FDA–2011–N–0444 and sent to the Division of Dockets Management (see **ADDRESSES**). All such submissions are to be filed in four copies. The public availability of information in these submissions is governed by 21 CFR 10.20(j).

Publicly available submissions may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Dated: October 25, 2011.

Armando Zamora,

Acting Director, Office of Enforcement, Office of Regulatory Affairs.

[FR Doc. 2011–28877 Filed 11–7–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–D–0453]

Draft Guidance for Industry and Food and Drug Administration Staff; 510(k) Device Modifications: Deciding When To Submit a 510(k) for a Change to an Existing Device; Availability; Reopening of Comment Period

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; reopening of comment period.

SUMMARY: The Food and Drug Administration (FDA) is reopening until November 28, 2011, the comment period for the notice entitled ''Draft Guidance for Industry and Food and Drug Administration Staff; 510(k) Device Modifications: Deciding When to Submit a 510(k) for a Change to an Existing Device; Availability,'' that appeared in the **Federal Register** of July 27, 2011 (76 FR 44935). In that document, FDA announced the availability of a draft guidance for industry and FDA staff and requested comments. The Agency is taking this action to allow interested persons additional time to submit comments.

DATES: Submit either electronic or written comments by November 28, 2011.

ADDRESSES: Submit electronic comments on the draft guidance to *http://www.regulations.gov.* Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT:

Michael J. Ryan, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, rm. 1615, Silver Spring, MD 20993–0002, (301) 796–6283; or

Stephen Ripley, Center for Biologics Evaluation and Research (HFM–17), Food and Drug Administration, 1401 Rockville Pike, Suite 200N, Rockville, MD 20852, (301) 827–6210.

I. Background

In the **Federal Register** of July 27, 2011 (76 FR 44935), FDA published a notice with a 90-day comment period to request comments on the draft guidance for industry and FDA staff entitled ''510(k) Device Modifications: Deciding When to Submit a 510(k) for a Change to an Existing Device.'' Comments on the draft guidance will assist FDA in the development of a final guidance for industry and FDA staff.

FDA is reopening the comment period for the notice until November 28, 2011. The Agency believes that this will allow adequate time for interested persons to submit comments without significantly delaying action by the Agency.

II. 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.

III. Electronic Access

Persons interested in obtaining a copy of the draft guidance may do so by using the Internet. A search capability for all Center for Devices and Radiological Health (CDRH) guidance documents is available at *http://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/GuidanceDocuments/default.htm.* Guidance documents are also available at *http://www.regulations.gov* or from the Center for Biologics Evaluation and Research at *http://www.fda.gov/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/default.htm.* To receive ''510(k) Device Modifications: Deciding When to Submit a 510(k) for a Change to an Existing Device'' from CDRH, you may either send an email request to *dsmica@fda.hhs.gov* to receive an electronic copy of the document or send a fax request to (301) 847–8149 to receive a hard copy. Please use the document number 1793 to identify the guidance you are requesting.

Dated: November 1, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–28875 Filed 11–7–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HOMELAND SECURITY

Citizenship and Immigration Services

Agency Information Collection Activities: Form I–817, Extension of a Currently Approved Information Collection; Comment Request

ACTION: 30-Day Notice of Information Collection Under Review: Form I–817, Application for Family Unity Benefits; OMB Control No. 1615–0005.

The Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. An information collection notice was previously published in the **Federal Register** on August 12, 2011, at 76 FR 50237, allowing for a 60-day public comment period. USCIS did not receive any comments on the extension of this information collection.

The purpose of this notice is to allow an additional 30 days for public comments. Comments are encouraged and will be accepted until December 8, 2011. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Department of Homeland Security (DHS), and to the Office of Management and Budget (OMB) USCIS Desk Officer. Comments may be submitted to: USCIS, Chief, Regulatory Products Division, Office of the Executive Secretariat, 20 Massachusetts Avenue NW., Washington, DC 20529–2020. Comments may also be submitted to DHS via facsimile to (202) 272–0997 or via email at *rfs.regs@dhs.gov,* and to the OMB USCIS Desk Officer via facsimile at (202) 395–5806 or via email at *oira_submission@omb.eop.gov.* When submitting comments by email please make sure to add OMB Control Number 1615–0005 in the subject box. Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(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 agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other

technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension of a currently approved information collection.

(2) *Title of the Form/Collection:* Application for Family Unity Benefits.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form I–817; U.S. Citizenship and Immigration Services (USCIS).

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary: Individuals or Households.* The information collected will be used to determine whether the applicant meets the eligibility requirements for benefits under 8 CFR 236.14 and 245a.33.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 1,750 responses at 2 hours per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 3,500 annual burden hours.

If you need a copy of the information collection instrument, please visit the Web site at: *http://www.regulations.gov.*

We may also be contacted at: USCIS, Regulatory Products Division, 20 Massachusetts Avenue NW., Washington, DC 20529–2020; Telephone (202) 272–8377.

Dated: November 3, 2011.

Sunday Aigbe,

Chief, Regulatory Products Division, Office of the Executive Secretariat, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2011–28954 Filed 11–7–11; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Agency Information Collection Activities: Form N–400, Extension of a Currently Approved Information Collection; Comment Request

ACTION: *30-Day Notice of Information Collection Under Review:* Form N–400, Application for Naturalization; OMB Control No. 1615–0052.

The Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. An information collection notice was previously published in the **Federal Register** on August 12, 2011, at 76 FR 50236, allowing for a 60-day public comment period. USCIS did not receive any comments on the 60-day notice.

The purpose of this notice is to allow an additional 30 days for public comments. Comments are encouraged and will be accepted until December 8, 2011. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Department of Homeland Security (DHS), and to the Office of Management and Budget (OMB), USCIS Desk Officer. Comments may be submitted to: USCIS, Chief, Regulatory Products Division, 20 Massachusetts Avenue, Washington, DC 20529–2020. Comments may also be submitted to DHS via facsimile to (202) 272–0997 or via email at *uscisfrcomment@dhs.gov* and to the OMB USCIS Desk Officer via facsimile at (202) 395–5806 or via email at *oira_submission@omb.eop.gov.*

When submitting comments by email please make sure to add OMB Control Number 1615–0052 in the subject box. Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(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 collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques, or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of this information collection:

(1) *Type of Information Collection:* Extension of an existing information collection.

(2) *Title of the Form/Collection:* Application for Naturalization.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form N–400. U.S. Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary: Individuals or households.* USCIS uses the information on this form to determine an applicant's eligibility for naturalization.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 693,890 responses at 6 hours and 8 minutes (6.13 hours) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 4,253,545 annual burden hours.

If you need a copy of the information collection instrument, please visit the Web site at: *http://www.regulations.gov/*

We may also be contacted at: USCIS, Regulatory Products Division, 20 Massachusetts Avenue, NW., Washington, DC 20529–2020, telephone number (202) 272–8377.

Dated: November 3, 2011.

Sunday Aigbe,

Chief, Regulatory Products Division, Office of the Executive Secretariat, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2011–28946 Filed 11–7–11; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Agency Information Collection Activities: Form I–192, Extension of a Currently Approved Information Collection; Comment Request

ACTION: 30-Day Notice of Information Collection Under Review: Form I–192, Application for Advance Permission to Enter as Nonimmigrant (Pursuant to 212(d)(3) of the Immigration and Nationality Act); OMB Control No. 1615–0017.

The Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) will be submitting the following information

collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection was previously published in the **Federal Register** on August 12, 2011, at 76 FR 50239, allowing for a 60-day public comment period. USCIS received one comment on the extension of this information collection. USCIS acknowledges receipt of the comment in the supporting statement (item 8) posted at *http://www.regulations.gov*.

The purpose of this notice is to allow an additional 30 days for public comments. Comments are encouraged and will be accepted until December 8, 2011. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Department of Homeland Security (DHS), and to the Office of Management and Budget (OMB) USCIS Desk Officer. Comments may be submitted to: USCIS, Chief, Regulatory Products Division, Office of the Executive Secretariat, 20 Massachusetts Avenue NW., Washington, DC 20529–2020. Comments may also be submitted to DHS via facsimile to (202) 272–0997 or via email at *rfs.regs@dhs.gov,* and to the OMB USCIS Desk Officer via facsimile at (202) 395–5806 or via email at *oira_submission@omb.eop.gov*. When submitting comments by email please make sure to add OMB Control Number 1615–0017 in the subject box. Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(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 agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of this information collection:

(1) *Type of Information Collection:* Extension of a currently approved information collection.

(2) *Title of the Form/Collection:* Application for Advance Permission to Enter as Nonimmigrant (Pursuant to 212(d)(3) of the Immigration and Nationality Act).

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form I–192; U.S. Citizenship and Immigration Services (USCIS).

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary: Individuals or Households.* The information collected will be used to determine whether the applicant meets the eligibility to enter the U.S temporarily under the provisions of section 212(d)(3) of the Immigration and Nationality Act.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 20,541 responses at 30 minutes (.50 hours) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 10,270 annual burden hours.

If you need a copy of the information collection instrument, please visit the Web site at: *http://www.regulations.gov*.

We may also be contacted at: USCIS, Regulatory Products Division, 20 Massachusetts Avenue NW., Washington, DC 20529–2020; *Telephone* (202) 272–8377.

Dated: November 3, 2011.

Sunday Aigbe,

Chief, Regulatory Products Division, Office of the Executive Secretariat, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2011–28953 Filed 11–7–11; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

Citizenship and Immigration Services

Agency Information Collection Activities: Form N–336, Revision of a Currently Approved Information Collection; Comment Request

ACTION: 30-Day Notice of Information Collection Under Review: Form N–336, Request for Hearing on a Decision in Naturalization Proceedings (Under Section 336 of the INA); OMB Control No. 1615–0050.

The Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. An information collection notice was previously published in the **Federal Register** on August 25, 2011, at 76 FR 53144, allowing for a 60-day public comment period. USCIS did not receive any comments on the 60-day notice.

The purpose of this notice is to allow an additional 30 days for public comments. Comments are encouraged and will be accepted until December 8, 2011. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Department of Homeland Security (DHS), and to the Office of Management and Budget (OMB), USCIS Desk Officer. Comments may be submitted to: USCIS, Chief, Regulatory Products Division, 20 Massachusetts Avenue, Washington, DC 20529–2020. Comments may also be submitted to DHS via facsimile to (202) 272–0997 or via email at *uscisfrcomment@dhs.gov,* and to the OMB USCIS Desk Officer via facsimile at (202) 395–5806 or via email at *oira_submission@omb.eop.gov.*

When submitting comments by email please make sure to add OMB Control Number 1615–0050 in the subject box. Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(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 collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques, or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Revision of an existing information collection.

(2) *Title of the Form/Collection:* Request for Hearing on a Decision in Naturalization Proceedings (Under Section 336 of the INA).

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form N–336. U.S. Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary: Individuals or households.* Form N–336 provides a method for applicants, whose applications for naturalization are denied, to request a new hearing by an Immigration Officer of the same or higher rank as the denying officer, within 30 days of the original decision.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 5,523 responses at 2 hours and 45 minutes (2.75 hours) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 15,188 annual burden hours.

If you need a copy of the information collection instrument, please visit the Web site at: *http://www.regulations.gov/* We may also be contacted at: USCIS, Regulatory Products Division, 20 Massachusetts Avenue NW., Washington, DC 20529–2020, telephone number (202) 272–8377.

Dated: November 3, 2011.

Sunday Aigbe,

Chief, Regulatory Products Division, Office of the Executive Secretariat, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2011–28951 Filed 11–7–11; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs And Border Protection

Agency Information Collection Activities: Entry Summary

AGENCY: U.S. Customs and Border Protection (CBP), Department of Homeland Security.

ACTION: 60–Day Notice and request for comments; Extension of an existing collection of information: 1651–0022.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, CBP invites the general public and other Federal agencies to comment on an information collection requirement concerning the Entry Summary (CBP Form 7501). This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13).

DATES: Written comments should be received on or before January 9, 2012, to be assured of consideration.

ADDRESSES: Direct all written comments to U.S. Customs and Border Protection, Attn: Tracey Denning, Regulations and Rulings, Office of International Trade, 799 9th Street NW., 5th Floor, Washington, DC 20229–1177.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Tracey Denning, U.S. Customs and Border Protection, Regulations and Rulings, Office of International Trade, 799 9th Street NW., 5th Floor, Washington, DC 20229–1177, at (202) 325–0265.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13). The comments should address: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) the annual costs burden to respondents or recordkeepers from the collection of information (a total capital/startup costs and operations and maintenance costs). The comments that are submitted will be summarized and included in the CBP request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document CBP is soliciting comments concerning the following information collection:

Title: Entry Summary.

OMB Number: 1651–0022.

Form Number: CBP Form 7501.

Abstract: CBP Form 7501, *Entry Summary,* is used to identify merchandise entering the commerce of the United States, and to document the amount of duty and/or tax paid. CBP Form 7501 is submitted by the importer, or the importer's agent, for each import transaction. The data on this form is used by CBP as a record of the import transaction; to collect the proper duty, taxes, certifications and enforcement information; and to provide data to the U.S. Census Bureau for statistical purposes. Collection of the data on this form is authorized by 19 U.S.C. 1484 and provided for by 19 CFR 142.11 and CFR 141.61. CBP Form 7501 and accompanying instructions can be found at *http://www.cbp.gov/xp/cgov/toolbox/forms/.*

Current Actions: CBP proposes to extend the expiration date of this information collection. The burden hours have been adjusted based on revised estimates by CBP.

Type of Review: Extension (with change).

Affected Public: Businesses.

CBP Form 7501—Formal Entries

Estimated Number of Respondents: 2,450.

Estimated Number of Responses per Respondent: 9,903.

Estimated Total Annual Responses: 24,262,980.

Estimated Time per Response: 20 minutes.

Estimated Total Annual Burden Hours: 8,079,572.

CBP Form 7501—Formal Entries With Softwood Lumber Agreement

Estimated Number of Respondents: 210.

Estimated Number of Responses per Respondent: 1905.

Estimated Total Annual Responses: 400,050.

Estimated Time per Response: 40 minutes.

Estimated Total Annual Burden Hours: 266,433.

CBP Form 7501—Informal Entries

Estimated Number of Respondents: 1,572.

Estimated Number of Responses per Respondent: 2,582.

Estimated Total Annual Responses: 4,059,355.

Estimated Time per Response: 15 minutes.

Estimated Total Annual Burden Hours: 1,014,839.

Dated: November 2, 2011.

Tracey Denning,

Agency Clearance Officer, U.S. Customs and Border Protection.

[FR Doc. 2011–28883 Filed 11–7–11; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

Customs and Border Protection

Agency Information Collection Activities: Foreign Trade Zone Annual Reconciliation Certification and Record Keeping Requirement

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: 30-Day notice and request for comments; Extension of an existing information collection: 1651–0051.

SUMMARY: U.S. Customs and Border Protection (CBP) of the Department of Homeland Security will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act: Foreign Trade Zone Annual Reconciliation Certification and Record Keeping Requirement. This is a proposed extension of an information collection that was previously approved. CBP is proposing that this information collection be extended with no change to the burden hours. This document is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** (76 FR 54780) on September 2, 2011, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.10.

DATES: Written comments should be received on or before December 8, 2011.

ADDRESSES: Interested persons are invited to submit written comments on this proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the OMB Desk Officer for Customs and Border Protection, Department of Homeland Security, and sent via electronic mail to *oira_submission@omb.eop.gov* or faxed to (202) 395–5806.

SUPPLEMENTARY INFORMATION: U.S. Customs and Border Protection (CBP) encourages the general public and affected Federal agencies to submit written comments and suggestions on proposed and/or continuing information collection requests pursuant to the Paperwork Reduction Act (Pub. L.104–13). Your comments should address one of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency/component, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies/components estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collections of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological techniques or other forms of information.

Title: Foreign Trade Zone Annual Reconciliation Certification and Record Keeping Requirement.

OMB Number: 1651–0051.

Form Number: None.

Abstract: In accordance with 19 CFR 146.25 and 146.4, foreign trade zone (FTZ) operators are required to account for zone merchandise admitted, stored, manipulated and removed from FTZs. FTZ operators must prepare a reconciliation report within 90 days after the end of the zone year for a spot check or audit by CBP. In addition, within 10 working days after the annual reconciliation, FTZ operators must submit to the CBP port director a letter signed by the operator certifying that the annual reconciliation has been prepared, is available for CBP review, and is accurate. These requirements are authorized by Foreign Trade Zones Act, as amended (Title 19 U.S.C. 81a).

Current Actions: CBP proposes to extend the expiration date of this information collection with no change to the burden hours or to the information collected.

Type of Review: Extension (without change).

Affected Public: Businesses.

Estimated Number of Respondents: 260.

Estimated Time per Respondent: 45 minutes.

Estimated Total Annual Burden Hours: 195.

If additional information is required contact: Tracey Denning, U.S. Customs and Border Protection, Regulations and Rulings, Office of International Trade, 799 9th Street, NW., 5th Floor, Washington, DC 20229–1177, at (202) 325–0265.

Dated: November 3, 2011.

Tracey Denning,

Agency Clearance Officer, U.S. Customs and Border Protection.

[FR Doc. 2011–28937 Filed 11–7–11; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R9–MB–2011–N113; 91100–3740–GRNT 7C]

Meeting Announcement: North American Wetlands Conservation Council

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of meeting.

SUMMARY: The North American Wetlands Conservation Council will meet to select North American Wetlands Conservation Act grant proposals for recommendation to the Migratory Bird Conservation Commission. This meeting is open to the public, and interested persons may present oral or written statements.

DATES: *Council Meeting:* December 6, 2011, 8:30 a.m. to 4 p.m. For deadlines and directions on registering to attend, submitting written material, and giving an oral presentation, please see ''Public Input'' under **SUPPLEMENTARY INFORMATION.**

ADDRESSES: The meeting will be held at the National Fish and Wildlife Foundation, 1133 15th St. NW., 11th Floor 1000, Washington, DC 20005.

FOR FURTHER INFORMATION CONTACT: Michael Kreger, Acting Council Coordinator, by phone at (703) 358–1784; by email at *dbhc@fws.gov;* or by U.S. mail at U.S. Fish and Wildlife Service, 4401 N. Fairfax Drive, Mail Stop MBSP 4075, Arlington, VA 22203.

SUPPLEMENTARY INFORMATION:

Background

In accordance with the North American Wetlands Conservation Act (Pub. L. 101–233, 103 Stat. 1968, December 13, 1989, as amended; NAWCA), the North American Wetlands Conservation Council (Council)—a State-private-Federal group—meets to consider wetland acquisition, restoration, enhancement, and management projects for recommendation to, and final funding approval by, the Migratory Bird Conservation Commission (Commission).

Project proposal due dates, application instructions, and eligibility requirements are available on the NAWCA Web site at *http://www.fws.gov/birdhabitat/Grants/NAWCA/Standard/US/Overview.shtm.*

Proposals require a minimum of 50 percent non-Federal matching funds.

Meeting

The Council will consider U.S. standard grant proposals at the meeting announced in **DATES.** The Commission will consider the Council's recommendations at its meeting tentatively scheduled for March 7, 2012.

Public Input

If you wish to—	You must contact the Council Coordinator (see **FOR FURTHER INFORMATION CONTACT**) no later than—
Attend the meeting	November 22, 2011.
Submit written information or questions before the meeting for the council to consider during the meeting.	November 22, 2011.
Give an oral presentation during the meeting	November 22, 2011.

Submitting Written Information or Questions

Interested members of the public may submit relevant information or questions for the Council to consider during the public meeting. If you wish to submit a written statement, so that the information may be made available to the Council for their consideration prior to this meeting, you must contact the Council Coordinator by the date above. Written statements must be supplied to the Council Coordinator in both of the following formats: One hard copy with original signature, and one electronic copy via email (acceptable file formats are Adobe Acrobat PDF, MS Word, MS PowerPoint, or rich text file).

Giving an Oral Presentation

Individuals or groups requesting to make an oral presentation at the meeting will be limited to 2 minutes per speaker, with no more than a total of 30 minutes for all speakers. Interested parties should contact the Council Coordinator by the date above, in writing (preferably via email; see **FOR FURTHER INFORMATION CONTACT**), to be placed on the public speaker list for this meeting. Nonregistered public speakers will not be considered during the meeting. Registered speakers who wish to expand upon their oral statements, or those who had wished to speak but could not be accommodated on the agenda, are invited to submit written statements to the Council within 30 days following the meeting.

Meeting Minutes

Summary minutes of the meeting will be maintained by the Council Coordinator at the address under **FOR FURTHER INFORMATION CONTACT**, and posted at *http://www.fws.gov/birdhabitat/Grants/NAWCA/CouncilAct.shtm#CouncilMeet* within 30 days following the meeting. Personal copies may be purchased for the cost of duplication.

Dated: October 31, 2011.

Jerome Ford,

Assistant Director, Migratory Birds.

[FR Doc. 2011–28751 Filed 11–7–11; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLIDT02000.L12200000.MA0000.241A.00]

Notice of Extension of Public Comment Period for a Resource Management Plan (RMP) Amendment and Associated Environmental Assessment for the Castle Rocks and Cedar Fields Areas, Burley Field Office, ID

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Extension.

SUMMARY: The Bureau of Land Management (BLM) published a Notice of Intent to Prepare a RMP Amendment and Associated Environmental Assessment for the Castle Rocks and Cedar Fields Areas in the **Federal Register** on August 23, 2011 [76 FR 52687] initiating the public comment period. In response to multiple requests, the BLM is extending the public comment period for the RMP Amendment and Associated Environmental Assessment for the Castle Rocks and Cedar Fields Areas until December 16, 2011.

DATES: The comment period is extended to December 16, 2011.

ADDRESSES: You may submit comments on issues and planning criteria related to Castle Rocks and Cedar Fields Land Use Plan Amendments by any of the following methods:

- *Email: id_burley_fo_@blm.gov.*
- *Fax:* (208) 677–6699, Attention: Dennis Thompson
- *Mail:* 15 East 200 South, Burley, ID 83318

FOR FURTHER INFORMATION CONTACT: For further information and/or to have your name added to our mailing list, contact Dennis Thompson, BLM Outdoor Recreation Planner, telephone (208) 677–6664; address 15 East 200 South, Burley, Idaho 83318; email *dennis_thompson@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: You may submit comments on issues and planning criteria for the Plan Amendments in writing to the BLM using one of the methods listed in the **ADDRESSES** section above. To be most helpful, you should submit comments by December 16, 2011.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority: 40 CFR 1501.7, 43 CFR 1610.5–5

Michael Courtney,

Field Manager.

[FR Doc. 2011–28854 Filed 11–7–11; 8:45 am]

BILLING CODE 4310–GG–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLWY920—L51010000—LVRWK11K1410]

Notice of Intent to Prepare an Environmental Impact Statement for the Quaking Aspen Wind Energy Project, Wyoming, and Notice of Segregation of Public Lands

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of intent.

SUMMARY: In accordance with the National Environmental Policy Act of 1969, as amended (NEPA), and the Federal Land Policy and Management Act of 1976, as amended, the Bureau of Land Management (BLM) Rock Springs Field Office, Rock Springs, Wyoming, intends to prepare an Environmental Impact Statement (EIS) for the Quaking Aspen Wind Energy Project (Quaking Aspen).

By this notice, BLM is: (1) Announcing the beginning of the scoping process to solicit public comments and identify potential issues related to the Quaking Aspen EIS; and (2) Segregating 3,698.35 acres of BLM-administered lands located within the Quaking Aspen right-of-way (ROW) application area from appropriation under the public land laws, including the 1872 Mining Law, but not the Mineral Leasing or Mineral Material Acts, for a period of 2 years from the date of publication of this notice.

DATES: This notice initiates: (1) The public scoping process for the EIS; and (2) The 2-year segregation period for the public lands within the Quaking Aspen ROW application area, effective as of November 8, 2011. The segregation will terminate as described below (see **SUPPLEMENTARY INFORMATION**'' section). Comments on potential issues may be submitted in writing until December 8, 2011. The date(s) and location(s) of any scoping meetings will be announced at least 15 days in advance through local media outlets and through the BLM Rock Springs Field Office's Web site at: *http://www.blm.gov/wy/en/info/NEPA/documents/rsfo/quaking-aspen.html.* In order to be considered in the Draft EIS, all comments must be received prior to the close of the scoping period or 15 days after the last public meeting, whichever is later. We will provide additional opportunities for public participation upon publication of the Draft EIS.

ADDRESSES: You may submit comments on potential issues to be addressed in the Quaking Aspen EIS by any of the following methods:

- *Email:* Quaking_Aspen_Wind_Energy_WY@blm.gov; or
- *Mail:* 280 Highway 191 N., Rock Springs, WY 82901.

Documents pertinent to this proposal may be examined at the BLM Rock Springs Field Office.

FOR FURTHER INFORMATION CONTACT: Lorraine Keith, Project Manager, telephone: (307) 352–0256; address: BLM, 280 Highway 191 N., Rock Springs, WY 82901; email: BLM_WY_QuakingAspen_Wind@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: This document provides notice that the BLM Rock Springs Field Office, Rock Springs, Wyoming, intends to prepare an EIS for the Quaking Aspen project; announces the beginning of the scoping process for that EIS; and seeks public input on potential issues to be addressed in the EIS. The project area is located in Sweetwater County, Wyoming, and encompasses approximately 3,698 acres of public, 3,865 acres of private, and 630 acres of state lands. The project will include up to 100 1.5 megawatt (MW) to 3 MW wind turbine generators with a nameplate capacity of 250 MW of power, and a 230 kV transmission line. The purpose of the public scoping process is to determine relevant potential issues that will influence the scope of the environmental analysis, including alternatives, and to guide the NEPA process. Preliminary potential issues have been identified by BLM personnel; Federal, State, and local agencies; and other stakeholders. The potential issues include: Wind energy development; management of site-type ROWs for renewable energy; visual resource management; fluid minerals, coal and other minerals; livestock grazing; wild horses; wildlife, particularly birds, bats, and pronghorn antelope; cultural and historical resources; and recreation. The BLM will ensure compliance with all applicable local, State, tribal, and Federal air quality laws, statutes, regulations, standards, and implementation plans, and will include an analysis of climate change.

You may submit comments with potential issues to be addressed in the EIS in writing to the BLM at any public scoping meeting, or you may submit them to the BLM using one of the methods listed in the **ADDRESSES** section above. To be most helpful, you should submit comments before the close of the comment period or within 15 days after the last public meeting, whichever is later. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment, including your personal identifying information, may be made publicly available at any time. While you may ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so. The minutes and list of attendees for each scoping meeting will be available to the public and open for 30 days after the meeting to any participant who wishes to clarify the views he or she expressed. The BLM will evaluate potential issues to be addressed in the EIS, and will place them into one of three categories:

1. Potential issues to be resolved in the EIS;
2. Potential issues to be resolved through policy or administrative action; or
3. Potential issues beyond the scope of this EIS.

The BLM will provide an explanation in the Draft EIS as to why an issue was placed in category two or three. The public is also encouraged to help identify any management questions and concerns that should be addressed in the EIS. The BLM will work collaboratively with interested parties to identify the management decisions that are best suited to local, regional, and national needs and concerns.

The BLM will use an interdisciplinary approach to develop the EIS in order to consider the variety of resource issues and concerns identified. Specialists with expertise in the following disciplines will be involved in the NEPA process: rangeland management, air quality, minerals and geology, botany, outdoor recreation, archaeology, paleontology, wildlife and fisheries, lands and realty, hydrology, soils, sociology and economics, and wildland fire.

The BLM will use and coordinate the NEPA commenting process to satisfy the public involvement process pursuant to Section 106 of the National Historic Preservation Act (NHPA) (16 U.S.C. 470f) as provided for in 36 CFR 800.2(d)(3). Native American tribal consultations will be conducted in accordance with policy, and tribal concerns will be given due consideration, including impacts on Indian trust assets. Federal, State, Tribal, and local agencies, along with other stakeholders that may be interested in or affected by the BLM's decision on this project, are invited to participate in the scoping process and, if eligible, may request or be requested by the BLM to participate as a cooperating agency.

In connection with the Quaking Aspen ROW application, public lands within the Quaking Aspen project area are segregated from appropriation under

the public land laws, including the Mining law, under the authority contained in 43 CFR 2091.3– 1(e) and 43 CFR 2804.25(e) for a period of 2 years, in order to process the ROW application filed on the described lands. This 2-year segregation period will commence upon publication of this **Federal Register** notice. It has been determined that this segregation is necessary for the orderly administration of the public lands. The temporary segregation period will terminate and the lands will automatically re-open to appropriation under the public land laws, including the mining laws, if one of the following events occurs: (1) Upon the BLM's issuance of a decision regarding whether to issue a ROW authorization for the wind energy generation proposal; (2) upon publication in the **Federal Register** of a notice of termination of the segregation; or (3) without further administrative action at the end of the segregation period provided for in the **Federal Register** notice initiating the segregation, whichever occurs first. Any segregation made under this authority would be effective only for a period of up to 2 years.

In accordance with 43 CFR 2091.3–1(e) and 2804.25(e), the following described public lands within the Quaking Aspen project area are hereby segregated for a period of up to 2 years, subject to valid existing rights, from all forms of appropriation under the public land laws, including location and entry under the United States mining laws, but not from leasing under the mineral leasing laws or disposal under the mineral material laws:

Sixth Principal Meridian, Wyoming
T. 16 N., R. 103 W.,
Sec. 6, lots 8 through 11, inclusive, E½SW¼, and SE¼;
Sec. 8; and
Sec. 18, lots 5 through 7, inclusive, NE¼, E½NW¼, NE¼SW¼, and N½SE¼.
T. 17 N., R. 103 W.,
Sec. 28, N½SW¼ and S½S½;
Sec. 30, lots 1 through 4, inclusive, NE¼NE¼, W½NE¼, E½NW¼, and SE¼SW¼, S½SE¼; and
Sec. 32.
T. 16 N., R. 104 W.,
Sec. 2, lots 5 through 7, inclusive, N½SE¼, and SE¼SE¼; and
Sec. 12, W½NE¼, E½NW¼, NW¼NW¼, NE¼SW¼, and NW¼SE¼.
T. 17 N., R. 104 W.,
Sec. 26, SE¼NE¼, S½S½, and NE¼SE¼.

The described Federal lands, aggregate to approximately 3,698.35 acres, according to the official plats of the surveys of the said lands, on file with the BLM.

Authority: 40 CFR 1501.7 and 43 CFR 1610.2

Mary E. Trautner,
Acting State Director, Wyoming.

[FR Doc. 2011–28852 Filed 11–7–11; 8:45 am]

BILLING CODE 4310–22–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLMT–06000–01–L10200000–PG0000]

Notice of Public Meeting; Central Montana Resource Advisory Council

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act and the Federal Advisory Committee Act of 1972, the U.S. Department of the Interior, Bureau of Land Management (BLM) Central Montana Resource Advisory Council (RAC) will meet as indicated below.

DATES: The meeting will be held December 6 and 7, 2011. The December 6 meeting will begin at 10 a.m. with a 30-minute public comment period and will adjourn at 5 p.m. The December 7 meeting will begin at 8 a.m. with a 30-minute public comment period and will adjourn at 3 p.m.

ADDRESSES: The meetings will be in the Bureau of Land Management's Central Montana District Office, at 920 NE Main Street, in Lewistown, MT.

SUPPLEMENTARY INFORMATION: This 15-member council advises the Secretary of the Interior on a variety of management issues associated with public land management in Montana. During these meetings the council will participate in/discuss/act upon these topics/activities: RAC charter review/orientation, RAC Roundtable, Associate/State Director's vision, Gilmore cabin rental proposal, District managers' updates, RAC 2012 work plan, Category 1 presentation, recreation statistics, national landscape conservation, open discussion; and administrative details. All RAC meetings are open to the public. The public may present written comments to the RAC. Each formal RAC meeting will also have time allocated for hearing public comments. Depending on the number of persons wishing to comment and time available, the time for individual oral comments may be limited.

FOR FURTHER INFORMATON CONTACT: Gary L. ''Stan'' Benes, Lewistown District Manager, Lewistown Field Office, 920 NE Main, Lewistown, MT 59457, (406) 538–1900, *gary_benes@blm.gov.* Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–(800) 677–8339 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.

Cynthia Staszak,
Acting State Director.

[FR Doc. 2011–28860 Filed 11–7–11; 8:45 am]

BILLING CODE 4310–DN–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLCOF02000 L71220000.EA0000 LVTFC09C6050]

Notice of Availability of the Record of Decision for the Over The River ™ Art Project, Colorado

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of availability.

SUMMARY: In accordance with the National Environmental Policy Act of 1969 (NEPA), as amended, and the Federal Land Policy and Management Act of 1976 (FLPMA), as amended, the Bureau of Land Management (BLM) announces the availability of its Record of Decision (ROD) to issue a land-use permit authorizing the construction, display, and removal of the proposed *Over The River*™ Art Project (*OTR*). The ROD is effective immediately upon publication of this notice.

ADDRESSES: Copies of the ROD are available for public inspection at the BLM Royal Gorge Field Office, 3028 East Main Street, Cañon City, CO 81212; the BLM Colorado State Office, 2850 Youngfield St., Lakewood, CO 80215; Cañon City Public Library, 516 Macon Ave., Cañon City, CO 81212; Salida Regional Library, 405 E. St., Salida, Colorado 81201; Arkansas Headwaters Recreation Area office, 307 West Sackett Ave., Salida, CO 81201; Denver Public Library, 10 W. Fourteenth Ave. Parkway, Denver, Colorado 80204; and the Cotopaxi Store, 20204 U.S. Highway 50, Cotopaxi, Colorado 81223. Interested persons may also review the ROD at the following Web site: *http://www.blm.gov/co/st/en/fo/rgfo/planning/otr.html.*

FOR FURTHER INFORMATION CONTACT: Mr. Vincent Hooper, *OTR* Project Manager, at the Royal Gorge Field Office (see **ADDRESSES** section above); telephone (719) 269–8555. Persons who use a

telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at (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 *OTR* Corporation, formed by the artists Christo and Jeanne-Claude, proposes to install a work of art, titled *Over The River*™, on Federal, state and private lands adjacent to the Arkansas River between the cities of Salida and Cañon City in Colorado. Following an estimated two-year construction period, the exhibit is proposed for a two-week display and viewing period in early August 2014. The Notice of Realty Action for OTR Corporation land use permit application was published on October 31, 2008 (73 FR 64981). The Notice of Availability for the project's Final Environmental Impact Statement was published on July 29, 2011 (76 FR 45614).

The proposed art exhibit involves the installation of approximately 900 porous, semi-transparent fabric panels, which would be suspended eight to 25 feet above the water for a total distance of approximately 5.9 miles at eight locations along the 42.4 mile stretch of the Arkansas River between Salida and Canon City. The fabric panels would be supported by approximately 1,270 steel cables and a series of steel anchor transition frames. More than 9,000 steel anchors would be drilled into the banks along the Arkansas River to support the panels. At the end of the two-week exhibition period, the fabric panels, system of support cables, anchors and other above-ground materials would be removed over an estimated three-month period. Below ground materials will not be removed. The OTR Corp. will be responsible for restoring the river corridor according to the standards, conditions and mitigation measures imposed by the operator permitting and approval authorities, including the BLM.

More than 300,000 people are expected to visit the Arkansas River canyon during the two-week exhibition period. The art exhibit is a no-fee visitor event. As approved, the project will be located primarily on Federal lands administered by the BLM Royal Gorge Field Office, but would also be located on lands owned or managed by the Colorado State Land Board (SLB), Union Pacific Railroad, and private landowners, and lands owned or cooperatively managed by Colorado Parks and Wildlife in the Arkansas Headwaters Recreation Area. The Colorado Department of Transportation and Colorado State Patrol have jurisdiction for activities along U.S. Highway 50. The majority of the project area is within Fremont County; however, a small portion at the western end of the project is within Chaffee County. Approximately 80 percent of the area in the proposed project would be located in the Arkansas Canyonlands Area of Critical Environmental Concern, a BLM-designated area that is managed to protect and enhance recreation, scenic, historic, cultural and wildlife values.

The Final Environmental Impact Statement identified seven alternatives (including a no action alternative) that vary by panel length, transportation, visitor management, and timing considerations from which the preferred alternative was selected. The preferred alternative was identified in the Final EIS published on July 29, 2011. The ROD sets forth the Front Range District Manager's decision to authorize a land-use permit for construction, display, and removal of 5.9 total miles of fabric panel at eight locations along the Arkansas River between Salida and Canon City, Colorado for a two-week display period in early August 2014. Included in this authorization are a variety of terms and conditions, which set forth mitigation and monitoring requirements for the protection of Federal resource values, lands and habitats.

The ROD was finalized based on multiple opportunities for public participation through scoping and later public comment throughout the EIS process. The BLM sought participation from the public; 16 tribes; and local, state and Federal agencies while developing the ROD. Cooperating agencies on the EIS included the Colorado Department of Natural Resources (Colorado Parks and Wildlife –formally known as the Division of Wildlife and the Colorado State Parks), SLB, Colorado State Patrol, Colorado Department of Transportation, and Fremont and Chaffee counties.

Prior to the BLM issuing a notice to proceed under the land use permit, OTR Corp. will have to obtain additional permits and authorizations from other state and local agencies. This decision is in compliance with the requirements of NEPA, FLPMA and other applicable laws, regulations, and resource management plans.

The ROD constitutes the BLM's final decision regarding the land-use permit application for the proposed *OTR* Art Project. The ROD contains implementation-level decisions that are appealable pursuant to 43 CFR Part 4. Any party adversely affected by the BLM's decision may appeal the decision to the Interior Board of Land Appeals pursuant to 43 CFR Part 4, Subpart E. The appeal should state the specific decisions in the ROD that are being appealed. Appeals, as described in the regulation, must be filed by December 8, 2011.

Please consult the appropriate regulations for further information.

Authority: 40 CFR 1506.6 and 1506.10.

Helen M. Hankins,

State Director.

[FR Doc. 2011–28511 Filed 11–7–11; 8:45 am]

BILLING CODE 4310–JB–P

DEPARTMENT OF THE INTERIOR

National Park Service

[2253–665]

Native American Graves Protection and Repatriation Review Committee: Meeting

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is hereby given in accordance with the Federal Advisory Committee Act, 5 U.S.C. Appendix (1988), of a meeting of the Native American Graves Protection and Repatriation Review Committee (Review Committee). The Review Committee will meet on May 9–10, 2012, in the Ballroom of the La Fonda on the Plaza hotel, 100 East San Francisco Street, Santa Fe, NM 87501. This meeting will be open to the public.

The agenda for this meeting will include the appointment of the subcommittee to draft the Review Committee's Report to the Congress for 2012, and discussion of the scope of the Report; and National NAGPRA Program reports. In addition, the agenda may include requests to the Review Committee for a recommendation to the Secretary of the Interior, as required by law, in order to effect the agreed-upon disposition of Native American human remains determined to be culturally unidentifiable; presentations by Indian tribes, Native Hawaiian organizations, museums, Federal agencies, and the public; requests to the Review Committee, pursuant to 25 U.S.C. 3006 (c)(3), for review and findings of fact related to the identity or cultural affiliation of human remains or other cultural items, or the return of such items; and the hearing of disputes among parties convened by the Review Committee pursuant to 25 U.S.C. 3006

(c)(4). The agenda and materials for this meeting will be posted on or before April 20, 2012, at *http://www.nps.gov/nagpra.*

The Review Committee is soliciting presentations by Indian tribes, Native Hawaiian organizations, museums, and Federal agencies on the following two topics: (1) The progress made, and any barriers encountered, in implementing NAGPRA and (2) the outcomes of disputes that have come before the Review Committee pursuant to 25 U.S.C. 3006 (c)(4). The Review Committee also will consider other presentations by Indian tribes, Native Hawaiian organizations, museums, Federal agencies, and the public. A presentation request must, at minimum, include an abstract of the presentation and contact information for the presenter(s). Presentation requests must be received by March 2, 2012.

The Review Committee will consider requests for a recommendation to the Secretary of the Interior, as required by law, in order to effect the agreed-upon disposition of Native American human remains determined to be culturally unidentifiable (CUI). A CUI disposition request must include the appropriate, completed form posted on the National NAGPRA Program Web site and, as applicable, the ancillary materials noted on the form. To access and download the appropriate form—either the form for CUI with a ''tribal land'' or ''aboriginal land'' provenience or the form for CUI without a ''tribal land'' or ''aboriginal land'' provenience—go to *http://www.nps.gov/nagpra,* and then click on ''Request for CUI Disposition Form.'' CUI disposition requests must be received by February 24, 2012.

The Review Committee will consider requests, pursuant to 25 U.S.C. 3006 (c)(3), for review and findings of fact related to the identity or cultural affiliation of human remains or other cultural items, or the return of such items, where consensus among affected parties is unclear or uncertain. A request for findings of fact must be accompanied by the completed form posted on the National NAGPRA Program Web site and, as applicable, the ancillary materials noted on the form. To access and download the form, go to *http://www.nps.gov/nagpra,* and then click on ''Request for Findings of Fact (Not a Dispute) Form.'' Requests for findings of fact must be received by January 27, 2012.

The Review Committee will consider requests, pursuant to 25 U.S.C. 3006 (c)(4), to convene parties and facilitate a dispute, where consensus clearly has not been reached among affected parties regarding the identity or cultural affiliation of human remains or other cultural items, or the return of such items. A request to convene parties and facilitate a dispute must be accompanied by the completed form posted on the National NAGPRA Program Web site and, as applicable, the ancillary materials noted on the form. To access and download the form, go to *http://www.nps.gov/nagpra,* and then click on ''Request to Convene Parties and Facilitate a Dispute Form.'' Requests to convene parties and facilitate a dispute must be received by January 9, 2012.

Submissions may be made in one of three ways:

1. Electronically, as an attachment to a message (preferred for submissions of 10 pages or less). Electronic submissions are to be sent to: *David_Tarler@nps.gov.*

2. By mail, on a single compact disc (preferred for submissions of more than 10 pages). Mailed submissions are to be sent to: Designated Federal Officer, NAGPRA Review Committee, National Park Service, National NAGPRA Program, 1201 Eye Street NW., 8th Floor (2253), Washington, DC 20005.

3. By mail, in hard copy.

Such items are subject to posting on the National NAGPRA Program Web site prior to the meeting. Items submitted at the meeting are subject to posting after the meeting.

Information about NAGPRA, the Review Committee, and Review Committee meetings is available on the National NAGPRA Program Web site, at *http://www.nps.gov/nagpra.* For the Review Committee's meeting procedures, click on ''Review Committee,'' then click on ''Procedures.'' Meeting minutes may be accessed by going to the Web site; then clicking on ''Review Committee;'' and then clicking on ''Meeting Minutes.'' Approximately fourteen weeks after each Review Committee meeting, the meeting transcript is posted for a limited time on the National NAGPRA Program Web site.

The Review Committee was established in Section 8 of the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA), 25 U.S.C. 3006. Review Committee members are appointed by the Secretary of the Interior. The Review Committee is responsible for monitoring the NAGPRA inventory and identification process; reviewing and making findings related to the identity or cultural affiliation of cultural items, or the return of such items; facilitating the resolution of disputes; compiling an inventory of culturally unidentifiable human remains that are in the possession or control of each Federal agency and museum, and recommending specific actions for developing a process for disposition of such human remains; consulting with Indian tribes and Native Hawaiian organizations and museums on matters affecting such tribes or organizations lying within the scope of work of the Committee; consulting with the Secretary of the Interior on the development of regulations to carry out NAGPRA; and making recommendations regarding future care of repatriated cultural items. The Review Committee's work is carried out during the course of meetings that are open to the public.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: November 3, 2011.

Sherry Hutt,

Designated Federal Officer, Native American Graves Protection and Repatriation Review Committee.

[FR Doc. 2011–28948 Filed 11–7–11; 8:45 am]

BILLING CODE P

INTERNATIONAL BOUNDARY AND WATER COMMISSION, UNITED STATES AND MEXICO

Notice of Availability of the Final Supplemental Environmental Assessment and Finding of No Significant Impact for Improvements to the Mission Levee Protective System in Hidalgo County, TX

AGENCY: United States Section, International Boundary and Water Commission, United States and Mexico (USIBWC).

ACTION: Notice of Availability of the Final Supplemental Environmental Assessment (SEA) and Finding of No Significant Impact (FONSI).

SUMMARY: Pursuant to Section 102(2)(c) of the National Environmental Policy Act (NEPA) of 1969, the Council on Environmental Quality Final Regulations (40 CFR Parts 1500 through 1508), and the United States Section's Operational Procedures for Implementing Section 102 of NEPA, published in the **Federal Register** September 2, 1981 (46 FR 44083); the USIBWC hereby gives notice of availability of the Final Supplemental

Environmental Assessment and FONSI for Improvements to the Mission Levee Protective System located in Hidalgo County, Texas is available. A notice of finding of no significant impact dated April 6, 2011, provided a thirty (30) day comment period before making the finding final. The Notice was published in the **Federal Register** on April 6, 2011 (**Federal Register** Notice, Vol. 76, No. 66, Page 19124).

FOR FURTHER INFORMATION CONTACT: Daniel Borunda, Natural Resources Specialist, Environmental Management Division, United States Section, International Boundary and Water Commission; 4171 N. Mesa, C–100; El Paso, Texas 79902. *Telephone:* (915) 832–4767; *email: Daniel.Borunda@ibwc.gov.*

Availability: Electronic copies of the Final EA and FONSI are available from the USIBWC Home Page at *http://www.ibwc.state.gov.*

Dated: November 2, 2011.

Steven Fitten,

Legal Counsel.

[FR Doc. 2011–28855 Filed 11–7–11; 8:45 am]

BILLING CODE 4710–01–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–696 (Third Review)]

Pure Magnesium From China

Determination

On the basis of the record [1] developed in the subject five-year review, the United States International Trade Commission (Commission) determines, pursuant to section 751(c) of the Tariff Act of 1930 (19 U.S.C. 1675(c)), that revocation of the antidumping duty order on pure magnesium from China would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.[2]

Background

The Commission instituted this review on June 1, 2011 (76 F.R. 31635) and determined on September 6, 2011 that it would conduct an expedited review (76 F R 60291, October 6, 2011).

The Commission transmitted its determination in this review to the Secretary of Commerce on October 31, 2011. The views of the Commission are contained in USITC Publication 4274 (October 2011), entitled *Pure Magnesium from China: Investigation No. 731–TA–696 (Third Review).*

Issued: November 2, 2011.

By order of the Commission.

James R. Holbein,

Secretary to the Commission.

[FR Doc. 2011–28848 Filed 11–7–11; 8:45 am]

BILLING CODE 7020–02–P

[1] The record is defined in sec. 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR ' 207.2(f)).

[2] Commissioner Dean A. Pinkert did not participate in this review.

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–811]

Certain Integrated Solar Power Systems and Components Thereof: Notice of Institution of Investigation; Institution of Investigation Pursuant to 19 U.S.C. 1337

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on October 3, 2011, under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, on behalf of Westinghouse Solar, Inc. of Campbell, California and Andalay Solar, Inc. of Campbell, California. Supplements to the complaint were filed on October 18, 2011 and October 19, 2011. The complaint alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain integrated solar power systems and components thereof by reason of infringement of certain claims of U.S. Patent No. 7,406,800 (''the '800 patent'') and U.S. Patent No. 7,987,641 (''the '641 patent''). The complaint further alleges that an industry in the United States exists as required by subsection (a)(2) of section 337.

The complainants request that the Commission institute an investigation and, after the investigation, issue an exclusion order and cease and desist orders.

ADDRESSES: The complaint and supplements, except for any confidential information contained therein, are available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Room 112, Washington, DC 20436, telephone (202) 205–2000. Hearing impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at (202) 205–2000. General information concerning the Commission may also be obtained by accessing its internet server at *http://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://www.edis.usitc.gov.*

FOR FURTHER INFORMATION CONTACT: The Office of Unfair Import Investigations, U.S. International Trade Commission, telephone (202) 205–2560.

Authority: The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (2011).

Scope of Investigation: Having considered the complaint, the U.S. International Trade Commission, on November 1, 2011, ORDERED THAT—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain integrated solar power systems and components thereof that infringe one or more of claims 6 and 10 of the '800 patent and claim 1 of the '641 patent, and whether an industry in the United States exists as required by subsection (a)(2) of section 337;

(2) Pursuant to Commission Rule 210.50(b)(1), 19 CFR 210.50(b)(1), the presiding administrative law judge shall take evidence or other information and hear arguments from the parties and other interested persons with respect to the public interest in this investigation, as appropriate, and provide the Commission with findings of fact and a recommended determination on this issue, and the administrative law judge will limit public interest discovery, appropriately, with particular consideration for third parties, and will ensure that such discovery will not delay the investigation or be used improperly;

(3) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainants are:

Westinghouse Solar, Inc., 1475 South Bascom Avenue, Suite 101, Campbell, CA 95008.
Andalay Solar, Inc., 1475 South Bascom Avenue, Suite 101, Campbell, CA 95008.

(b) The respondents are the following entities alleged to be in violation of section 337, and are the parties upon which the complaint is to be served:
Zep Solar, Inc., 161 Mitchelle Boulevard, Suite 104, San Rafael, CA 94903.
Canadian Solar Inc., 650 Riverbend Drive, Suite B, Kitchener, Ontario, Canada N2K 3S2.
Canadian Solar (USA) Inc., 12657 Alcosta Boulevard, Suite 140, San Ramon, CA 94583.

(c) The Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street SW., Suite 401, Washington, DC 20436; and

(4) For the investigation so instituted, the Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

Responses to the complaint and the notice of investigation must be submitted by the named respondents in accordance with section 210.13 of the Commission's Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(d)–(e) and 210.13(a), such responses will be considered by the Commission if received not later than 20 days after the date of service by the Commission of the complaint and the notice of investigation. Extensions of time for submitting responses to the complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter an initial determination and a final determination containing such findings, and may result in the issuance of an exclusion order or a cease and desist order or both directed against the respondent.

Issued: November 2, 2011.

By order of the Commission.

James R. Holbein,

Secretary to the Commission.

[FR Doc. 2011–28849 Filed 11–7–11; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–757]

Certain Game Devices, Components Thereof, and Products Containing the Same; Determination Not To Review An Initial Determination Granting Motion to Terminate Based Upon Withdrawal of the Complaint; Termination of the Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined not to review an initial determination (''ID'') (Order No. 9) of the presiding administrative law judge (''ALJ'') granting a motion by Complainant to terminate the investigation based upon withdrawal of the complaint.

FOR FURTHER INFORMATION CONTACT: Panyin A. Hughes, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–3042. 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 January 28, 2011, based on a complaint filed by Microsoft Corporation of Redmond, Washington (''Microsoft''). 76 FR 5206 (Jan. 28, 2011). The complaint alleged violations of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain game devices, components thereof, and products containing the same by reason of infringement of certain claims of United States Patent No. 7,787,411. The complaint named the following entities as respondents: Datel Design and Development Inc. of Clearwater, Florida; and Datel Design and Development Ltd., Datel Direct Ltd., Datel Holdings Ltd., and Datel Electronics Ltd. all of Staffordshire, United Kingdom (collectively, ''Datel'').

On August 29, 2011, Microsoft filed a motion to terminate the investigation in its entirety based upon withdrawal of the complaint. On August 30, 2011, the Commission investigative attorney filed a response in support of the motion. On September 8, 2011, Respondent Datel filed a response in support of the motion and requested that the ALJ impose certain conditions on Microsoft.

On October 18, 2011, the ALJ issued the subject ID (Order No. 9) terminating the investigation. None of the parties petitioned for review of the ID. The Commission has determined not to review the ID. Accordingly, this investigation is terminated.

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 section 210.42 of the Commission's Rules of Practice and Procedure (19 CFR 210.42).

Issued: November 2, 2011.

By order of the Commission.

James R. Holbein,

Secretary to the Commission.

[FR Doc. 2011–28787 Filed 11–7–11; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under the Clean Air Act

Notice is hereby given that on November 1, 2011, a proposed Consent Decree in *United States* v. *Williams Four Corners, LLC,* Civil Action 1:11–cv–02846, was lodged with the United States District Court for the District of Colorado.

In this action the United States seeks civil penalties and injunctive relief for alleged violations of the Clean Air Act (''CAA''), 42 U.S.C. 7401 *et seq.,* at Four Corner's Ignacio Gas Plant (''Ignacio GP'') and Ute E Compressor Station (''Ute E'') located in La Plata County, Colorado, and situated within the exterior boundaries of the Southern Ute Indian Reservation. County, Utah. Specifically, the United States alleges that Four Corners failed to timely repair four leaks at its Ignacio GP in violation of the New Source Performance Standard at 40 CFR part 60, Subpart KKK, implementing Section 111 of the Clean Air Act (''CAA''), 42 U.S.C. 741, and violated Title V of the CAA and 40

CFR part 71 by failing to apply for a federal operating permit for the Ute E Compressor Station and pay annual emission fees and file related reports. The proposed consent decree would require Four Corners to pay a civil penalty of $50,000, implement an enhanced leak detection and repair program at the Ignacio GP using optical gas imaging, and obtain minor source permit coverage for Ute E under EPA's new Federal Implementation Plan for Indian country that was finalized on July 1, 2011 so that the facility is no longer a ''Part 71 source.''

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 emailed 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. *Williams Four Corners, LLC,* D.J. Ref. No. 90–5–2–1–06938/4.

The consent decree and associated appendices 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 and the associated appendices 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 emailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $7.50 (25 cents per page reproduction cost) payable to the U.S. Treasury or, if by email or fax, forward a check in that amount to the Consent Decree Library at the stated address. All requests for documents should refer to *United States* v. *Williams Four Corners, LLC,* Civil Action Number 1:11–cv–02846, and D.J. Ref. No. 90–5–2–1–06938/4.

Robert Brook,

Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2011–28851 Filed 11–7–11; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms and Explosives

[OMB Number 1140–0022]

Agency Information Collection Activities: Proposed collection; comments requested; Federal Explosives License/Permit (FEL) Renewal Application

ACTION: 30-Day notice.

The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** Volume 76, Number 169, page 54255–54256 on August 31, 2011, allowing for a 60 day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until December 8, 2011. This process is conducted in accordance with 5 CFR 1320.10.

Written comments concerning this information collection should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, *Attn:* DOJ Desk Officer. The best way to ensure your comments are received is to mail them to *oria_submission@omb.eop.gov* or fax them to (202) 395–7285. All comments should reference the 8 digit OMB number for the collection or the title of the collection. If you have questions concerning the collection, please call Christopher Reeves at (304) 616–4419.

Comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Summary of Information Collection

(1) *Type of Information Collection:* Revision of a currently approved collection.

(2) *Title of the Form/Collection:* Federal Explosives License/Permit (FEL) Renewal Application.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form Number: ATF F 5400.14/5400.15, Part III. Bureau of Alcohol, Tobacco, Firearms and Explosives.

(4) *Affected public who will be asked or required to respond:* Primary: Business or other for-profit. Other: Federal Government, State, Local, or Tribal Government.

Need for Collection

The form is used for the renewal of an explosive license or permit. The renewal application is used by ATF to determine that the applicant remains eligible to retain the license or permit .

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* There will be an estimated 2,500 respondents, who will complete the form within approximately 25 minutes.

(6) *An estimate of the total burden (in hours) associated with the collection:* There are an estimated 825 total burden hours associated with this collection.

If additional information is required contact: Jerri Murray, Department Clearance Officer, United States Department of Justice, Policy and Planning Staff, Justice Management Division, Two Constitution Square, Room 2E–508, 145 N Street NE., Washington, DC 20530.

Jerri Murray,

Department Clearance Officer, PRA, United States Department of Justice.

[FR Doc. 2011–28801 Filed 11–7–11; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms, and Explosives

[OMB Number 1140–0019]

Agency Information Collection Activities: Proposed Collection; Comments Requested; Federal Firearms License (FFL) Renewal Application

ACTION: 30-Day notice.

The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** Volume 76, Number 169, page 54255 on August 31, 2011, allowing for a 60 day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until December 8, 2011. This process is conducted in accordance with 5 CFR 1320.10.

Written comments concerning this information collection should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, *Attn:* DOJ Desk Officer. The best way to ensure your comments are received is to email them to *oira_submission@omb.eop.gov* or fax them to (202) 395–7285. All comments should reference the 8 digit OMB number for the collection or the title of the collection. If you have any questions concerning the collection, please call Patricia Power at (304) 616–4608.

Comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Summary of Information Collection

(1) *Type of Information Collection:* Revision of a currently approved collection.

(2) *Title of the Form/Collection:* Federal Firearms License (FFL) RENEWAL Application.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form Number: ATF F 8 (5310.11). Bureau of Alcohol, Tobacco, Firearms and Explosives.

(4) *Affected public who will be asked or required to respond:* Primary: Business or other for-profit. Other: Individuals or households.

Need for Collection

The form is filed by the licensee desiring to renew a Federal firearms license. It is used to identify the applicant, locate the business/collection premises, identify the type of business/collection activity, and determine the eligibility of the applicant.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* There will be an estimated 35,000 respondents, who will complete the form within approximately 25 minutes.

(6) An estimate of the total burden (in hours) associated with the collection: There are an estimated 14,700 total burden hours associated with this collection.

If additional information is required contact: Jerri Murray, Department Clearance Officer, United States Department of Justice, Policy and Planning Staff, Justice Management Division, Two Constitution Square, Room 2E–508, 145 N Street NE., Washington, DC 20530.

Jerri Murray,

Department Clearance Officer, PRA, United States Department of Justice.

[FR Doc. 2011–28802 Filed 11–7–11; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF JUSTICE

Federal Bureau of Investigation

National Instant Criminal Background Check System Section Agency Information Collection Activities: Existing collection, comments requested the Voluntary Appeal File (VAF) Brochure

ACTION: 60-Day Notice of Information Collection Under Review.

The Department of Justice (DOJ) FBI Criminal Justice Information Services (CJIS) Division's National Instant Criminal Background Check System (NICS) Section has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for 60 days until January 9, 2012. This process is conducted in accordance with Title 5, Code of Federal Regulations (CFR), § 1320.10.

If you have comments (especially on the estimated public burden or associated response time), suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Sherry L. Kuneff, Management and Program Analyst, FBI, Criminal Justice Information Services Division, National Instant Criminal Background Check System Section, Module A–3, 1000 Custer Hollow Road, Clarksburg, West Virginia, 26306, or facsimile at (304) 625–7540.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency/component, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's/component's estimate of the burden of the proposed collection of the 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 the use of

appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of this information

(1) *Type of Information Collection:* Approval of an Existing Collection.

(2) *Title of the Form:* Voluntary Appeal File.

(3) *Agency Form Number, if any, and the applicable component of the department sponsoring the collection:*

Form Number: 1110–0043.

Sponsor: Criminal Justice Information Services (CJIS) Division of the FBI, Department of Justice (DOJ).

(4) *Affected Public who will be asked or required to respond, as well as a brief abstract:*

Primary: Any individual requesting entry into the Voluntary Appeal File (VAF) of the FBI Criminal Justice Information Services (CJIS) Division's National Instant Criminal Background Check System (NICS) Section.

Brief Abstract: Under 28 CFR, § 25.9(b)(1), (2), and (3), the NICS must destroy all identifying information on allowed transactions within 24 hours of the Federal Firearms Licensee (FFL) being notified of the transaction's proceed status. If a potential purchaser is delayed or denied a firearm then successfully appeals the decision, the NICS Section cannot retain a record of the overturned appeal or the supporting documentation. If the record cannot be updated, the purchaser continues to be delayed or denied, and if that individual appeals the decision, the documentation must be resubmitted for every subsequent purchase. As such, the Voluntary Appeal File (VAF) was mandated to be created and maintained by the NICS Section for the purpose of preventing future lengthy delays or erroneous denials of a firearm transfer. An individual wishing to request entry into the VAF may obtain a VAF brochure from the NICS Section, an FFL, or the NICS Section Web site: *http://www.fbi.gov/about-us/cjis/nics/nics.*

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:*

It is estimated that annually 7,542 individuals will request entry into the VAF. It takes an average of 5 minutes to read and complete all areas of the application, an estimated 2 hours for the process of fingerprinting including travel, and 25 minutes to mail the form for a total of 2.5 hours estimated burden to the respondent.

(6) *An estimate of the total public burden (in hours) associated with the collection:*

The number of persons requesting entry into the VAF is estimated to be 7,542 individuals annually. The time it takes each individual to complete the process is 2.5 hours. The total public burden hours are 7,542 respondents multiplied by 2.5 hours which equals 18,855 total burden hours.

If additional information is required, contact: Jerri Murray, Department Clearance Officer, United States Department of Justice, Policy and Planning Staff, Justice Management Division, Two Constitution Square, 145 N Street, NE., Room 2E–508, Washington, DC 20530.

Jerri Murray,

Department Clearance Officer, PRA, United States Department of Justice.

[FR Doc. 2011–28803 Filed 11–7–11; 8:45 am]

BILLING CODE P

LIBRARY OF CONGRESS

Copyright Office

[Docket No. 2011–1]

Cable Statutory License: Specialty Station List

AGENCY: Copyright Office, Library of Congress.

ACTION: Notice of objections and specialty station filings.

SUMMARY: Periodically, the Copyright Office (''Office'') seeks to update its list of specialty stations related to the use of the cable compulsory license. In response to the publication of an initial list of specialty stations for this purpose in April of this year, the Office received objections filed by the Motion Picture Association of America to the identification of certain stations as being entitled to specialty station status in accordance with the Federal Communications Commission's (''FCC'') definition of specialty station in effect on June 24, 1981. Consequently, before compiling the final list, the Office is providing an opportunity for response to the filed objections. The Office is also publishing for comment a new list of television stations reported in filed affidavits received after publication of the initial list in which the owner or licensee of the television station attests that the station qualifies as a specialty station under the FCC's former rules.

DATES: Objections to the newly designated specialty stations must be filed no later than December 8, 2011. Responses to any objections filed to the newly designated specialty stations must be received no later than January 9, 2012. Responses to any of the MPAA objections noted herein must also be filed with the Office no later than January 9, 2012.

ADDRESSES: All comments and reply comments shall be submitted electronically. A comment page containing a comment form is posted on the Copyright Office Web site at *http://www.copyright.gov/docs/ssl.* The Web site interface requires submitters to complete a form specifying name and organization, as applicable, and to upload comments as an attachment via a browser button. To meet accessibility standards, all objections, comments, or other filings must be uploaded in a single file in either the Adobe Portable Document File (PDF) format that contains searchable, accessible text (not an image); Microsoft Word; WordPerfect; Rich Text Format (RTF); or ASCII text file format (not a scanned document). The maximum file size is 6 megabytes (MB). The name of the submitter and organization should appear on both the form and the face of the filings. All objections, comments, and other filings will be posted publicly on the Copyright Office Web site exactly as they are received, along with names and organizations. If electronic submission of objections, comments, or other filings is not feasible, please contact Tracie Coleman of the Licensing Division at (202)–707–8150 for special instructions.

FOR FURTHER INFORMATION CONTACT: Ben Golant, Assistant General Counsel, and Tanya M. Sandros, Deputy General Counsel, Copyright GC/I&R, P.O. Box 70400, Southwest Station, Washington, DC 20024. Telephone: (202) 707–8380. Telefax: (202) 707–8366.

SUPPLEMENTARY INFORMATION: Under the cable statutory license, a cable operator may retransmit the signal of a distant television station identified as a specialty station at the base rate rather than at the higher 3.75% rate that is incurred for the carriage of a non-permitted signal. 37 CFR 256.2(c). Specialty station status is determined by reference to the former regulations of the FCC which defined a specialty station as ''a commercial television broadcast station that generally carries foreign-language, religious, and/or automated programming in one-third of the hours of an average broadcast week and one-third of the weekly prime-time hours.'' 47 CFR 76.5(kk) (1981). The specialty station designation was part of a complex regulatory structure which governed the carriage of distant network station signals in the 1970s. However,

the FCC no longer determines whether a station qualifies as a specialty station. It repealed its distant signal carriage rules in 1981 and has not reviewed its specialty station policy since that time. Nevertheless, the Office still keeps an active list because it is relevant to the calculation of royalties under Section 111.

The Office published its first specialty station list in 1990 under a procedure which allowed the owner of the station to file an affidavit with the Office attesting to the fact that the station's programming comports with the 1981 FCC definition, and hence, qualifies it as a specialty station. 55 FR 40021 (October 1, 1990). The Office noted at that time that it would periodically update the list.

Accordingly, on January 28, 2011, the Office published a Notice in the **Federal Register** asking the owner, or a valid agent of the owner, to file a sworn affidavit stating that the station's programming satisfies the FCC's former requirements for specialty station status. 76 FR 5213 (January 28, 2011). The Office received affidavits from 63 broadcast stations for which the owner or licensee of the television station had filed the requested affidavit. The Office then published an initial specialty station list in the **Federal Register** on April 22, 2011. 76 FR 22733 (April 22, 2011).

Objections. In the aforementioned Notice, the Office stated that any party objecting to any claim to specialty station status must submit comments with the Office stating his or her objections within thirty days of publication of this Notice in the **Federal Register**. The Motion Picture Association of America, Inc. (''MPAA'') has made such a filing and objected to the inclusion of the following stations for the following reasons:

• Stations offering full days of syndicated programming, including during prime time, cannot be identified as specialty stations:

WBQD–LP, Davenport, IA
WYNA–CA, Albany, NY

• Stations carrying the multicast signals of, and featuring the same programs as, a Public Broadcasting Service affiliate cannot be identified as specialty stations:

K241C–D, Bellingham, WA: translator that carries multicast signals of Public Broadcasting Service affiliate KBTC, Bellingham, WA to Vancouver, BC. K241C–D offers the same programs at the same times that they are broadcast by KBTC.

• Stations offering home shopping programming throughout the day, and during prime time as well as stations solely broadcasting infomercials cannot be identified as specialty stations:

KBCB–TV, Bellingham, WA: Home Shopping Network affiliated station.
KHTV–LP, Los Angeles, CA: Home Shopping Network affiliated station.
WNJJ–LD, Paterson, NJ: broadcasts only infomercials.

• Stations currently licensed and silent cannot be identified as specialty stations:

KDBK–LP, Caliente, CA.
KEBK–LP, Bakersfield, CA.
KFIQ–LP, Lubbock, TX.
KILA–LP, Cherry Valley, CA.
KMRZ–LP, Moreno Valley, CA .
KRMV–LP, Walnut, CA.
KRPE–LP, Banning, CA.
KRVD–LP, Banning, CA.
KSCZ–LP, Greenfield, CA .
KSGO–LP, Chico, CA .
WXOX–LP, Cleveland, OH.

• ABC and Fox affiliates offering syndicated programming throughout the day in English should not be identified as specialty stations:

WPRU–LP, Aguadilla, PR.
WSJX–LP, Aguadilla, PR.
WVXF(TV), Charlotte Amalie, USVI.

• Stations offering a radio programming format should not be identified as specialty stations:

KFMP–LP, Lubbock, TX.
WLFM–LP, Chicago, IL.

• The following Port Jervis, NY licensed stations for which there is no evidence of construction or the type of programming broadcast should not be identified as specialty stations:

W20CM.
W26DB.
W34d1.
W42DQ.
W49DK.
W52DW.
W59EA.

Before compiling a new list of specialty stations, television broadcast stations that have filed affidavits attesting to their specialty station status should have the opportunity to rebut any objections filed to their identification as a specialty station and clarify their status for the purposes expressed herein. On this point, it should be noted that over twenty years ago, the Office implemented policies and procedures concerning notice to the public regarding specialty stations, the point of which was to provide all interested parties with a chance to comment on those stations claiming specialty status. The goal was to establish a set of facts so that cable systems can make an informed decision as to whether copyright owners might continue to contest the carriage of a particular station on a specialty basis. It was the Office's intention at that time that the notice, publication, and objection procedures would give all parties a chance to cooperate in their assessment of the specialty stations on the list. 54 FR 38461, 38464 (September 18, 1989). To that end, the Office contacted the representatives of stations for which it had received written objections and gave them an opportunity to respond. See 56 FR 61056 (November 29, 1991). Today, the Office is requesting written comments in response to the objections received from MPAA, which may be viewed at *http://www.copyright.gov/docs/specialtystations/objections-PS-2011.pdf.*

In addition to this notice, the Office will also contact each of the broadcast stations informing it that an objection has been filed to its representation that it is a specialty station and advising that it may respond to that objection. Responses from the broadcaster must be filed with the Office no later than January 9, 2012. A broadcaster that has determined that its station should not be considered as a specialty station at this time may inform the Office of this fact and the station will not be included on the final list. However, unless a broadcaster asks to be removed from the list of specialty stations, it will be included on the final list with an annotation to denote that an objection had been filed to the station's characterizing itself as a specialty station.

The Office will place in the public file together with the relevant affidavit any objection received and response thereto. With regard to the treatment of contested specialty stations after this proceeding concludes, it is important to note that the Licensing Division examiners will look at these stations in the same way they have done in the past. That is, if a cable operator claims specialty station status for a contested station on the list, the examiner will inform the operator by letter that a particular party objects to the ''specialty characterization.'' *See* 54 FR 38461, 38464 (September 18, 1989). The cable operator then has the opportunity to file an amended Statement of Account and recalculate royalties, if the operator so chooses.

MPAA also contended that the Register has the authority to determine whether a particular station is properly identified as a specialty station. In its objection, MPAA referred to the standards set forth in 17 U.S.C. 411(b)(1) regarding the use of a registration certificate for purposes of filing an infringement suit, noting that the

certificate of registration would not be valid for this purpose if the application contained inaccurate information which, ''if known would have caused the Register of Copyrights to refuse registration.'' MPAA maintained that the same principle should apply in the case of specialty stations where the Office has accurate information to make a final determination as to whether a particular station should be characterized as a specialty station. The Office, however, has not made such determinations in the past and has stated that ''it should not itself verify the specialty station status of particular stations,'' 54 FR 38466 (September 18, 1989), although it has relied on rulings made by the Federal Communications Commission with respect to the retransmission of English-speaking stations in Puerto Rico. *See, e.g.,* letter from Marilyn Kretsinger, Assistant General Counsel, to Christopher Cinnamon on February 14, 1997. Rather, the Office provides periodically an updated annotated list so that ''cable systems can make an informed decision as to whether MPAA or any other party might contest the system's carriage of a particular station on a specialty basis.'' 56 FR 61056 (November 29, 1991). These policies and practices do not support MPAA's contention that the Office can make determinations regarding the specialty status of a particular station. Nevertheless, the Office seeks comment on MPAA's contention that 17 U.S.C. 411(b)(1) provides authority for or is relevant to whether the Office can make a final determination on the classification of a broadcast station as a specialty station.

New Specialty Station Claims. Since the publication of the initial list, the Office has received 24 additional affidavits, attesting to the specialty station status of the 24 identified stations. Because the Office has received a substantial number of late filed affidavits, the Office finds it necessary to seek input from the public regarding the asserted specialty station status of these particular stations. Any interested party may file an objection to these newly listed stations. Such objections are due no later than December 8, 2011 and [a list will be] will be posted on the Office's Web site shortly after that deadline. The Office will also accept responses to these objections. Such responses are due January 9, 2012. After comments or objections are received in response to this Notice, the Office plans to publish a final list of specialty stations that shall be effective January 1, 2012, for the accounting period 2012/1 and thereafter. The Office also notes that while the current practice is to accept late filed affidavits after the publication of the final list, it will be reexamining this practice in an upcoming rulemaking proceeding.

New List of Additional Specialty Stations: Call Letter and Cities of License

KCGI–CA, Cape Girardeau, MO .
KCSO–LD, Sacramento, CA.
W07DP–D35, Harrisburg, PA .
W14DFD–TV14, Elliotsburg, PA .
W16COD–TV16, Middleburg, PA .
W29CO–TV29, Sharon, PA .
W45BT–TV45, Brookville, PA.
W46EJ–D21, Clarksburg, WV.
WAQP, Saginaw, MI .
WBNF–CA, Buffalo, NY .
WDWO–CA, Detroit, MI .
WDYR–CA, Dyersburg, TN.
WINM, Angola, IN.
WKBS–TV47, Altoona, PA.
WMBC–TV, Newton, NJ .
WNYB, Jamestown, NY .
WPCB–TV40, Greensburg, PA.
WRAY–TV, Wilson, NC .
WRLM, Canton, OH .
WTCT–Marion, IL .
WTLJ, Muskegon, MI.
WXLI, Greensboro, NC .
XERV–TV, Reynosa, Tamaulipas, Mexico.
XHAB–TV, Matamoros, Tamaulipas, Mexico.

Dated: November 2, 2011.

Maria A. Pallante,

Register of Copyrights.

[FR Doc. 2011–28939 Filed 11–7–11; 8:45 am]

BILLING CODE 1410–30–P

MILLENNIUM CHALLENGE CORPORATION

[MCC 11–11]

Report on Countries That Are Candidates for Millennium Challenge Account Eligibility in Fiscal Year 2012 and Countries That Would Be Candidates But For Legal Prohibitions

AGENCY: Millennium Challenge Corporation.

ACTION: Notice.

SUMMARY: Section 608(d) of the Millennium Challenge Act of 2003 requires the Millennium Challenge Corporation to publish a report that identifies countries that are ''candidate countries'' for Millennium Challenge Account assistance during FY 2012. The report is set forth in full below and updates the report published September 7, 2011 (76 FR 55419) to reflect the issuance of presidential determinations that waived sanctions with respect to certain countries under Section 110 of the Trafficking Victims Protection Act of 2000 (Pub. L. 106–386), as amended.

Dated: November 2, 2011.

Melvin F. Williams, Jr.,

VP/General Counsel and Corporate Secretary, Millennium Challenge Corporation.

Report on Countries that are Candidates for Millennium Challenge Account Eligibility for Fiscal Year 2012 and Countries that would be Candidates but for Legal Prohibitions

Summary

This report to Congress is provided in accordance with section 608(a) of the Millennium Challenge Act of 2003, as amended, 22 U.S.C. 7701, 7707(a) (the ''Act'').

The Act authorizes the provision of Millennium Challenge Account (MCA) assistance for countries that enter into a Millennium Challenge Compact with the United States to support policies and programs that advance the progress of such countries to achieve lasting economic growth and poverty reduction. The Act requires the Millennium Challenge Corporation (MCC) to take a number of steps in selecting countries with which MCC will seek to enter into a compact, including (a) Determining the countries that will be eligible for MCA assistance for fiscal year 2012 (FY12) based on a country's demonstrated commitment to (i) Just and democratic governance, (ii) economic freedom, and (iii) investments in its people; and (b) considering the opportunity to reduce poverty and generate economic growth in the country. These steps include the submission of reports to the congressional committees specified in the Act and the publication of notices in the **Federal Register** that identify:

The countries that are ''candidate countries'' for MCA assistance for FY12 based on per capita income levels and eligibility to receive assistance under U.S. law, and countries that would be candidate countries but for specified legal prohibitions on assistance (section 608(a) of the Act);

The criteria and methodology that the MCC Board of Directors (Board) will use to measure and evaluate the relative policy performance of the ''candidate countries'' consistent with the requirements of subsections (a) and (b) of section 607 of the Act in order to determine ''MCA eligible countries'' from among the ''candidate countries'' (section 608(b) of the Act); and

The list of countries determined by the Board to be ''MCA eligible countries'' for FY12, identification of such countries with which the Board will seek to enter into compacts, and a justification for such eligibility determination and selection for compact negotiation (section 608(d) of the Act).

This report is the first of three required reports listed above.

Candidate Countries for FY12

The Act requires the identification of all countries that are candidates for MCA assistance for FY12 and the identification of all countries that would be candidate countries but for specified legal prohibitions on assistance. Sections 606(a) and (b) of the Act provide that for FY12 a country shall be a candidate for the MCA if it:

Meets one of the following two income tests:

Has a per capita income equal to or less than the historical ceiling of the International Development Association eligibility for the fiscal year involved (or $1,915 gross national income (GNI) per capita for FY12) (the ''low income category''); or

Is classified as a lower middle income country in the then most recent edition of the World Development Report for Reconstruction and Development published by the International Bank for Reconstruction and Development and has an income greater than the historical ceiling for International Development Association eligibility for the fiscal year involved (or $1,916 to $3,975 GNI per capita for FY12) (the ''lower middle income category''); and

Is not ineligible to receive U.S. economic assistance under part I of the Foreign Assistance Act of 1961, as amended, (the ''Foreign Assistance Act''), by reason of the application of the Foreign Assistance Act or any other provision of law.

Pursuant to section 606(c) of the Act, the Board has identified the following countries as candidate countries under the Act for FY12. In so doing, the Board has anticipated that prohibitions against assistance as applied to countries in the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2010 (Div. F, Pub. L. 111–117) (the ''FY 2010 SFOAA''), will again apply for FY12, even though the Department of State, Foreign Operations, and Related Programs Appropriations Act for FY12 has not yet been enacted and certain findings under other statutes have not yet been made. As noted below, MCC will provide any required updates on subsequent changes in applicable legislation or other circumstances that affect the status of any country as a candidate country for FY12. All section references identified as prohibitions on assistance to a given country are taken from the FY 2010 SFOAA as carried over by the Full-Year Continuing Appropriations Act, 2011 (Div. B, Pub. L. 112–10) unless another statue is identified.

Candidate Countries: Low Income Category

Afghanistan
Bangladesh
Benin
Bolivia
Burkina Faso
Burundi
Cambodia
Cameroon
Central African Republic
Chad
Comoros
Cote D'Ivoire
Dem. Rep. of the Congo
Djibouti
Ethiopia
Gambia, The
Ghana
Guinea
Guinea-Bissau
Haiti
Honduras
India
Kenya
Kyrgyz Republic
Lao PDR
Lesotho
Liberia
Malawi
Mali
Mauritania
Moldova
Mongolia
Mozambique
Nepal
Nicaragua
Niger
Nigeria
Pakistan
Papua New Guinea
Rwanda
Sao Tome and Principe
Senegal
Sierra Leone
Solomon Islands
Somalia
Tajikistan
Tanzania
Timor-Leste
Togo
Uganda
Vietnam
Yemen
Zambia

Candidate Countries: Lower Middle Income Category

Angola
Armenia
Belize
Bhutan
Cape Verde
Congo, Republic of the
Egypt, Arab Republic
El Salvador
Fiji
Georgia
Guatemala
Guyana
Indonesia
Iraq
Kiribati
Kosovo
Marshall Islands
Micronesia
Morocco
Paraguay
Philippines
Samoa
Sri Lanka
Swaziland
Tonga
Turkmenistan
Tuvalu
Ukraine
Vanuatu

Countries that Would be Candidate Countries but for Legal Prohibitions that Prohibit Assistance

Countries that would be considered candidate countries for FY12, but are ineligible to receive United States economic assistance under part I of the Foreign Assistance Act by reason of the application of any provision of the Foreign Assistance Act or any other provision of law are listed below. As noted above, this list is based on legal prohibitions against economic assistance that apply for fiscal year 2011 and that are anticipated to apply again for FY12.

Prohibited Countries: Low Income Category

Burma is subject to numerous restrictions, including but not limited to section 570 of the FY 1997 Foreign Operations, Export Financing, and Related Programs Appropriations Act (Pub. L. 104–208), which prohibits assistance to the government of Burma until it makes progress on improving human rights and implementing democratic government, and due to its status as a major drug-transit or major illicit drug producing country for 2009 (Presidential Determination No. 2009–30 (9/15/2009)).

Eritrea is subject to restrictions due to its status as a Tier III country under the Trafficking Victims Protection Act, as amended, 22 U.S.C. 7101 *et seq.*

Madagascar is subject to section 7008 of the FY 2010 SFOAA, which prohibits assistance to the government of a country whose duly elected head of government is deposed by military coup or decree and also section 7086(c) of the FY 2010 SFOAA regarding budget transparency. It is also subject to restrictions due to its status as a Tier III country under the Trafficking Victims Protection Act, as amended, 22 U.S.C. 7101 *et seq.*

North Korea is subject to numerous restrictions, including section 7007 of the FY 2010 SFOAA which prohibits any direct assistance to the government.

Sudan is subject to numerous restrictions, including but not limited to

section 620A of the Foreign Assistance Act which prohibits assistance to governments supporting international terrorism, section 7012 of the FY 2010 SFOAA and section 620(q) of the Foreign Assistance Act, both of which prohibit assistance to countries in default in payment to the U.S. in certain circumstances, section 7008 of the FY 2010 SFOAA, which prohibits assistance to the government of a country whose duly elected head of government is deposed by military coup or decree, and section 7070(f) of the FY 2010 SFOAA.

Uzbekistan's central government is subject to section 7076(a) of the FY 2009 SFOAA, which is largely incorporated by reference and carried forward by section 7075 of the FY 2010 SFOAA. This restriction states that funds (other than expanded international military education and training funds) may be made available for assistance to the central government of Uzbekistan only if the Secretary of State determines and reports to the Congress that the government is making substantial and continuing progress in meeting its commitments under a framework agreement with the United States.

Zimbabwe is subject to several restrictions, including section 7070(i)(2) of the FY 2010 SFOAA which prohibits assistance (except for macroeconomic growth assistance) to the central government of Zimbabwe, unless the Secretary of State determines and reports to Congress that the rule of law has been restored in Zimbabwe.

Prohibited Countries: Lower Middle Income Category

Syria is subject to numerous restrictions, including but not limited to 620A of the Foreign Assistance Act which prohibits assistance to governments supporting international terrorism, section 7007 of the FY 2010 SFOAA which prohibits direct assistance, and section 7012 of the FY 2010 SFOAA and section 620(q) of the Foreign Assistance Act, both of which prohibit assistance to countries in default in payment to the U.S. in certain circumstances.

The countries identified above as candidate countries, as well as countries that would be considered candidate countries but for the applicability of legal provisions that prohibit U.S. economic assistance, may be the subject of future statutory restrictions or determinations, or changed country circumstances, that affect their legal eligibility for assistance under part I of the Foreign Assistance Act by reason of application of the Foreign Assistance Act or any other provision of law for FY12. MCC will include any required updates on such statutory eligibility that affect countries' identification as candidate countries for FY12, at such time as it publishes the notices required by sections 608(b) and 608(d) of the Act or at other appropriate times. Any such updates with regard to the eligibility or ineligibility of particular countries identified in this report will not affect the date on which the Board is authorized to determine eligible countries from among candidate countries which, in accordance with section 608(a) of the Act, shall be no sooner than 90 days from the date of publication of this report.

[FR Doc. 2011–28862 Filed 11–7–11; 8:45 am]

BILLING CODE 9211–03–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice 11–113]

NASA Advisory Council Science Committee Planetary Science Subcommittee; Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of Meeting Postponement.

SUMMARY: In accordance with the Federal Advisory Committee Act, Public Law 92–463, as amended, the National Aeronautics and Space Administration (NASA) announces that the meeting of the Planetary Science Subcommittee of the NASA Advisory Council originally scheduled for November 2–3, 2011, at NASA Headquarters, has been postponed due to the recent unexpected and tragic loss of Dr. Ronald Greeley, Subcommittee Chair. A notice was published in the **Federal Register** at 76 FR 64387 on October 18, 2011 announcing the meeting. NASA regrets any inconvenience due to these extraordinary circumstances. The meeting will be rescheduled for a later date, and notice of the new date will be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Ms. Marian Norris, Science Mission Directorate, NASA Headquarters, Washington, DC 20546, at *mnorris@nasa.gov* or by telephone at (202) 358–4452.

November 1, 2011.

P. Diane Rausch,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 2011–28938 Filed 11–7–11; 8:45 am]

BILLING CODE P

NATIONAL SCIENCE FOUNDATION

Notice of Permits Issued Under the Antarctic Conservation Act of 1978

AGENCY: National Science Foundation.

ACTION: Notice of permit issued under the Antarctic Conservation of 1978, Public Law 95–541.

SUMMARY: The National Science Foundation (NSF) is required to publish notice of permits issued under the Antarctic Conservation Act of 1978. This is the required notice.

FOR FURTHER INFORMATION CONTACT: Nadene G. Kennedy, Permit Office, Office of Polar Programs, Rm. 755, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230.

SUPPLEMENTARY INFORMATION: On October 3, 2011, the National Science Foundation published a notice in the **Federal Register** of a permit application received. The permit was issued on November 2, 2011 to:

Mahlon C. Kennicutt, II, Permit No. 2012–010.

Nadene G. Kennedy,

Permit Officer.

[FR Doc. 2011–28804 Filed 11–7–11; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2011–0256]

Aging Management of Stainless Steel Structures and Components in Treated Borated Water

AGENCY: Nuclear Regulatory Commission.

ACTION: Draft interim staff guidance; request for public comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) requests public comment on Draft License Renewal Interim Staff Guidance (LR–ISG), LR–ISG–2011–01, ''Aging Management of Stainless Steel Structures and Components in Treated Borated Water.'' This LR–ISG revises the guidance in the Standard Review Plan for Review of License Renewal Applications for Nuclear Power Plants (SRP–LR) and Generic Aging Lessons Learned (GALL) Report for the aging management of stainless steel structures and components exposed to treated borated water.

DATES: Submit comments by December 8, 2011. Comments received after this date will be considered, if it is practical to do so, but the NRC staff is able to

ensure consideration only for comments received on or before this date.

ADDRESSES: Please include Docket ID NRC–2011–0256 in the subject line of your comments. For additional instructions on submitting comments and instructions on accessing documents related to this action, see ''Submitting Comments and Accessing Information'' in the **SUPPLEMENTARY INFORMATION** section of this document. You may submit comments by one of the following methods:

• *Federal Rulemaking Web Site:* Go to *http://www.regulations.gov* and search for documents filed under Docket ID NRC–2011–0256. Address questions about NRC dockets to Carol Gallagher, telephone: (301) 492–3668; email: *Carol.Gallagher@nrc.gov*.

• *Mail comments to:* Cindy Bladey, Chief, Rules, Announcements, and Directives Branch (RADB), Office of Administration, Mail Stop: TWB–05–B01M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

• *Fax comments to:* RADB at (301) 492–3446.

FOR FURTHER INFORMATION CONTACT: Dr. John Wise, Division of License Renewal, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: (301) 415–8489; email: *John.Wise@nrc.gov*.

SUPPLEMENTARY INFORMATION:

Submitting Comments and Accessing Information

Comments submitted in writing or in electronic form will be posted on the NRC Web site and on the Federal rulemaking Web site, *http://www.regulations.gov*. Because your comments will not be edited to remove any identifying or contact information, the NRC cautions you against including any information in your submission that you do not want to be publicly disclosed.

The NRC requests that any party soliciting or aggregating comments received from other persons for submission to the NRC inform those persons that the NRC will not edit their comments to remove any identifying or contact information, and therefore, they should not include any information in their comments that they do not want publicly disclosed.

You can access publicly available documents related to this document 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, Room 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 email to *pdr.resource@nrc.gov*. The draft LR–ISG–2011–01 is available electronically under ADAMS Accession Number ML112360626. The GALL Report and SRP–LR are available under ADAMS Accession Nos. ML103490041 and ML103490036, respectively.

• *Federal Rulemaking Web Site:* Public comments and supporting materials related to this notice can be found at *http://www.regulations.gov* by searching on Docket ID NRC–2011–0256.

• *NRC's Interim Staff Guidance Web Site:* The LR–ISG documents are also available online under the ''License Renewal'' heading at *http://www.nrc.gov/reading-rm/doc-collections/#int*.

Background

The NRC issues LR–ISGs to communicate insights and lessons learned and to address emergent issues not covered in license renewal guidance documents, such as the GALL Report and SRP–LR. In this way, the NRC staff and stakeholders may use the guidance in an LR–ISG document before it is incorporated into a formal license renewal guidance document revision. The NRC staff issues LR–ISG in accordance with the LR–ISG Process, Revision 2 (ADAMS Accession No. ML100920158), for which a notice of availability was published in the **Federal Register** on June 22, 2010 (75 FR 35510).

The NRC staff has determined that existing guidance in the SRP–LR and GALL Report may not adequately address aging management of stainless steel structures and components exposed to treated borated water. Specifically, for pressurized water reactors, the guidance inappropriately credits boron as a corrosion inhibitor in place of other aging management activities. As a result, aging effects such as loss of material, cracking, and reduction of heat transfer may not be adequately managed. The staff has proposed to revise the SRP–LR and GALL Report to align the guidance for treated borated water with that for treated (non-borated) water. The revisions include adding the One-Time Inspection Program to verify the effectiveness of the Water Chemistry Program to manage loss of material and cracking of stainless steel structures and components exposed to treated borated water and adding reduction of heat transfer due to fouling as an aging effect requiring management for stainless steel heat exchanger tubes exposed to treated borated water.

Proposed Action

By this action, the NRC is requesting public comments on draft LR–ISG–2011–01. This LR–ISG proposes certain revisions to NRC guidance in the SRP–LR and GALL Report. The NRC staff will make a final determination regarding issuance of the LR–ISG after it considers any public comments received in response to this request.

Dated at Rockville, Maryland, this 1st day of November, 2011. For the Nuclear Regulatory Commission.

Melanie A. Galloway,

Acting Director, Division of License Renewal, Office of Nuclear Reactor Regulation.

[FR Doc. 2011–28891 Filed 11–7–11; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2009–0352; Docket No. 40–09083]

U.S. Army Installation Management Command; Notice of Issuance of Director's Decision

Notice is hereby given that the Director, Office of Federal and State Materials and Environmental Management Programs (FSME) has issued a Director's Decision with regard to a Petition, dated March 4, 2010, filed by Mr. Issac Harp, herein after referred to as the ''Petitioner,'' pursuant to Title 10 of the *Code of Federal Regulations* (10 CFR) 2.206. The Petition was supplemented on April 14, 2010. The Petition concerns the possession, by the U.S. Army, of depleted uranium (DU), a source material, in spent spotting rounds from the Davy Crockett Weapon System without a valid U.S. Nuclear Regulatory Commission (NRC) license.

The Petition requested that the NRC take enforcement action against the U.S. Army by initiating an investigation into the potential violation of NRC License SUB–459, and if it was determined that a violation occurred, to apply the full penalty permissible by law. The Petition

also requested that any monetary fines be used for remediation of the Schofield Barracks and Pohakuloa Training Areas in Hawaii. The basis for the request was that the U.S. Army's license, SUB–459, expired on October 31, 1964, and that any DU possessed by the U.S. Army or released into the environment after the expiration date was an unlawful act, subject to NRC enforcement policies.

The Petition raised a concern about the possession of licensable quantities of DU by the U.S. Army without an NRC license to do so. Section 40.3 states, in part, that persons may not receive title to, own, receive, possess, use, transfer, or dispose of source material unless authorized in a specific or general license issued by the Commission. Contrary to 10 CFR 40.3, the U.S. Army is in possession of DU, a source material, in the form of spent spotting rounds (expended prior to 1968) at firing ranges located at Schofield Barracks and Pohakuloa Training Area, in Hawaii and on other U.S. Army installations, in excess of the exempt and general use limits, without authorization in a specific or general license issued by the NRC.

The Petitioner met with the FSME Petition Review Board by teleconference on April 14, 2010, to discuss the Petition. The meeting gave the Petitioner an opportunity to provide additional information and to clarify issues raised in the Petition. The transcript of this meeting was treated as a supplement to the Petition and is available in the Agencywide Document Access and Management System (ADAMS) for inspection at the NRC's Public Document Room, O1–F21, One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland 20852. Publicly available documents created or receive at the NRC are available online in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.*

The NRC issued a proposed Director's Decision (DD–11–05) dated August 8, 2011, which granted the Petition, in part, and denied the Petition, in part. The NRC sent a copy of the proposed Director's Decision to the Petitioner and to the U.S. Army for comment on August 8, 2011. The Petitioner responded on August 21, 2011. The U.S. Army did not provide comments on the proposed Director's Decision. The Petitioner's comments and the NRC staff's responses are included in the Director's Decision.

The Director of the Office of Federal and State Materials and Environmental Management Programs has determined that the activities requested by the Petitioner have been granted in part and denied in part. The reasons for this decision are explained in the Director's Decision pursuant to 10 CFR 2.206 [DD–11–05], the complete text of which is available in ADAMS for inspection at the NRC's Public Document Room, O1–F21, One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland 20852. Publicly available documents created or receive at the NRC are available online in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.*

The Petition requested that the NRC investigate whether, contrary to applicable law and regulations, the U.S. Army possessed or released into the environment DU from spent spotting rounds after the expiration of NRC License SUB–459. NRC conducted an investigation of the U.S. Army's possession of licensable quantities of DU and issued a Severity Level III Notice of Violation to the U.S. Army (ML111680087). Consistent with NRC Enforcement Policy (*www.nrc.gov/about-nrc/regulatory/enforcement/enfore-pol.html*) the NRC chose not to impose any civil penalty because: (1) The U.S. Army installations in Hawaii have not been previously the subject of escalated enforcement action; (2) the U.S. Army identified and notified the NRC of the presence of radioactive material; and (3) the U.S. Army implemented corrective actions in response to the discovery of the presence of the depleted uranium. Therefore, insofar as the NRC has undertaken certain activities requested by the Petitioner, that being the initiation of an investigation to determine whether the U.S. Army possesses DU in licensable quantities without authorization from the NRC to do so and the issuance of an enforcement action based on that investigation, the NRC granted that portion of the Petition concerned with such activities.

In addition, the Petition requested that, if the NRC determined that a violation occurred, to assess against the U.S. Army the maximum penalty permitted by law, and asked that any assessed monetary fines be applied to the environmental remediation of DU contamination at the Schofield Barracks and Pohakuloa Training Area installations in Hawaii, if the law provides for such action. Were the NRC to have chosen to impose a civil penalty, the law does not provide for the application of that assessed civil penalty to the environmental remediation of DU contamination as requested by the Petitioner. Fines assessed for violations of NRC requirements are sent to the U.S. Treasury. Therefore, this portion of the Petition was denied.

As provided in 10 CFR 2.206(c), a copy of this Director's Decision will be filed with the Secretary of the Commission for the Commission to review. As provided for by this regulation, the Decision will constitute the final action of the Commission 25 days after the date of the Decision, unless the Commission, on its own motion, institutes a review of the Decision within that time.

Dated at Rockville, Maryland, this 29th day of October 2011.

For the Nuclear Regulatory Commission.

Cynthia A. Carpenter,

Deputy Director, Office of Federal and State Materialsand Environmental Management Programs.

[FR Doc. 2011–28889 Filed 11–7–11; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2011–0204]

Proposed Generic Communication Draft Generic Letter on Seismic Risk Evaluations for Operating Reactors

AGENCY: Nuclear Regulatory Commission.

ACTION: Draft generic letter; extension of comment period.

SUMMARY: On September 1, 2011 (76 FR 54507), the U.S. Nuclear Regulatory Commission (NRC) published for public comment Draft Generic Letter 2011–XX: Seismic Risk Evaluations for Operating Reactors. The public comment period was scheduled to expire on October, 31, 2011; however, on September 16, 2011 (76 FR 57767), the NRC issued a correction and extended the public comment period to November 15, 2011. In order to allow the public sufficient time to review and comment on the Draft Generic Letter, the NRC has decided to extend the comment period for the Draft Generic Letter until December 15, 2011.

DATES: The comment period has been extended and expires on December 15, 2011. Comments received after this date will be considered if it is practical to do so. The NRC is only able to assure consideration of comments received on or before this date.

ADDRESSES: Please include Docket ID NRC–2011–0204 in the subject line of your comments. For instructions on submitting comments and accessing documents related to this action, see Section I, ''Submitting Comments and Accessing Information'' in the **SUPPLEMENTARY INFORMATION** section of this document. You may submit

comments by any one of the following methods:

• *Federal Rulemaking Web Site:* Go to *http://www.regulations.gov* and search for documents filed under Docket ID NRC–2011–0204. Address questions about NRC dockets to Carol Gallagher, *telephone:* (301) 492–3668; *email: Carol.Gallagher@nrc.gov.*

• *Mail comments to:* Cindy Bladey, Chief, Rules, Announcements, and Directives Branch (RADB), Office of Administration, Mail Stop: TWB–05–B01M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

• *Fax comments to:* RADB at (301) 492–3446.

FOR FURTHER INFORMATION CONTACT: Kamal Manoly, Division of Engineering, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; *telephone:* (301) 415–2765, *email: Kamal.Manoly@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Submitting Comments and Accessing Information

Comments submitted in writing or in electronic form will be posted on the NRC Web site and on the Federal rulemaking Web site, *http://www.regulations.gov.* Because your comments will not be edited to remove any identifying or contact information, the NRC cautions you against including any information in your submission that you do not want to be publicly disclosed.

The NRC requests that any party soliciting or aggregating comments received from other persons for submission to the NRC inform those persons that the NRC will not edit their comments to remove any identifying or contact information and; therefore, they should not include any information in their comments that they do not want publicly disclosed.

You can access publicly available documents related to this document 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 email to *pdr.resource@nrc.gov.* The Draft Generic Letter is available electronically in ADAMS under Accession Number ML111710783.

• *Federal Rulemaking Web Site:* Public comments and supporting materials related to this notice can be found at *http://www.regulations.gov* by searching on Docket ID NRC–2011–0204.

II. Discussion

On September 1, 2011 (76 FR 54507), the NRC published for public comment Draft Generic Letter 2011–XX: Seismic Risk Evaluations for Operating Reactors to inform addressees that the NRC requests addressees to evaluate their facilities to determine the current level of seismic risk and to submit the requested information to facilitate the NRC's determination if there is a need for additional regulatory action. The public comment period was scheduled to expire on October, 31, 2011; however, on September 16, 2011 (76 FR 57767), the NRC issued a correction and extended the public comment period to November 15, 2011. In order to allow the public sufficient time to review and comment on the Draft Generic Letter, the NRC has decided to extend the comment period for the Draft Generic Letter until December 15, 2011.

Dated at Rockville, Maryland, this 31 day of October, 2011.

For the Nuclear Regulatory Commission.

Stacey Rosenberg,

Chief, Generic Communications and Power Uprate Branch, Division of Policy and Rulemaking, Office of Nuclear Reactor Regulation.

[FR Doc. 2011–28895 Filed 11–7–11; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 40–9091–MLA; ASLBP No. 12–915–01–MLA–BD01]

Strata Energy, Inc.; Establishment of Atomic Safety and Licensing Board

Pursuant to delegation by the Commission dated December 29, 1972, published in the **Federal Register,** 37 FR 28,710 (1972), and the Commission's regulations, *see* 10 CFR 2.104, 2.105, 2.300, 2.309, 2.313, 2.318, and 2.321, notice is hereby given that an Atomic Safety and Licensing Board (Board) is being established to preside over the following proceeding:

Strata Energy, Inc. (Ross In Situ Recovery Uranium Project)

This proceeding involves a license application from Peninsula Minerals, Ltd., doing business as Strata Energy, Inc., requesting a new source and byproduct materials license at its Ross In Situ Recovery Uranium Project site located in Crook County, Wyoming. In response to a Notice of Materials License Application, Opportunity to Request a Hearing and to Petition for Leave to Intervene, and Commission Order Imposing Procedures for document Access to Sensitive Unclassified Non-Safeguards Information published in the **Federal Register** on July 13, 2011 (76 FR 41,308), a petition to intervene was submitted by the Natural Resources Defense Council (NRDC) and Powder River Basin Resource Council (PRBRC) from Geoffrey Fettus of NRDC and Shannon Anderson of PRBRC.

The Board is comprised of the following administrative judges:

G. Paul Bollwerk, III, Chair, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

Dr. Richard F. Cole, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

Dr. Kenneth L. Mossman, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

All correspondence, documents, and other materials shall be filed in accordance with the NRC E–Filing rule, which the NRC promulgated in August 2007 (72 FR 49,139).

Issued at Rockville, Maryland, this 2nd day of November 2011.

E. Roy Hawkens,

Chief Administrative Judge, Atomic Safety and Licensing Board Panel.

[FR Doc. 2011–28884 Filed 11–7–11; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Sunshine Act Notice

AGENCY HOLDING THE MEETINGS: Nuclear Regulatory Commission, [NRC–2011–0006].

DATES: Weeks of November 7, 14, 21, 28, December 5, 12, 2011.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and Closed.

Week of November 7, 2011

There are no meetings scheduled for the week of November 7, 2011.

Week of November 14, 2011—Tentative

There are no meetings scheduled for the week of November 14, 2011.

Week of November 21, 2011—Tentative

There are no meetings scheduled for the week of November 21, 2011.

Week of November 28, 2011—Tentative

Tuesday, November 29, 2011

9:30 a.m.—Meeting with the Advisory Committee on Reactor Safeguards, (ACRS) (Public Meeting), (Contact: Tanny Santos, (301) 415–7270).

This meeting will be webcast live at the Web address—*http://www.nrc.gov.*

Thursday, December 1, 2011

9:30 a.m.—Briefing on Equal Employment Opportunity (EEO) and Small Business Programs (Public Meeting). (Contact: Barbara Williams, (301) 415–7388.)

This meeting will be webcast live at the Web address—*http://www.nrc.gov.*

Week of December 5, 2011—Tentative

There are no meetings scheduled for the week of December 5, 2011.

Week of December 12, 2011—Tentative

Tuesday, December 13, 2011

9 a.m.—Briefing on NFPA 805 Fire Protection (Public Meeting). (Contact: Alex Klein, (301) 415–2822.)

This meeting will be webcast live at the Web address–*http://www.nrc.gov.*

* * * * *

* The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings, call (recording)—(301) 415–1292. Contact person for more information: Rochelle Bavol, (301) 415–1651.

* * * * *

The NRC Commission Meeting Schedule can be found on the Internet at: *http://www.nrc.gov/public-involve/public-meetings/schedule.html.*

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The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings, or need this meeting notice or the transcript or other information from the public meetings in another format (*e.g.* braille, large print), please notify Bill Dosch, Chief, Work Life and Benefits Branch, at (301) 415–6200, TDD: (301) 415–2100, or by email at *william.dosch@nrc.gov.* Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

* * * * *

This notice is distributed electronically to subscribers. If you no longer wish to receive it, or would like to be added to the distribution, please contact the Office of the Secretary, Washington, DC 20555 (301) 415–1969, or send an email to *darlene.wright@nrc.gov.*

Dated: November 3, 2011.

Richard Laufer,

Technical Coordinator, Office of the Secretary.

[FR Doc. 2011–29035 Filed 11–4–11; 4:15 pm]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Project No. 753; NRC–2010–0170]

Proposed Models for Plant-Specific Adoption of Technical Specifications Task Force Traveler TSTF–500, Revision 2, ''DC Electrical Rewrite—Update to TSTF–360''

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of Availability; correction.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is correcting a notice appearing in the **Federal Register** on September 1, 2011 (76 FR 54510), that announced the availability of the model application (with model no significant hazards consideration determination) and model safety evaluation (SE) (Agencywide Documents Access and Management System (ADAMS) Accession No. ML111751792) for plant-specific adoption of Technical Specifications Task Force (TSTF) Traveler TSTF–500, Revision 2, ''DC Electrical Rewrite—Update to TSTF–360'' (ADAMS Accession No. ML092670242).

The original Notice of Availability (NOA) published in the **Federal Register** on September 1, 2011 (76 FR 54510), mistakenly stated that the TSTF–500 was available for adoption under the Consolidated Line Item Improvement Process (CLIIP). TSTF–500 is available for adoption, but not under the CLIIP. No other information contained in the original NOA has changed.

FOR FURTHER INFORMATION CONTACT: Ms. Michelle C. Honcharik, Senior Project Manager, Licensing Processes Branch, Mail Stop: O–12D20, Division of Policy and Rulemaking, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC, 20555–0001; telephone (301) 415–1774 or email at *michelle.honcharik@nrc.gov.* For technical questions, please contact Mr. Gerald Waig, Senior Reactor Systems Engineer, Technical Specifications Branch, Mail Stop: O–7 C2A, Division of Inspection and Regional Support, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC, 20555–0001; telephone (301) 415–2260 or email at *gerald.waig@nrc.gov.*

SUPPLEMENTARY INFORMATION: On September 1, 2011 (76 FR 54510), the NRC published an NOA announcing the availability of the model application and model SE for plant-specific adoption of TSTF Traveler TSTF–500, Revision 2. In that publication on page 54510 first column under the section titled **SUMMARY** first paragraph, delete ''As part of the consolidated line item improvement process (CLIIP).'' On page 54510 second column under the section titled **SUMMARY** last sentence of first paragraph and third column under the section titled **SUPPLEMENTARY INFORMATION** first sentence of second paragraph delete ''CLIIP.'' On page 54510 third column under the section **SUPPLEMENTARY INFORMATION** second sentence of second paragraph replace ''CLIIP'' with ''Traveler.''

Dated at Rockville, Maryland, this 25th day of October 2011.

For the Nuclear Regulatory Commission.

John R. Jolicoeur,

Chief, Licensing Processes Branch, Division of Policy and Rulemaking, Office of Nuclear Reactor Regulation.

[FR Doc. 2011–28837 Filed 11–7–11; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–407, NRC–2011–0153]

University of Utah, University of Utah TRIGA Nuclear Reactor, Notice of Issuance of Renewed Facility Operating License No. R–126

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of issuance of renewed facility operating license.

ADDRESSES: You can access publicly available documents related to this document 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 email to *pdr.resource@nrc.gov.*

• *Federal Rulemaking Web Site:* Public comments and supporting materials related to this final rule can be found at *http://www.regulations.gov* by searching on Docket ID NRC–2011–0153. Address questions about NRC dockets to Carol Gallagher, telephone: (301) 492–3668; email: *Carol.Gallagher@nrc.gov.*

For details with respect to the application for renewal, see the licensee's letter dated March 25, 2005 (ADAMS Accession No. ML050900074), as supplemented on June 1, 2009 (ADAMS Accession No. ML092090027), February 9, 2010 (ADAMS Accession No. ML100550670), March 10, 2010 (ADAMS Accession No. ML100810143), May 13, 2010 (ADAMS Accession No. ML101380222), May 27, 2010 (ADAMS Accession No. ML101600188), October 4, 2010 (two letters), (ADAMS Accession Nos. ML103210041 and ML103160196), June 8, 2011 (ADAMS Accession No. ML111720666), July 15, 2011 (ADAMS Accession No. ML11207A429), August 23, 2011 (ADAMS Accession No. ML11249A053), and August 31, 2011 (ADAMS Accession No. ML112490384).

FOR FURTHER INFORMATION CONTACT: Geoffrey Wertz, Project Manager, Research and Test Reactor Licensing Branch, Division of Policy and Rulemaking, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Rockville, MD 20852. Telephone: (301) 415–0893; fax number: (301) 415–3031; email: *Geoffrey.Wertz@nrc.gov.*

SUPPLEMENTARY INFORMATION: The U.S. Nuclear Regulatory Commission (NRC or the Commission) has issued renewed Facility Operating License No. R–126, held by the University of Utah (UU, the licensee), which authorizes continued operation of the UU TRIGA Nuclear Reactor (UUTR), located in Salt Lake City, Utah. The UUTR is a pool-type, natural convection, light-water cooled, and shielded TRIGA (Training, Research, Isotope Production, General Atomics) reactor fuel. The UUTR is licensed to operate at a steady-state power level of 100 kilowatts thermal power. The renewed Facility Operating License No. R–126 will expire 20 years from its date of issuance.

The renewed facility operating license complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's regulations in Title 10, Chapter 1, ''Nuclear Regulatory Commission,'' of the *Code of Federal Regulations* (10 CFR), and sets forth those findings in the renewed facility operating license. The agency afforded an opportunity for hearing in the Notice of Opportunity for Hearing published in the **Federal Register** on July 21, 2011 (76 FR 43733–43737). The NRC received no request for a hearing or petition for leave to intervene following the notice.

The NRC staff prepared a safety evaluation report for the renewal of Facility Operating License No. R–126 and concluded, based on that evaluation, the licensee can continue to operate the facility without endangering the health and safety of the public. The NRC staff also prepared an Environmental Assessment and Finding of No Significant Impact for the renewal of the facility operating license, noticed in the **Federal Register** on September 28, 2011 (76 FR 60091–60094), and concluded that renewal of the facility operating license will not have a significant impact on the quality of the human environment.

Dated at Rockville, Maryland, this 31st day of October, 2011.

For the Nuclear Regulatory Commission.

Patricia A. Silva,

Acting Chief, Research and Test Reactors Licensing Branch, Division of Policy and Rulemaking, Office of Nuclear Reactor Regulation.

[FR Doc. 2011–28892 Filed 11–7–11; 8:45 am]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

Sunshine Act Meetings

TIME AND DATE: Wednesday, November 16, 2011, at 11 a.m.

PLACE: Commission Hearing Room, 901 New York Avenue NW., Suite 200, Washington, DC 20268–0001.

STATUS: Part of this meeting will be open to the public. The rest of the meeting will be closed to the public. The open session will be audiocast. The audiocast may be accessed via the Commission's Web site at *http://www.prc.gov.*

MATTERS TO BE CONSIDERED: The agenda for the Commission's October 2011 meeting includes the items identified below.

PORTIONS OPEN TO THE PUBLIC:

1. Report on legislative activities.
2. Report on international activities.
3. Report on pending dockets.
4. Report on administrative activities.

PORTION CLOSED TO THE PUBLIC:

5. Discussion of pending litigation.
6. Report on information technology security assessment.

CONTACT PERSON FOR MORE INFORMATION: Stephen L. Sharfman, General Counsel, Postal Regulatory Commission, 901 New York Avenue, NW., Suite 200, Washington, DC 20268–0001, at (202) 789–6820 (for agenda-related inquiries) and Shoshana M. Grove, Secretary of the Commission, at (202) 789–6800 or *shoshana.grove@prc.gov* (for inquiries related to meeting location, access for handicapped or disabled persons, the audiocast, or similar matters).

Dated: November 4, 2011.

By the Commission.

Shoshana M. Grove,

Secretary.

[FR Doc. 2011–29001 Filed 11–4–11; 11:15 am]

BILLING CODE 7710–FW–P

POSTAL REGULATORY COMMISSION

[Docket No. A2012–36; Order No. 942]

Post Office Closing

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: This document informs the public that an appeal of the closing of the East Poland, Maine 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: November 9, 2011: Administrative record due (from Postal Service); November 28, 2011, 4:30 p.m., Eastern Time: Deadline for notices to intervene. *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 October 25, 2011, the Commission received two petitions for review of the Postal Service's determination to close the East Poland post office in East Poland, Maine. The first petition for review was filed by Carl E. Duchette. The second petition for review was filed by the Concerned Citizens of East Poland. The earliest postmark date is October 14, 2011. The Commission hereby institutes a proceeding under 39 U.S.C. 404(d)(5) and establishes Docket No. A2012–36 to consider Petitioners' appeal. If Petitioners would like to further explain their position with supplemental information or facts, Petitioners may either file a Participant Statement on PRC Form 61 or file a brief with the Commission no later than November 29, 2011.

Categories of issues apparently raised. Petitioners contend that (1) the Postal Service failed to consider the effect of the closing on the community (*see* 39 U.S.C. 404(d)(2)(A)(i)); (2) the Postal Service failed to consider whether or not it will continue to provide a maximum degree of effective and regular postal services to the community (*see* 39 U.S.C. 404(d)(2)(A)(iii)); and (3) Petitioners contend that there are factual errors contained in the Final Determination.

After the Postal Service files the administrative record and the Commission reviews it, the Commission may find that there are more legal issues than those set forth above, 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 November 9, 2011. *See* 39 CFR 3001.113. In addition, the due date for any responsive pleading by the Postal Service to this notice is November 9, 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 participant's submissions also will be posted on the 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., Eastern Time, 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, *http://www.prc.gov,* or by contacting the Commission's docket section at *prc-dockets@prc.gov* or via telephone at (202) 789–6846.

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 Petitioners and respondents, 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 November 28, 2011. A notice of intervention shall be filed using the Internet (Filing Online) at the Commission's Web site, *http://www.prc.gov,* 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 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 November 9, 2011.

2. Any responsive pleading by the Postal Service to this notice is due no later than November 9, 2011.

3. The procedural schedule listed below is hereby adopted.

4. Pursuant to 39 U.S.C. 505, Jeremy L. Simmons 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 and Procedural Schedule in the **Federal Register**.

By the Commission.

Shoshana M. Grove,

Secretary.

PROCEDURAL SCHEDULE

October 25, 2011	Filing of Appeal.
November 9, 2011	Deadline for the Postal Service to file the applicable administrative record in this appeal.
November 9, 2011	Deadline for the Postal Service to file any responsive pleading.
November 28, 2011	Deadline for notices to intervene (*see* 39 CFR 3001.111(b)).
November 29, 2011	Deadline for Petitioners' Form 61 or initial brief in support of petition (*see* 39 CFR 3001.115(a) and (b)).
December 19, 2011	Deadline for answering brief in support of the Postal Service (*see* 39 CFR 3001.115(c)).
January 3, 2011	Deadline for reply briefs in response to answering briefs (*see* 39 CFR 3001.115(d)).
January 10, 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).

PROCEDURAL SCHEDULE—Continued

February 13, 2012	Expiration of the Commission's 120-day decisional schedule (*see* 39 U.S.C. 404(d)(5)).

[FR Doc. 2011–28913 Filed 11–7–11; 8:45 am]

BILLING CODE 7710–FW–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Rule 11a–3; SEC File No. 270–321; OMB Control No. 3235–0358.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), the Securities and Exchange Commission (the ''Commission'') has submitted to the Office of Management and Budget a request for extension of the previously approved collection of information discussed below.

Section 11(a) of the Investment Company Act of 1940 (''Act'') (15 U.S.C. 80a–11(a)) provides that it is unlawful for a registered open-end investment company (''fund'') or its underwriter to make an offer to the fund's shareholders or the shareholders of any other fund to exchange the fund's securities for securities of the same or another fund on any basis other than the relative net asset values (''NAVs'') of the respective securities to be exchanged, ''unless the terms of the offer have first been submitted to and approved by the Commission or are in accordance with such rules and regulations as the Commission may have prescribed in respect of such offers.'' Section 11(a) was designed to prevent ''switching,'' the practice of inducing shareholders of one fund to exchange their shares for the shares of another fund for the purpose of exacting additional sales charges.

Rule 11a–3 (17 CFR 270.11a–3) under the Act of 1940 is an exemptive rule that permits open-end investment companies (''funds''), other than insurance company separate accounts, and funds' principal underwriters, to make certain exchange offers to fund shareholders and shareholders of other funds in the same group of investment companies. The rule requires a fund, among other things, (i) To disclose in its prospectus and advertising literature the amount of any administrative or redemption fee imposed on an exchange transaction, (ii) if the fund imposes an administrative fee on exchange transactions, other than a nominal one, to maintain and preserve records with respect to the actual costs incurred in connection with exchanges for at least six years, and (iii) give the fund's shareholders a sixty day notice of a termination of an exchange offer or any material amendment to the terms of an exchange offer (unless the only material effect of an amendment is to reduce or eliminate an administrative fee, sales load or redemption fee payable at the time of an exchange).

The rule's requirements are designed to protect investors against abuses associated with exchange offers, provide fund shareholders with information necessary to evaluate exchange offers and certain material changes in the terms of exchange offers, and enable the Commission staff to monitor funds' use of administrative fees charged in connection with exchange transactions.

The staff estimates that there are approximately 1,790 active open-end investment companies registered with the Commission as of June 2011. The staff estimates that 25 percent (or 448) of these funds impose a non-nominal administrative fee on exchange transactions. The staff estimates that the recordkeeping requirement of the rule requires approximately 1 hour annually of clerical time per fund, for a total of 448 hours for all funds.[1]

The staff estimates that 5 percent of these 1,790 funds (or 90) terminate an exchange offer or make a material change to the terms of their exchange offer each year, requiring the fund to comply with the notice requirement of the rule. The staff estimates that complying with the notice requirement of the rule requires approximately 1 hour of attorney time and 2 hours of clerical time per fund, for a total of approximately 270 hours for all funds to comply with the notice requirement.[2] The recordkeeping and notice requirements together therefore impose a total burden of 718 hours on all funds.[3] The total number of respondents is 538, each responding once a year.[4] The burdens associated with the disclosure requirement of the rule are accounted for in the burdens associated with the Form N–1A registration statement for funds.

The estimate of average burden hours is made solely for the purposes of the Paperwork Reduction Act, and is not derived from a comprehensive or even a representative survey or study of the costs of Commission rules and forms. 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.

The public may view the background documentation for this information collection at the following Web site, *http://www.reginfo.gov*. Comments should be directed to: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503, or by sending an email to: *Shagufta_Ahmed@omb.eop.gov*; and (ii) Thomas Bayer, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 6432 General Green Way, Alexandria, VA 22312 or send an email to: *PRA_Mailbox@sec.gov*. Comments must be submitted to OMB within 30 days of this notice.

Dated: November 3, 2011.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2011–28899 Filed 11–7–11; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Investor

[1] This estimate is based on the following calculations: (1,790 funds × 0.25% = 448 funds); (448 × 1 (clerical hour) = 448 clerical hours).

[2] This estimate is based on the following calculations: (1790 (funds) × 0.05% = 90 funds); (90 × 1 (attorney hour) = 90 total attorney hours); (90 (funds) × 2 (clerical hours) = 180 total clerical hours); (90 (attorney hours) + 180 (clerical hours) = 270 total hours).

[3] This estimate is based on the following calculations: (270 (notice hours) + 448 (recordkeeping hours) = 718 total hours).

[4] This estimate is based on the following calculation: (448 funds responding to recordkeeping requirement + 90 funds responding to notice requirement = 538 total respondents).

Education and Advocacy, Washington, DC 20549–0213.

Extension:

Rule 17a–7; SEC File No. 270–238; OMB Control No. 3235–0214.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget a request for extension of the previously approved collection of information described below.

Rule 17a–7 (17 CFR 270.17a–7) (the ''rule'') under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) (the ''Act'') is entitled ''Exemption of certain purchase or sale transactions between an investment company and certain affiliated persons thereof.'' It provides an exemption from section 17(a) of the Act for purchases and sales of securities between registered investment companies (''funds''), that are affiliated persons (''first-tier affiliates'') or affiliated persons of affiliated persons (''second-tier affiliates''), or between a fund and a first- or second-tier affiliate other than another fund, when the affiliation arises solely because of a common investment adviser, director, or officer. Rule 17a–7 requires funds to keep various records in connection with purchase or sale transactions effected in reliance on the rule. The rule requires the fund's board of directors to establish procedures reasonably designed to ensure that the rule's conditions have been satisfied. The board is also required to determine, at least on a quarterly basis, that all affiliated transactions effected during the preceding quarter in reliance on the rule were made in compliance with these established procedures. If a fund enters into a purchase or sale transaction with an affiliated person, the rule requires the fund to compile and maintain written records of the transaction.[1] The Commission's examination staff uses these records to evaluate for compliance with the rule.

While most funds do not commonly engage in transactions covered by rule 17a–7, the Commission staff estimates that nearly all funds have adopted procedures for complying with the rule.[2] Of the approximately 3,318 currently active funds, the staff estimates that virtually all have already adopted procedures for compliance with rule 17a–7. This is a one-time burden, and the staff therefore does not estimate an ongoing burden related to the policies and procedures requirement of the rule for funds.[3] The staff estimates that there are approximately 150 new funds that register each year, and that each of these funds adopts the relevant policies and procedures. The staff estimates that it takes approximately 4 hours to develop and adopt these policies and procedures. Therefore, the total annual burden related to developing and adopting these policies and procedures would be approximately 600 hours.[4]

Of the 3,318 existing funds, the staff assumes that approximately 25%, (or 830) enter into transactions affected by rule 17a–7 each year (either by the fund directly or through one of the fund's series), and that the same percentage (25%, or 38 funds) of the estimated 150 funds that newly register each year will also enter into these transactions, for a total of 868[5] companies that are affected by the recordkeeping requirements of rule 17a–7. These funds must keep records of each of these transactions, and the board of directors must quarterly determine that all relevant transactions were made in compliance with the company's policies and procedures. The rule generally imposes a minimal burden of collecting and storing records already generated for other purposes.[6] The staff estimates that the burden related to making these records and for the board to review all transactions would be 3 hours annually for each respondent, (2 hours spent by compliance attorneys and 1 hour spent by the board of directors)[7] or 2,604 total hours each year.[8]

Based on these estimates, the staff estimates the combined total annual burden hours associated with rule 17a–7 is 3,204 hours.[9] The staff also estimates that there are approximately 1,018 respondents and 7,094 total responses.[10]

The estimates of burden hours are made solely for the purposes of the Paperwork Reduction Act, and are not derived from a comprehensive or even a representative survey or study of the costs of Commission rules. The collection of information required by rule 17a–7 is necessary to obtain the benefits of the rule. Responses will not be kept confidential. 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.

The public may view the background documentation for this information collection at the following Web site, *http://www.reginfo.gov*. Comments should be directed to: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503, or by sending an email to: *Shagufta_Ahmed@omb.eop.gov*; and (ii) Thomas Bayer, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 6432 General Green Way, Alexandria, VA 22312 or send an email to: *PRA_Mailbox@sec.gov*. Comments must be submitted to OMB within 30 days of this notice.

Dated: November 3, 2011.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2011–28900 Filed 11–7–11; 8:45 am]

BILLING CODE 8011–01–P

[1] The written records are required to set forth a description of the security purchased or sold, the identity of the person on the other side of the transaction, and the information or materials upon which the board of directors' determination that the transaction was in compliance with the procedures was made.

[2] Unless stated otherwise, these estimates are based on conversations with the examination and inspections staff of the Commission and fund representatives.

[3] Based on our reviews and conversations with fund representatives, we understand that funds rarely, if ever, need to make changes to these policies and procedures once adopted, and therefore we do not estimate a paperwork burden for such updates.

[4] This estimate is based on the following calculations: (4 hours × 150 new funds = 600 hours).

[5] This estimate is based on the following calculation: (830 + 38 = 868).

[6] Commission staff believes that rule 17a–7 does not impose any costs associated with record preservation in addition to the costs that funds already incur to comply with the record preservation requirements of rule 31a–2 under the Act. Rule 31a–2 requires companies to preserve certain records for specified periods of time.

[7] The staff estimates that funds that rely on rule 17a–7 annually enter into an average of 8 rule 17a–7 transactions each year. The staff estimates that the compliance attorneys of the companies spend approximately 15 minutes per transaction on this recordkeeping, and the board of directors spends a total of 1 hour annually in determining that all transactions made that year were done in compliance with the company's policies and procedures.

[8] This estimate is based on the following calculation: (3 hours × 868 companies = 2,604 hours).

[9] This estimate is based on the following calculation: (600 hours + 2,604 hours = 3,204 total hours).

[10] This estimate is based on the following calculations: (150 newly registered funds + 868 funds that engage in rule 17a–7 transactions = 1,018); (868 funds that engage in rule 17a–7 transactions × 8 times per year = 6,944); (6944 + 150 = 7,094 responses).

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:
Rule 17f–1; SEC File No. 270–236; OMB Control No. 3235–0222.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (the ''Commission'') has submitted to the Office of Management and Budget a request for extension of the previously approved collection of information discussed below.

Rule 17f–1 (17 CFR 270.17f–1) under the Investment Company Act of 1940 (the ''Act'') (15 U.S.C. 80a) is entitled: ''Custody of Securities with Members of National Securities Exchanges.'' Rule 17f–1 provides that any registered management investment company (''fund'') that wishes to place its assets in the custody of a national securities exchange member may do so only under a written contract that must be ratified initially and approved annually by a majority of the fund's board of directors. The written contract also must contain certain specified provisions. In addition, the rule requires an independent public accountant to examine the fund's assets in the custody of the exchange member at least three times during the fund's fiscal year. The rule requires the written contract and the certificate of each examination to be transmitted to the Commission. The purpose of the rule is to ensure the safekeeping of fund assets.

Commission staff estimates that each fund makes 1 response and spends an average of 3.5 hours annually in complying with the rule's requirements. Commission staff estimates that on an annual basis it takes: (i) 0.5 hours for the board of directors[1] to review and ratify the custodial contracts; and (ii) 3 hours for the fund's controller to assist the fund's independent public auditors in verifying the fund's assets. Approximately 5 funds rely on the rule annually, with a total of 5 responses.[2] Thus, the total annual hour burden for rule 17f–1 is approximately 17.5 hours.[3]

Funds that rely on rule 17f–1 generally use outside counsel to prepare the custodial contract for the board's review and to transmit the contract to the Commission. Commission staff estimates the cost of outside counsel to perform these tasks for a fund each year is $800.00.[4] Funds also must have an independent public accountant verify the fund's assets three times each year and prepare the certificate of examination. Commission staff estimates the annual cost for an independent public accountant to perform this service is $8,000.00.[5] Therefore, the total annual cost burden for a fund that relies on rule 17f–1 would be approximately $8,800.00.[6] As noted above, the staff estimates that 5 funds rely on rule 17f–1 each year, for an estimated total annualized cost burden of $44,000.00.[7]

The estimate of average burden hours is made solely for the purposes of the Paperwork Reduction Act, and is not derived from a comprehensive or even a representative survey or study of the costs of Commission rules. Compliance with the collections of information required by rule 17f–1 is mandatory for funds that place their assets in the custody of a national securities exchange member. Responses will not be kept confidential. 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.

The public may view the background documentation for this information collection at the following Web site, *http://www.reginfo.gov.* Comments should be directed to: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503, or by sending an email to: *Shagufta_Ahmed@omb.eop.gov;* and (ii) Thomas Bayer, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 6432 General Green Way, Alexandria, VA 22312 or send an email to: *PRA_Mailbox@sec.gov.* Comments must be submitted to OMB within 30 days of this notice.

Dated: November 3, 2011.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2011–28901 Filed 11–7–11; 8:45 am]

BILLING CODE 8011–01–P

[1] Estimates of the number of hours are based on conversations with representatives of mutual funds that comply with the rule. The actual number of hours may vary significantly depending on individual fund assets. The hour burden for rule 17f–1 does not include preparing the custody contract because that would be part of customary and usual business practice.

[2] Based on a review of Form N–17f–1 filings over the last three years the Commission staff estimates that an average of 5 funds rely on rule 17f–1 each year.

[3] This estimate is based on the following calculation: (5 respondents × 3.5 hours = 17.5 hours). The annual burden for rule 17f–1 does not include time spent preparing Form N–17f–1. The burden for Form N–17f–1 is included in a separate collection of information.

[4] This estimate is based on the following calculation: (2 hours of outside counsel time × $400 = $800). The staff has estimated the average cost of outside counsel at $400 per hour, based on information received from funds, fund intermediaries, and their counsel.

[5] This estimate is based on information received from fund representatives estimating the aggregate annual cost of an independent public accountant's periodic verification of assets and preparation of the certificate of examination.

[6] This estimate is based on the following calculation: ($800 + $8,000 = $8,800).

[7] This estimate is based on the following calculation: (5 funds × $8.800.00 = $44,000.00).

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:
Form 24F–2; SEC File No. 270–399; OMB Control No. 3235–0456.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), the Securities and Exchange Commission (the ''Commission'') has submitted to the Office of Management and Budget a request for extension of the previously approved collection of information discussed below.

Rule 24f–2 (17 CFR 270.24f–2) under the Investment Company Act of 1940 (15 U.S.C. 80a) requires any open-end management companies (''mutual funds''), unit investment trusts (''UITs'') or face-amount certificate companies (collectively, ''funds'') deemed to have registered an indefinite amount of securities to file, not later than 90 days after the end of any fiscal year in which it has publicly offered such securities, Form 24F–2 (17 CFR 274.24) with the Commission. Form 24F–2 is the annual notice of securities sold by funds that accompanies the payment of registration fees with respect to the securities sold during the fiscal year.

The Commission estimates that 6,120 funds file Form 24F–2 on the required annual basis. The average annual burden per respondent for Form 24F–2 is estimated to be two hours. The total annual burden for all respondents to Form 24F–2 is estimated to be 12,240 hours. The estimate of average burden hours is made solely for the purposes of

the Paperwork Reduction Act, and is not derived from a comprehensive or even a representative survey or study of the costs of Commission rules.

Compliance with the collection of information required by Form 24F–2 is mandatory. The Form 24F–2 filing that must be made to the Commission is available to the public. 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.

The public may view the background documentation for this information collection at the following Web site, *http://www.reginfo.gov*. Comments should be directed to: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503, or by sending an email to: *Shagufta_Ahmed@omb.eop.gov*; and (ii) Thomas Bayer, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 6432 General Green Way, Alexandria, VA 22312 or send an email to: *PRA_Mailbox@sec.gov*. Comments must be submitted to OMB within 30 days of this notice.

Dated: November 3, 2011.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2011–28903 Filed 11–7–11; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Form N–6F; SEC File No. 270–185; OMB Control No. 3235–0238.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget a request for extension of the previously approved collection of information discussed below.

The title for the collection of information is ''Form N–6F (17 CFR 274.15), Notice of Intent to Elect to be Subject to Sections 55 through 65 of the Investment Company Act of 1940.'' The purpose of Form N–6F is to notify the Commission of a company's intent to file a notification of election to become subject to Sections 55 through 65 of the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) (''1940 Act''). Certain companies may have to make a filing with the Commission before they are ready to elect to be regulated as a business development company.[1] A company that is excluded from the definition of ''investment company'' by Section 3(c)(1) because it has fewer than one hundred shareholders and is not making a public offering of its securities may lose such an exclusion solely because it proposes to make a public offering of securities as a business development company. Such company, under certain conditions, would not lose its exclusion if it notifies the Commission on Form N–6F of its intent to make an election to be regulated as a business development company. The company only has to file a Form N–6F once.

The Commission estimates that on average approximately thirteen companies file these notifications each year. Each of those companies need only make a single filing of Form N–6F. The Commission further estimates that this information collection imposes burden of 0.5 hours, resulting in a total annual PRA burden of 6.5 hours. Based on the estimated wage rate, the total cost to the industry of the hour burden for complying with Form N–6F would be approximately $2,080.00.

The collection of information under Form N–6F is mandatory. The information provided under the form is not kept confidential. 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 public may view the background documentation for this information collection at the following Web site, *http://www.reginfo.gov*. Comments should be directed to: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503, or by sending an email to: *Shagufta_Ahmed@omb.eop.gov*; and (ii) Thomas Bayer, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 6432 General Green Way, Alexandria, VA 22312 or send an email to: *PRA_Mailbox@sec.gov*. Comments must be submitted to OMB within 30 days of this notice.

Dated: November 3, 2011.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2011–28904 Filed 11–7–11; 8:45 am]

BILLING CODE 8011–01–P

[1] A company might not be prepared to elect to be subject to Sections 55 through 65 of the 1940 Act because its capital structure or management compensation plan is not yet in compliance with the requirements of those sections.

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Form N–54C; SEC File No. 270–184; OMB Control No. 3235–0236.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (the ''PRA''), the Securities and Exchange Commission (the ''Commission'') has submitted to the Office of Management and Budget a request for extension of the previously approved collection of information discussed below.

Under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) (the ''Investment Company Act''), certain investment companies can elect to be regulated as business development companies, as defined in Section 2(a)(48) of the Investment Company Act (15 U.S.C. 80a–2(a)(48)). Under Section 54(a) of the Investment Company Act (15 U.S.C. 80a–53(a)), any company defined in Section 2(a)(48)(A) and (B) of the Investment Company Act (15 U.S.C. 80a–2(a)(48)(A) and (B)), may, if it meets certain enumerated eligibility requirements, elect to be subject to the provisions of Sections 55 through 65 of the Investment Company Act (15 U.S.C. 80a–54 to 80a–64) by filing with the Commission a notification of election on Form N–54A (17 CFR 274.53). Under Section 54(c) of the Investment Company Act (15 U.S.C. 80a–53(c)), any business development company may voluntarily withdraw its election under Section 54(a) of the Investment Company Act (15 U.S.C. 80a–53(a)) by filing a notice of withdrawal of election with the Commission. The Commission has adopted Form N–54C (17 CFR 274.54) as the form for notification of withdrawal of election to be subject to Sections 55 through 65 of the Investment Company Act.

The purpose of Form N–54C is to notify the Commission that the business development company withdraws its election to be subject to Sections 55 through 65 of the Investment Company Act, enabling the Commission to administer those provisions of the Investment Company Act to such companies.

The Commission estimates that on average approximately 10 business development companies file these notifications each year. Each of those business development companies need only make a single filing of Form N–54C. The Commission further estimates that this information collection imposes a burden of one hour, resulting in a total annual PRA burden of 10 hours. Based on the estimated wage rate, the total cost to the business development industry of the hour burden for complying with Form N–54C would be approximately $3,200.00.

The collection of information under Form N–54C is mandatory. The information provided by the form is not kept confidential. 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.

The public may view the background documentation for this information collection at the following Web site, *http://www.reginfo.gov*. Comments should be directed to: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503, or by sending an email to: *Shagufta_Ahmed@omb.eop.gov*; and (ii) Thomas Bayer, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 6432 General Green Way, Alexandria, VA 22312 or send an email to: *PRA_Mailbox@sec.gov*. Comments must be submitted to OMB within 30 days of this notice.

Dated: November 3, 2011.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2011–28905 Filed 11–7–11; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Rule 0–1, SEC File No. 270–472, OMB Control No. 3235–0531.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget a request for extension of the previous approved collection of information discussed below.

The Investment Company Act of 1940 (the ''Act'') [1] establishes a comprehensive framework for regulating the organization and operation of investment companies (''funds''). A principal objective of the Act is to protect fund investors by addressing the conflicts of interest that exist between funds and their investment advisers and other affiliated persons. The Act places significant responsibility on the fund board of directors in overseeing the operations of the fund and policing the relevant conflicts of interest.[2]

In one of its first releases, the Commission exercised its rulemaking authority pursuant to sections 38(a) and 40(b) of the Act by adopting rule 0–1 (17 CFR 270.0–1).[3] Rule 0–1, as subsequently amended on numerous occasions, provides definitions for the terms used by the Commission in the rules and regulations it has adopted pursuant to the Act. The rule also contains a number of rules of construction for terms that are defined either in the Act itself or elsewhere in the Commission's rules and regulations. Finally, rule 0–1 defines terms that serve as conditions to the availability of certain of the Commission's exemptive rules. More specifically, the term ''independent legal counsel,'' as defined in rule 0–1, sets out conditions that funds must meet in order to rely on any of ten exemptive rules (''exemptive rules'') under the Act.[4]

The Commission amended rule 0–1 to include the definition of the term ''independent legal counsel'' in 2001.[5] This amendment was designed to enhance the effectiveness of fund boards of directors and to better enable investors to assess the independence of those directors. The Commission also amended the exemptive rules to require that any person who serves as legal counsel to the independent directors of any fund that relies on any of the exemptive rules must be an ''independent legal counsel.'' This requirement was added because independent directors can better perform the responsibilities assigned to them under the Act and the rules if they have the assistance of truly independent legal counsel.

If the board's counsel has represented the fund's investment adviser, principal underwriter, administrator (collectively, ''management organizations'') or their ''control persons'' [6] during the past two years, rule 0–1 requires that the board's independent directors make a determination about the adequacy of the counsel's independence. A majority of the board's independent directors are required to reasonably determine, in the exercise of their judgment, that the counsel's prior or current representation of the management organizations or their control persons was sufficiently limited to conclude that it is unlikely to adversely affect the counsel's professional judgment and legal representation. Rule 0–1 also requires that a record for the basis of this determination is made in the minutes of the directors' meeting. In addition, the independent directors must have obtained an undertaking from the counsel to provide them with the information necessary to make their determination and to update promptly that information when the person begins to represent a management organization or control person, or when he or she materially increases his or her representation. Generally, the independent directors must re-evaluate their determination no less frequently than annually.

Any fund that relies on one of the exemptive rules must comply with the requirements in the definition of ''independent legal counsel'' under rule 0–1. We assume that approximately 3,796 funds rely on at least one of the

[1] 15 U.S.C. 80a.

[2] For example, fund directors must approve investment advisory and distribution contracts. *See* 15 U.S.C. 80a–15(a), (b), and (c).

[3] Investment Company Act Release No. 4 (Oct. 29, 1940) (5 FR 4316 (Oct. 31, 1940)). Note that rule 0–1 was originally adopted as rule N–1.

[4] The relevant exemptive rules are: rule 10f–3 (17 CFR 270.10f–3), rule 12b–1 (17 CFR 270.12b–1), rule 15a–4(b)(2) (17 CFR 270.15a–4(b)(2)), rule 17a–7 (17 CFR 270.17a–7), rule 17a–8 (17 CFR 270.17a–8), rule 17d–1(d)(7) (17 CFR 270.17d–1(d)(7)), rule 17e–1(c) (17 CFR 270.17e–1(c)), rule 17g–1 (17 CFR 270.17g–1), rule 18f–3 (17 CFR 270.18f–3), and rule 23c–3 (17 CFR 270.23c–3).

[5] *See* Role of Independent Directors of Investment Companies, Investment Company Act Release No. 24816 (Jan. 2, 2001) (66 FR 3735 (Jan. 16, 2001)).

[6] A ''control person'' is any person—other than a fund—directly or indirectly controlling, controlled by, or under common control, with any of the fund's management organizations. *See* 17 CFR 270.01(a)(6)(iv)(B).

exemptive rules annually.[7] We further assume that the independent directors of approximately one-third (1,265) of those funds would need to make the required determination in order for their counsel to meet the definition of independent legal counsel.[8] We estimate that each of these 1,265 funds would be required to spend, on average, 0.75 hours annually to comply with the recordkeeping requirement associated with this determination, for a total annual burden of approximately 949 hours. Based on this estimate, the total annual cost for all funds' compliance with this rule is approximately $169,927.00. To calculate this total annual cost, the Commission staff assumed that approximately two-thirds of the total annual hour burden (633 hours) would be incurred by compliance staff with an average hourly wage rate of $235.00 per hour,[9] and one-third of the annual hour burden (316 hours) would be incurred by clerical staff with an average hourly wage rate of $67.00 per hour.[10]

These burden hour estimates are based upon the Commission staff's experience and discussions with the fund industry. The estimates of average burden hours are made solely for the purposes of the Paperwork Reduction Act. These estimates are not derived from a comprehensive or even a representative survey or study of the costs of Commission rules.

Compliance with the collection of information requirements of the rule is mandatory and is necessary to comply with the requirements of the rule in general. 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.

The public may view the background documentation for this information collection at the following Web site, *http://www.reginfo.gov.* Comments should be directed to: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503, or by sending an email to: *Shagufta_Ahmed@omb.eop.gov;* and (ii) Thomas Bayer, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 6432 General Green Way, Alexandria, VA 22312 or send an email to: *PRA_Mailbox@sec.gov.* Comments must be submitted to OMB within 30 days of this notice.

Dated: November 3, 2011.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2011–28902 Filed 11–7–11; 8:45 am]

BILLING CODE 8011–01–P

[7] Based on statistics compiled by Commission staff, we estimate that there are approximately 4218 funds that could rely on one or more of the exemptive rules. Of those funds, we assume that approximately 90 percent (3796) actually rely on at least one exemptive rules annually.

[8] We assume that the independent directors of the remaining two-thirds of those funds will choose not to have counsel, or will rely on counsel who has not recently represented the fund's management organizations or control persons. In both circumstances, it would not be necessary for the fund's independent directors to make a determination about their counsel's independence.

[9] The estimated hourly wages used in this PRA analysis were derived from reports prepared by the Securities Industry and Financial Markets Association. *See* Securities Industry and Financial Markets Association, Report on Management and Professional Earnings in the Securities Industry—2010 (2010), modified to account for an 1800-hour work year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead; and Securities Industry and Financial Markets Association, Office Salaries in the Securities Industry—2010 (2010), modified to account for an 1800-hour work year and multiplied by 2.93 to account for bonuses, firm size, employee benefits and overhead.

[10] (633 × $235/hour) + (316 × $67/hour) = $169,927.00.

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Form N–17f–1; SEC File No. 270–316; OMB Control No. 3235–0359.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (the ''Commission'') has submitted to the Office of Management and Budget a request for extension of the previously approved collection of information discussed below.

Form N–17f–1 (17 CFR 274.219) is entitled ''Certificate of Accounting of Securities and Similar Investments of a Management Investment Company in the Custody of Members of National Securities Exchanges.'' The form serves as a cover sheet to the accountant's certificate that is required to be filed periodically with the Commission pursuant to rule 17f–1 (17 CFR 270.17f–1) under the Act, entitled ''Custody of Securities with Members of National Securities Exchanges,'' which sets forth the conditions under which a fund may place its assets in the custody of a member of a national securities exchange. Rule 17f–1 requires, among other things, that an independent public accountant verify the fund's assets at the end of every annual and semi-annual fiscal period, and at least one other time during the fiscal year as chosen by the independent accountant. Requiring an independent accountant to examine the fund's assets in the custody of a member of a national securities exchange assists Commission staff in its inspection program and helps to ensure that the fund assets are subject to proper auditing procedures. The accountant's certificate stating that it has made an examination, and describing the nature and the extent of the examination, must be attached to Form N–17f–1 and filed with the Commission promptly after each examination. The form facilitates the filing of the accountant's certificates, and increases the accessibility of the certificates to both Commission staff and interested investors.

Commission staff estimates that on an annual basis it takes: (i) 1 hour of clerical time to prepare and file Form N–17f–1; and (ii) 0.5 hour for the fund's chief compliance officer to review Form N–17f–1 prior to filing with the Commission, for a total of 1.5 hours. Each fund is required to make 3 filings annually, for a total annual burden per fund of approximately 4.5 hours.[1] Commission staff estimates that an average of 5 funds currently file Form N–17f–1 with the Commission 3 times each year, for a total of 15 responses annually.[2] The total annual hour burden for Form N–17f–1 is therefore estimated to be approximately 22.5 hours.[3]

The estimate of average burden hours is made solely for the purposes of the Paperwork Reduction Act, and is not derived from a comprehensive or even a representative survey or study of the costs of Commission rules. Compliance with the collections of information required by Form N–17f–1 is mandatory for funds that place their assets in the custody of a national securities exchange member. Responses will not be kept confidential. 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.

[1] This estimate is based on the following calculation: (1.5 hours × 3 responses annually = 4.5 hours).

[2] This estimate is based on a review of Form N–17f–1 filings made with the Commission over the last three years.

[3] This estimate is based on the following calculations: (4.5 hours × 5 funds = 22.5 total hours).

The public may view the background documentation for this information collection at the following Web site, *http://www.reginfo.gov*. Comments should be directed to: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503, or by sending an email to: *Shagufta_Ahmed@omb.eop.gov*; and (ii) Thomas Bayer, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 6432 General Green Way, Alexandria, VA 22312 or send an email to: *PRA_Mailbox@sec.gov*. Comments must be submitted to OMB within 30 days of this notice.

Dated: November 3, 2011.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2011–28907 Filed 11–7–11; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Rule 3a–8, SEC File No. 270–516, OMB Control No. 3235–0574.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget a request for extension of the previously approved collection of information discussed below.

Rule 3a–8 (17 CFR 270.3a–8) of the Investment Company Act of 1940 (15 U.S.C. 80a) (the ''Act''), serves as a nonexclusive safe harbor from investment company status for certain research and development companies (''R&D companies'').

The rule requires that the board of directors of an R&D company seeking to rely on the safe harbor adopt an appropriate resolution evidencing that the company is primarily engaged in a non-investment business and record that resolution contemporaneously in its minute books or comparable documents.[1] An R&D company seeking to rely on the safe harbor must retain these records only as long as such records must be maintained in accordance with state law.

Rule 3a–8 contains an additional requirement that is also a collection of information within the meaning of the PRA. The board of directors of a company that relies on the safe harbor under rule 3a–8 must adopt a written policy with respect to the company's capital preservation investments. We expect that the board of directors will base its decision to adopt the resolution discussed above, in part, on investment guidelines that the company will follow to ensure its investment portfolio is in compliance with the rule's requirements.

The collection of information imposed by rule 3a–8 is voluntary because the rule is an exemptive safe harbor, and therefore, R&D companies may choose whether or not to rely on it. The purposes of the information collection requirements in rule 3a–8 are to ensure that: (i) The board of directors of an R&D company is involved in determining whether the company should be considered an investment company and subject to regulation under the Act, and (ii) adequate records are available for Commission review, if necessary. Rule 3a–8 would not require the reporting of any information or the filing of any documents with the Commission.

Commission staff estimates that there is no annual recordkeeping burden associated with the rule's requirements. Nevertheless, the Commission requests authorization to maintain an inventory of one burden hour for administrative purposes.

Commission staff estimates that approximately 1,851 R&D companies may rely on rule 3a–8. Given that the board resolutions and investment guidelines will generally need to be adopted only once (unless relevant circumstances change),[2] the Commission believes that all the companies that rely on rule 3a–8 adopted their board resolutions and established written investment guidelines in 2003 when the rule was adopted. We expect that newly formed R&D companies would adopt the board resolution and investment guidelines simultaneously with their formation documents in the ordinary course of business.[3] Therefore, we estimate that rule 3a-8 will not create an additional time burden.

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.

The public may view the background documentation for this information collection at the following Web site, *http://www.reginfo.gov*. Comments should be directed to: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503, or by sending an email to: *Shagufta_Ahmed@omb.eop.gov*; and (ii) Thomas Bayer, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 6432 General Green Way, Alexandria, VA 22312 or send an email to: *PRA_Mailbox@sec.gov*. Comments must be submitted to OMB within 30 days of this notice.

Dated: November 3, 2011.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2011–28908 Filed 11–7–11; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Rule 18f–3, SEC File No. 270–385, OMB Control No. 3235–0441.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget request for extension of the previously approved collection of information discussed below.

[1] Rule 3a–8(a)(6) (17 CFR 270.3a–8(6)).

[2] In the event of changed circumstances, the Commission believes that the board resolution and investment guidelines will be amended and recorded in the ordinary course of business and would not create additional time burdens.

[3] In order for these companies to raise sufficient capital to fund their product development stage, we believe they will need to present potential investors with investment guidelines. Investors would want to be assured that the company's funds are invested consistent with the goals of capital preservation and liquidity.

Section 18(f)(1)[1] of the Investment Company Act of 1940[2] (the ''Investment Company Act'' or ''Act'') prohibits registered open-end management investment companies (''funds'') from issuing any senior security. Rule 18f–3 under the Act[3] exempts from section 18(f)(1) a fund that issues multiple classes of shares representing interests in the same portfolio of securities (a ''multiple class fund'') if the fund satisfies the conditions of the rule. In general, each class must differ in its arrangement for shareholder services or distribution or both, and must pay the related expenses of that different arrangement.

The rule includes one requirement for the collection of information. A multiple class fund must prepare, and fund directors must approve, a written plan setting forth the separate arrangement and expense allocation of each class, and any related conversion features or exchange privileges (''rule 18f–3 plan'').[4] Approval of the plan must occur before the fund issues any shares of multiple classes and whenever the fund materially amends the plan. In approving the plan, a majority of the fund board, including a majority of the fund's independent directors, must determine that the plan is in the best interests of each class and the fund as a whole.

The requirement that the fund prepare and directors approve a written rule 18f–3 plan is intended to ensure that the fund compiles information relevant to the fairness of the separate arrangement and expense allocation for each class, and that directors review and approve the information. Without a blueprint that highlights material differences among classes, directors might not perceive potential conflicts of interests when they determine whether the plan is in the best interests of each class and the fund. In addition, the plan may be useful to Commission staff in reviewing the fund's compliance with the rule.

There are approximately 5,655 multiple class funds offered by 1,020 registrants.[5] Based on a review of typical rule 18f–3 plans, the Commission's staff estimates that the 1,020 registrants together make an average of 510 responses each year to prepare and approve a written rule 18f–3 plan, requiring approximately 8 hours per response and a total of 4,080 burden hours per year in the aggregate.[6] The staff estimates that preparation of the rule 18f–3 plan may require 5 hours of the services of an attorney employed by the fund, at a cost of approximately $354.00 per hour for professional time,[7] and approval of the plan may require 3 hours of the services of the board of directors, at a cost of approximately $4,000.00 per hour.[8] The staff therefore estimates that the aggregate annual cost of complying with the paperwork requirements of the rule is approximately $7,022,700.00 ((5 hours × 510 responses × $354.00.00 = $902,700.00) + (3 hours × 510 responses × $4,000.00 = $6,120,000.00)).

The estimated annual burden of 4,080 hours represents a decrease of 1,520 hours from the prior estimate of 5,600 hours. The decrease in burden hours is attributable to changes in the estimates of the average hour burden per response and the number of responses that are submitted pursuant to the rule.

The estimate of average burden hours is made solely for the purposes of the Paperwork Reduction Act. The estimate is not derived from a comprehensive or even a representative survey or study of the costs of Commission rules. Complying with this collection of information requirement is mandatory. Responses will not be kept confidential. 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.

The public may view the background documentation for this information collection at the following Web site, *http://www.reginfo.gov.* Comments should be directed to: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503, or by sending an email to: *Shagufta_Ahmed@omb.eop.gov;* and (ii) Thomas Bayer, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 6432 General Green Way, Alexandria, VA 22312 or send an email to: *PRA_Mailbox@sec.gov.* Comments must be submitted to OMB within 30 days of this notice.

November 3, 2011.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2011–28909 Filed 11–7–11; 8:45 am]

BILLING CODE 8011–01–P

[1] 15 U.S.C. 80a–18(f)(1).

[2] 15 U.S.C. 80a.

[3] 17 CFR 270.18f–3.

[4] Rule 18f–3(d).

[5] This estimate is based on data from Form N–SAR, the semi-annual report that funds file with the Commission. In previous years, the staff estimated that each multiple class fund prepared and approved a rule 18f–3 plan. However, the staff has revised this estimate to reflect its belief that most registrants prepare and approve a single rule 18f–3 plan for all series funds offered by the registrants.

[6] The estimate reflects the assumption that each registrant prepares and approves a rule 18f–3 plan every two years when issuing a new fund or new class or amending a plan (or that 510 of all 1020 registrants prepare and approve a plan each year). The estimate assumes that the time required to prepare a plan is 5 hours per plan (or 2550 hours for 510 registrants annually), and the time required to approve a plan is an additional 3 hours per plan (or 1530 hours for 510 registrants annually).

[7] This hourly rate estimate is derived from annual salaries reported in: Securities Industry and Financial Markets Association, *Management and Professional Earnings in the Securities Industry* (2010), modified by Commission staff to account for an 1800-hour work year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead.

[8] This hourly rate estimate is derived from fund representatives.

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Rule 30b2–1, SEC File No. 270–213, OMB Control No. 3235–0220.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (the ''Commission'') has submitted to the Office of Management and Budget (''OMB'') a request for extension of the previously approved collection of information discussed below.

Rule 30b2–1 (17 CFR 270.30b2–1) under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) (the ''Investment Company Act'') requires a registered management investment company (''fund'') to (1) file a report with the Commission on Form N–CSR (17 CFR 249.331 and 274.128) not later than 10 days after the transmission of any report required to be transmitted to shareholders under rule 30e–1 under the Investment Company Act, and (2) file with the Commission a copy of every periodic or interim report or similar communication containing financial statements that is transmitted by or on behalf of such fund to any class of such fund's security holders and that is not required to be filed with the Commission under (1) above, not later than 10 days after the transmission to security holders. The purpose of the collection of information required by rule 30b2–1 is to meet the disclosure requirements of the Investment Company Act and certification

requirements of the Sarbanes-Oxley Act of 2002 (Pub. L 107–204, 116 Stat. 745 (2002)) and to provide investors with information necessary to evaluate an interest in the fund.

The Commission estimates that there are 2,520 funds, with a total of approximately 9,250 portfolios, that are governed by the rule. For purposes of this analysis, the burden associated with the requirements of rule 30b2–1 has been included in the collection of information requirements of rule 30e-1 and Form N–CSR, rather than the rule. The Commission has, however, requested a one hour burden for administrative purposes.

The collection of information under rule 30b2–1 is mandatory. The information provided under rule 30b2–1 is not kept confidential. 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 public may view the background documentation for this information collection at the following Web site, *http://www.reginfo.gov*. Comments should be directed to: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503, or by sending an email to: *Shagufta_Ahmed@omb.eop.gov;* and (ii) Thomas A. Bayer, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 6432 General Green Way, Alexandria, VA 22312; or send an email to: *PRA_Mailbox@sec.gov*. Comments must be submitted to OMB within 30 days of this notice.

Dated: November 3, 2011.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2011–28910 Filed 11–7–11; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request, Copy Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Rule 34b–1, File No. 270–305, OMB Control No. 3235–0346.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (the ''Commission'') has submitted to the Office of Management and Budget a request for extension of the previously approved collection of information discussed below.

Rule 34b–1 under the Investment Company Act (17 CFR 270.34b–1) governs sales material that accompanies or follows the delivery of a statutory prospectus (''sales literature''). Rule 34b–1 deems to be materially misleading any investment company (''fund'') sales literature required to be filed with the Securities and Exchange Commission (''Commission'') by Section 24(b) of the Investment Company Act (15 U.S.C. 80a–24(b)) that includes performance data, unless the sales literature also includes the appropriate uniformly computed data and the legend disclosure required in investment company advertisements by rule 482 under the Securities Act of 1933 (17 CFR 230.482). Requiring the inclusion of such standardized performance data in sales literature is designed to prevent misleading performance claims by funds and to enable investors to make meaningful comparisons among funds.

The Commission estimates that on average 3,525 respondents file approximately 12,433 responses with the Commission that include the information required by rule 34b–1 each year. The burden from rule 34b–1 requires 2.41 hours per response. The total annual burden hours for rule 34b–1 is 29,964 hours per year in the aggregate (12,443 responses × 2.41 hours per response).

The collection of information under rule 34b–1 is mandatory. The information provided under rule 34b–1 is not kept confidential. 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.

The public may view the background documentation for this information collection at the following Web site, *http://www.reginfo.gov*. Comments should be directed to: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503, or by sending an email to: *Shagufta_Ahmed@omb.eop.gov*; and (ii) Thomas Bayer, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 6432 General Green Way, Alexandria, VA 22312 or send an email to: *PRA_Mailbox@sec.gov*. Comments must be submitted to OMB within 30 days of this notice.

Dated: November 3, 2011.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2011–28911 Filed 11–7–11; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request, Copy Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Rule 498, File No. 270–574, OMB Control No. 3235–0648.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995,[1] the Securities and Exchange Commission (the ''Commission'') has submitted to the Office of Management and Budget a request for extension of the previously approved collection of information discussed below.

Rule 498 under the Securities Act of 1933 (''Securities Act'')[2] permits open-end management investment companies (''funds'') to satisfy their prospectus delivery obligations under the Securities Act by sending or giving key information directly to investors in the form of a summary prospectus (''Summary Prospectus'') and providing the statutory prospectus on a Web site. Upon an investor's request, funds are also required to send the statutory prospectus to the investor. In addition, under rule 498, a fund that relies on the rule to meet its statutory prospectus delivery obligations must make available, free of charge, the fund's current Summary Prospectus, statutory prospectus, statement of additional information, and most recent annual and semi-annual reports to shareholders at the Web site address specified in the required Summary Prospectus legend. A Summary Prospectus that complies with rule 498 is deemed to be a prospectus that is authorized under Section 10(b) of the Securities Act[3] and Section 24(g) of the Investment Company Act of 1940.[4]

The purpose of rule 498 is to enable a fund to provide investors with a Summary Prospectus containing key information necessary to evaluate an investment in the fund. Unlike many other federal information

[1] 44 U.S.C. 3501 *et* seq.

[2] 17 CFR 230.498.

[3] 15 U.S.C. 77j. A ''prospectus,'' as defined by the Securities Act, is any prospectus, notice, circular, advertisement, letter, or communication, written or by radio or television, which offers any security for sale or confirms the sale of any security, with certain exceptions. 15 U.S.C. 77b(a)(10).

[4] 15 U.S.C. 80a–24(g).

collections, which are primarily for the use and benefit of the collecting agency, this information collection is primarily for the use and benefit of investors. The information filed with the Commission also permits the verification of compliance with securities law requirements and assures the public availability and dissemination of the information.

The current approved annual internal hour burden for filing and updating Summary Prospectuses and posting the required disclosure documents on a Web site pursuant to rule 498 is 63,014 hours. Based on staff review of Summary Prospectuses filed with the Commission, the Commission now estimates that approximately 6,250 portfolios are using a Summary Prospectus. Therefore, the Commission estimates that the total annual internal burden for filing and updating Summary Prospectuses and posting the required disclosure documents to a Web site pursuant to rule 498 will therefore be approximately 9,375 hours, representing a decrease of 53,639 hours.

The current approved total annual cost burden is $106,200,000 or approximately $15,200 per portfolio. Adjusting the total annual cost burden per portfolio for the effects of inflation, the Commission now estimates the total annual cost burden per portfolio to be $15,900, for a total annual cost burden of approximately $99,375,000. This represents a decrease in the total annual cost burden of approximately $6,825,000.

Estimates of average burden hours are made solely for the purposes of the Paperwork Reduction Act, and are not derived from a comprehensive or even a representative survey or study of the costs of Commission rules and forms. The collection of information under rule is voluntary. The information provided under rule is not kept confidential. 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 public may view the background documentation for this information collection at the following Web site, *http://www.reginfo.gov.* Comments should be directed to: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503, or by sending an email to: *Shagufta_Ahmed@omb.eop.gov;* and (ii) Thomas Bayer, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 6432 General Green Way, Alexandria, VA 22312 or send an email to: *PRA_Mailbox@sec.gov.* Comments must be submitted to OMB within 30 days of this notice.

November 3, 2011.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2011–28912 Filed 11–7–11; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meeting

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Public Law 94–409, that the Securities and Exchange Commission will hold a Closed Meeting on Thursday, November 10, 2011 at 2 p.m.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the Closed Meeting. Certain staff members who have an interest in the matters also may be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (7), (9)(B) and (10) and 17 CFR 200.402(a)(3), (5), (7), (9)(ii) and (10) permit consideration of the scheduled matters at the Closed Meeting.

Commissioner Walter, as duty officer, voted to consider the items listed for the Closed Meeting in a closed session.

The subject matter of the Closed Meeting scheduled for Thursday, November 10, 2011 will be:

Institution and settlement of injunctive actions; institution and settlement of administrative proceedings; and other matters relating to enforcement proceedings.

At times, changes in Commission priorities require alterations in the scheduling of meeting items.

For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact: The Office of the Secretary at (202) 551–5400.

Dated: November 3, 2011.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2011–28996 Filed 11–4–11; 11:15 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–65670; File No. SR–Phlx–2011–144]

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the Extension of a Pilot Program Concerning Disseminated Quotations

November 2, 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 October 26, 2011, NASDAQ OMX PHLX LLC (''Phlx'' or ''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 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 the Substance of the Proposed Rule Change

The Exchange proposes to amend Exchange Rules 1017, Openings in Options, and 1082, Firm Quotations, to extend, through February 29, 2012, a pilot program (the ''pilot'') under which the Exchange's rules describe the manner in which the PHLX XL® automated options trading system[3] disseminates quotations when (i) There is an opening imbalance in a particular series, and (ii) there is a Quote Exhaust (as described below) or a Market Exhaust (as described below) quote condition present in a particular series.

The current pilot is scheduled to expire November 30, 2011.

The text of the proposed rule change is available on the Exchange's Web site at *http://www.nasdaqtrader.com/micro.aspx?id=PHLXRulefilings,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] This proposal refers to ''PHLX XL'' as the Exchange's automated options trading system. In May 2009 the Exchange enhanced the system and adopted corresponding rules referring to the system as ''Phlx XL II.'' *See* Securities Exchange Act Release No. 59995 (May 28, 2009), 74 FR 26750 (June 3, 2009) (SR–Phlx–2009–32). The Exchange intends to submit a separate technical proposed rule change that would change all references to the system from ''Phlx XL II'' to ''PHLX XL'' for branding purposes.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to extend the pilot through February 29, 2012.

Background

In June, 2009, the Exchange added several significant enhancements to its automated options trading platform (now known as PHLX XL), and adopted rules to reflect those enhancements.[4] As part of the system enhancements, the Exchange proposed to disseminate a ''non-firm'' quote condition on a bid or offer whose size is exhausted in certain situations. The non-exhausted side of the Exchange's disseminated quotation would remain firm up to its disseminated size. At the time the Exchange proposed the ''one-sided non-firm'' quote condition, the Options Price Reporting Authority (''OPRA'') was only capable of disseminating option quotations for which both sides of the quotation are marked ''non-firm.'' OPRA did not disseminate a ''non-firm'' condition for one side of a quotation while the other side of the quotation remains firm.

Accordingly, the Exchange proposed, for a pilot period scheduled to expire November 30, 2009, and later extended through September 30, 2010,[5] to disseminate quotations in such a circumstance with a (i) A bid price of $0.00, with a size of one contract if the remaining size is a seller, or (ii) an offer price of $200,000, with a size of one contract if the remaining size is a buyer.

The Exchange subsequently modified the manner in which the PHLX XL system disseminates quotes when one side of the quote is exhausted but the opposite side still has marketable size at the disseminated price, by disseminating, on the opposite side of the market from remaining unexecuted contracts: (i) A bid price of $0.00, with a size of zero contracts if the remaining size is a seller, or (ii) an offer price of $0.00, with a size of zero contracts if the remaining size is a buyer.[6] That modification was implemented on a pilot basis, scheduled to expire November 30, 2010,[7] and that pilot was then extended through March 31, 2011,[8] and again through July 31, 2011.[9] Subsequently, the pilot was extended through its current expiration date of November 30, 2011.[10]

On October 7, 2010, the U.S. options exchanges, as participants in the OPRA Plan, voted to make technological changes that would enable OPRA to support a one-sided non-firm quote condition. These technological changes provide the opportunity for OPRA and the participants to design, test, and deploy modifications to their systems, and to establish connectivity with quotation vendors, that will support the one-sided non-firm quote condition. Upon the conclusion of the proposed extended pilot (*i.e.,* beginning March 1m [sic], 2012), the Exchange intends to implement a system change (and prior to that date to file an appropriate proposed rule change) to disseminate a ''non-firm'' condition for one side of a quotation while the other side of the quotation remains firm. The Exchange is proposing to extend the current pilot through February 29, 2012, in order to account for the time required to implement the technological changes.

Opening Imbalance

An opening ''imbalance'' occurs when all opening marketable size cannot be completely executed at or within an established Opening Quote Range (''OQR'') for the affected series.[11] Currently, pursuant to Exchange Rule 1017(l)(v)(C)(7), any unexecuted contracts from the opening imbalance not traded or routed are displayed in the Exchange quote at the opening price for a period not to exceed ten seconds, and subsequently, cancelled back to the entering participant if they remain unexecuted and priced through the opening price, unless the member that submitted the original order has instructed the Exchange in writing to re-enter the remaining size, in which case the remaining size will be automatically submitted as a new order. During this display time period, the PHLX XL system disseminates, if the imbalance is a buy imbalance, an offer of $0.00, with a size of zero contracts or, if the imbalance is a sell imbalance, a bid of $0.00, with a size of zero contracts, on the opposite side of the market from remaining unexecuted contracts.

The purpose of this provision is to indicate that the Exchange has exhausted all marketable interest, at or within the OQR, on one side of the market during the opening process yet has remaining unexecuted contracts on the opposite side of the market that are firm at the disseminated price and size.

Rule 1017(l)(v)(C)(7) is subject to the pilot, which is scheduled to expire November 30, 2011. The Exchange proposes to extend the pilot through February 29, 2012.

Quote Exhaust

Quote Exhaust occurs when the market at a particular price level on the Exchange includes a quote, and such market is exhausted by an inbound contra-side quote or order (''initiating quote or order''), and following such exhaustion, contracts remain to be executed from the initiating quote or order.[12]

Rather than immediately executing at the next available price, the PHLX XL system employs a timer (a ''Quote Exhaust Timer''), not to exceed one second, in order to allow market participants to refresh their quotes. During the Quote Exhaust Timer, PHLX XL currently disseminates the ''Reference Price'' (the most recent execution price) for the remaining size, provided that such price does not lock an away market, in which case, the Exchange currently disseminates a bid and offer that is one Minimum Price Variation (''MPV'') from the away market price. During the Quote Exhaust Timer, the Exchange disseminates: (i) A bid price of $0.00, with a size of zero contracts if the remaining size is a seller, or (ii) an offer price of $0.00, with a size of zero contracts if the remaining size is a buyer.

Currently, Exchange Rules 1082(a)(ii)(B)(3)(g)(iv)(A)(3), 1082(a)(ii)(B)(3)(g)(iv)(A)(4), 1082(a)(ii)(B)(3)(g)(iv)(B)(2), and 1082(a)(ii)(B)(3)(g)(iv)(C) describe various scenarios under which the PHLX XL system trades, routes, or posts unexecuted contracts after determining the ''Best Price'' following a Quote Exhaust. These rules permit an up to 10 second time period during which participants may revise their quotes prior to the PHLX XL system taking action. In all of these scenarios, during the up to 10 second time period, the PHLX XL system currently disseminates

[4] *See* Securities Exchange Act Release No. 59995 (May 28, 2009), 74 FR 26750 (June 3, 2009) (SR–Phlx–2009–32).

[5] *See* Securities Exchange Act Release No. 60951 (November 6, 2009), 74 FR 59275 (November 17, 2009) (SR–Phlx–2009–95).

[6] *See* Securities Exchange Act Release No. 63024 (September 30, 2010), 75 FR 61799 (October 6, 2010) (SR–Phlx–2010–134).

[7] *Id.*

[8] *See* Securities Exchange Act Release No. 63350 (November 19, 2010), 75 FR 73150 (November 29, 2010) (SR–Phlx–2010–156).

[9] *See* Securities Exchange Act Release No. 64056 (March 8, 2011), 76 FR 13678 (March 14, 2011) (SR–Phlx–2011–29).

[10] *See* Securities Exchange Act Release No. 64833 (July 7, 2011), 76 FR 41317 (July 13, 2011) (SR–Phlx–2011–95).

[11] Where there is an imbalance at the price at which the maximum number of contracts can trade that is also at or within the lowest quote bid and highest quote offer, the PHLX XL system will calculate an OQR for a particular series, outside of which the PHLX XL system will not execute. *See* Exchange Rule 1017(l)(iii) and (iv).

[12] *See* Exchange Rule 1082(a)(ii)(B)(3).

an offer of $0.00, with a size of zero contracts if the remaining size is a buyer or, if the remaining size is a seller, a bid of $0.00, with a size of zero contracts, on the opposite side of the market from remaining unexecuted contracts.

Exchange Rules 1082(a)(ii)(B)(3)(g)(iv)(A)(3), 1082(a)(ii)(B)(3)(g)(iv)(A)(4), 1082(a)(ii)(B)(3)(g)(iv)(B)(2), and 1082(a)(ii)(B)(3)(g)(iv)(C) are subject to the pilot, which is scheduled to expire November 30, 2011. The Exchange proposes to extend the pilot through February 29, 2012.

Current Rule 1082(a)(ii)(B)(3)(g)(vi) describes what the PHLX XL system does if, after trading at the PHLX and/or routing, there are unexecuted contracts from the initiating order that are still marketable. In this situation, remaining contracts are posted for a period of time not to exceed 10 seconds and then cancelled after such period of time has elapsed, unless the member that submitted the original order has instructed the Exchange in writing to re-enter the remaining size, in which case the remaining size will be automatically submitted as a new order. During the up to 10 second time period, the Exchange will disseminate, on the opposite side of the market from remaining unexecuted contracts: (i) A bid price of $0.00, with a size of zero contracts if the remaining size is a seller, or (ii) an offer price of $0.00, with a size of zero contracts if the remaining size is a buyer.

Rule 1082(a)(ii)(B)(3)(g)(vi) is subject to the pilot. The Exchange proposes to extend the pilot through February 29, 2012.

Market Exhaust

Market Exhaust occurs when there are no PHLX XL participant quotations in the Exchange's disseminated market for a particular series and an initiating order in the series is received. In such a circumstance, the PHLX XL system initiates a ''Market Exhaust Auction'' for the initiating order.[13]

In this situation, the PHLX XL system will first determine if the initiating order, or a portion thereof, can be executed on the PHLX. Thereafter, if there are unexecuted contracts remaining in the initiating order the PHLX XL system will initiate a Market Exhaust Timer. During the Market Exhaust Timer, the Exchange disseminates any unexecuted size of the initiating order at the ''Reference Price,'' which is the execution price of a portion of the initiating order, or one MPV from a better-priced away market price if the Reference Price would lock the away market. The PHLX XL system currently disseminates, on the opposite side of the market from the remaining unexecuted contracts: (i) A bid price of $0.00, with a size of zero contracts if the remaining size is a seller, or (ii) an offer price of $0.00, with a size of zero contracts if the remaining size is a buyer. This provision is subject to the pilot. The Exchange proposes to extend the pilot through February 29, 2012.

Provisional Auction

Exchange Rule 1082(a)(ii)(B)(4)(d)(iv)(E) describes what PHLX XL does after it has explored all alternatives and there still remain unexecuted contracts. During the ''Provisional Auction,'' any unexecuted contracts from the initiating order are displayed in the Exchange quote for the remaining size for a brief period not to exceed ten seconds and subsequently cancelled back to the entering participant if they remain unexecuted, unless the member that submitted the original order has instructed the Exchange in writing to re-enter the remaining size, in which case the remaining size will be automatically submitted as a new order. The rule states that during the brief period, the Phlx XL system disseminates, on the opposite side of the market from remaining unexecuted contracts: (i) A bid price of $0.00, with a size of zero contracts if the remaining size is a seller, or (ii) an offer price of $0.00, with a size of zero contracts if the remaining size is a buyer.[14]

Rule 1082(a)(ii)(B)(4)(d)(iv)(E) is subject to the pilot. The Exchange proposes to extend the pilot through February 29, 2012.

The Exchange believes that the pilot benefits customers and the marketplace as a whole by enabling PHLX to effectively reflect the market interest the Exchange has that is firm and executable, while at the same time indicating the other side of the Exchange market is not firm and therefore not executable. This allows the Exchange to protect orders on its book and attempt to attract interest to execute against such order.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act[15] in general, and furthers the objectives of Section 6(b)(5) of the Act[16] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest.

The Exchange further believes that the proposal is consistent with the SEC Quote Rule's provisions regarding non-firm quotations.[17] Specifically, Rule 602(a)(3)(i) provides that if, at any time a national securities exchange is open for trading, the exchange determines, pursuant to rules approved by the Commission, that the level of trading activities or the existence of unusual market conditions is such that the exchange is incapable of collecting, processing, and making available to vendors the data for a subject security required to be made available in a manner that accurately reflects the current state of the market on such exchange, such exchange shall immediately notify all specified persons of that determination and, upon such notification, the exchange is relieved of its obligations under paragraphs (a)(1) and (2) of Rule 602 relating to collecting and disseminating quotations, subject to certain other provisions of Rule 602(a)(3).

By disseminating a bid of $0.00 for a size of zero contracts, or an offer of $0.00 for a size of zero contracts in certain situations delineated above in the Exchange's rules, the Exchange believes that it is adequately communicating that it is non-firm on that side of the market in compliance with the Quote Rule.

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.

[13] *See* Exchange Rule 1082(a)(ii)(B)(4)(b).

[14] The Exchange notes that there is a discrepancy between the text of Rule 1014)(a)(ii)(B)(4)(d)(iv)(E) and the actual functionality of PHLX XL regarding the Exchange's disseminated market. The Exchange reported this discrepancy to the Commission and advised membership by way of an Options Trader Alert (''OTA'') which was distributed on May 25, 2011. The Exchange will file a proposed rule change to correct this discrepancy. The OTA is available at *http://www.nasdaqtrader.com/TraderNews.aspx?id=OTA2011-22.*

[15] 15 U.S.C. 78f(b).

[16] 15 U.S.C. 78f(b)(5).

[17] *See* 17 CFR 242.602(a)(3)(i) and (ii).

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 the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate, it has become effective pursuant to 19(b)(3)(A) of the Act [18] and Rule 19b–4(f)(6) [19] 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 email to *rule-comments@sec.gov.* Please include File Number SR–Phlx–2011–144 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–Phlx–2011–144. This file number should be included on the subject line if email is used.

To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room 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 offices 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–Phlx–2011–144, and should be submitted on or before November 29, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[20]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2011–28832 Filed 11–7–11; 8:45 am]

BILLING CODE 8011–01–P

[18] 15 U.S.C. 78s(b)(3)(A).

[19] 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. The Exchange has satisfied this requirement.

[20] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–65669; File No. SR–NYSEArca–2011–78]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Offering a Market Data Product to Vendors and Subscribers That Combines Three Existing Market Data Feeds as Well as Additional Market Data From the Exchange Into One Integrated Product, the NYSE Arca Integrated Data Feed

November 2, 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 October 26, 2011, NYSE Arca, Inc. (''NYSEArca'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by 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 the Substance of the Proposed Rule Change

The Exchange proposes to offer a market data product to vendors and subscribers that combines three existing market data feeds as well as additional market data from the Exchange into one integrated product, the NYSE Arca Integrated Data Feed. The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and *http://www.nyse.com.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to offer a market data product to vendors and subscribers that combines three existing market data feeds as well as additional market data from the Exchange into one integrated product, the NYSE Arca Integrated Data Feed. The three existing products, which were previously approved by the Securities and Exchange Commission (the ''Commission'') [sic] directly or became effective pursuant to Section 19(b)(3)(A), are: (1) NYSE Arca BBO,[3] a service that makes available the Exchange's best bids and offers; (2) NYSE Arca Trades,[4] a service that makes available NYSE Arca last sale information on a real-time basis; and (3)

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 62188 (May 27, 2010), 75 FR 31484 (June 3, 2010) (SR–NYSEArca–2010–23).

[4] *See* Securities Exchange Act Release No. 59598 (March 18, 2009), 74 FR 12919 (March 29, 2009) (SR–NYSEArca–2009–05).

ArcaBook,[5] a compilation of all limit orders resident in the NYSE Arca limit order book. In addition, the NYSE Arca Integrated Data Feed would include the following types of market data, which are currently available through existing market data products: order imbalance information prior to the opening and closing of trading[6] and security status information (*i.e.,* delayed openings and trading halts).[7]

The Exchange proposes to offer the NYSE Arca Integrated Data Feed through the Exchange's Liquidity Center Network (''LCN''), a local area network in the Exchange's Mahwah, New Jersey data center that is available to Users of the Exchange's co-location services. The Exchange also would offer the NYSE Arca Integrated Data Feed through the Exchange's Secure Financial Transaction Infrastructure (''SFTI'') network, through which all other Users and member organizations access the Exchange's trading and execution systems and other proprietary market data products.

Offering an integrated product addresses requests received from vendors and subscribers that would like to receive the data described above in an integrated fashion. An integrated data feed would provide a lower latency solution to those vendors and subscribers that are interested in receiving market data as quickly as possible. In addition, an integrated data feed would provide greater efficiencies and reduce errors for vendors and subscribers that currently choose to integrate the data after receiving it from the Exchange. The Exchange believes that providing vendors and subscribers with the option of a market data product that both integrates existing products and includes additional market data would allow vendors and subscribers to choose the best solution for their specific businesses.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b)[8] of the Securities Exchange Act of 1934 (the ''Act''), in general, and furthers the objectives of Section 6(b)(5),[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, 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, and it is not designed to permit unfair discrimination among customers, brokers, or dealers.

In adopting Regulation NMS, the Commission granted self-regulatory organizations (''SROs'') and broker-dealers increased authority and flexibility to offer new and unique market data to consumers of such data. It was believed that this authority would expand the amount of data available to users and consumers of such data and also spur innovation and competition for the provision of market data. The Exchange believes that the NYSE Arca Integrated Data Feed is precisely the sort of market data product that the Commission envisioned when it adopted Regulation NMS. The Commission concluded that Regulation NMS—by lessening regulation of the market in proprietary data—would itself further the Act's goals of facilitating efficiency and competition:

Efficiency is promoted when broker-dealers who do not need the data beyond the prices, sizes, market center identifications of the NBBO and consolidated last sale information are not required to receive (and pay for) such data. The Commission also believes that efficiency is promoted when broker-dealers may choose to receive (and pay for) additional market data based on their own internal analysis of the need for such data.[10]

The Exchange further notes that the existence of alternatives to the Exchange's product, including real-time consolidated data, free delayed consolidated data, and proprietary data from other sources, as well as the continued availability of the Exchange's separate data feeds, ensures that the Exchange is not unreasonably discriminatory because vendors and subscribers can elect these alternatives.

The NYSE Arca Integrated Data Feed will help to protect a free and open market by providing additional data to the marketplace and give investors greater choices. In addition, the proposal would not permit unfair discrimination because the product will be available to all of the Exchange's customers and broker-dealers through both the LCN and SFTI.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The market for proprietary data products is currently competitive and inherently contestable because there is fierce competition for the inputs necessary to the creation of proprietary data. Numerous exchanges compete with each other for listings, trades, and market data itself, providing virtually limitless opportunities for entrepreneurs who wish to produce and distribute their own market data. This proprietary data is produced by each individual exchange, as well as other entities (such as internalizing broker-dealers and various forms of alternative trading systems, including dark pools and electronic communication networks), in a vigorously competitive market. It is common for market participants to further and exploit this competition by sending their order flow and transaction reports to multiple markets, rather than providing them all to a single market.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[11] and Rule 19b–4(f)(6) thereunder.[12] Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of

[5] *See* Securities Exchange Act Release No. 63291 (November 9, 2010), 75 FR 70311 (November 17, 2010).

[6] The Exchange's affiliates, the New York Stock Exchange, LLC (''NYSE'') and NYSE Amex, LLC, currently offer imbalance data feed products pursuant to proposed rule changes filed with the Commission. *See* Securities Exchange Act Release No. 60153 (June 19, 2009), 74 FR 30656 (June 26, 2009) (SR–NYSE–2009–49) (order approving proposed rule change) [sic]; and Securities Exchange Act Release No. 60151 (June 19, 2009), 74 FR 30653 (June 26, 2009) (SR–NYSEAmex–2009–29).

[7] The Commission previously approved the NYSE Alerts data feed for NYSE, which includes delayed opening and trading halt data. *See* Securities Exchange Act Release No. 50844 (December 13, 2004), 69 FR 76806 (December 22, 2004) (SR–NYSE–2004–53).

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(5).

[10] Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005).

[11] 15 U.S.C. 78s(b)(3)(A)(iii).

[12] 17 CFR 240.19b–4(f)(6).

investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6)(iii) thereunder.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEArca–2011–78 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2011–78. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro/shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 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 No. SR–NYSEArca–2011–78 and should be submitted on or before November 29, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2011–28831 Filed 11–7–11; 8:45 am]

BILLING CODE 8011–01–P

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–65668; File No. SR–C2–2011–032]

Self-Regulatory Organizations; C2 Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend Transaction Fees

November 2, 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 October 26, 2011, C2 Options Exchange, Incorporated (the ''Exchange'' or ''C2'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange proposes to amend its transaction fee. The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.org/legal*), at the Exchange's Office of the Secretary, and at the Commission.

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 its fees and rebates for straight one-sided orders in all multiply-listed, equity and ETF options classes. Specifically, the Exchange proposes to increase the Maker rebate to $0.37 per contract and the Taker fee to $.44 per contract for orders originating from public customers. The Exchange also proposes to increase the Maker rebate to $0.40 per contract and the Taker fee to $.45 per contract for orders originating from C2 Market-Makers, and increase the Maker rebate to $0.35 per contract and the Taker fee to $.45 per contract for orders originating from all other market participants.

The purpose of the proposed change is to increase the Exchange's competitive position relative to other exchanges and attract order flow. The Exchange believes that the proposed changes to the Fees Schedule compare favorably to the pricing offered at other exchanges[3] and will allow C2 to better compete for order flow.

The proposed change is to take effect on November 1, 2011.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act,[4] in general, and furthers the objectives of Section 6(b)(4)[5] of the Act in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among C2 Trading Permit Holders and other persons using Exchange facilities. The amounts of the proposed fees and rebates for orders originating from public customers, C2 Market-Makers and all other market participants are reasonable because they are comparable to the amounts of such fees for similar executions on other exchanges.[6]

Offering a slightly higher Maker rebate for orders originating from C2

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* NYSE Arca, Inc. (''Arca'') Options Fee Schedule, page 3, BATS Exchange, Inc. (''BATS'') Fee Schedule, pages 2–3, and NASDAQ Options Market (''NOM'') Fees, page 1.

[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(4).

[6] *See* Note 3.

Market-Makers than those originating from other market participants (including public customers) is equitable and not unfairly discriminatory because C2 Market-Makers take on certain obligations to the Exchange (such as providing two-sided markets) that other market participants to not undertake. Offering a slightly higher Maker rebate for orders originating from public customers than those originating from other market participants (not including C2 Market-Makers) is equitable and not unfairly discriminatory because the Exchange believes this will attract public customer order flow to the Exchange and incentivize broker-dealers and firms to execute public customer orders on the Exchange. To the extent that this purpose is achieved, all of the Exchange's market participants should benefit from the improved market liquidity and the greater number of public customer orders with which to trade. Further, the Exchange believes that the proposed public customer Maker rebate is not unfairly discriminatory because the same rebate would be assessed uniformly to all public customers.

Offering a slightly lower Taker fee for orders originating from public customers than for orders originating from other market participants is equitable and not unfairly discriminatory because the Exchange believes this will attract public customer order flow to the Exchange and incentivize broker-dealers and firms to execute public customer orders on the Exchange. To the extent that this purpose is achieved, all of the Exchange's market participants should benefit from the improved market liquidity and the greater number of public customer orders with which to trade. Further, the Exchange believes that the proposed public customer Taker fee is not unfairly discriminatory because the same fee would be assessed uniformly to all public customers. Also, a number of other exchanges offer different pricing for executions based on the type of market participant from which an order originates.[7]

The Exchange operates in a highly competitive market in which sophisticated and knowledgeable market participants readily can, and do, send order flow to competing exchanges based on fee levels. The Exchange believes that the fees it assesses must be competitive with fees assessed on other options exchanges. The Exchange believes that this competitive marketplace impacts the fees present on the Exchange today and influences the proposals set forth above.

B. Self-Regulatory Organization's Statement on Burden on Competition

C2 does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The proposed rule change is designated by the Exchange as establishing or changing a due, fee, or other charge, thereby qualifying for effectiveness on filing pursuant to Section 19(b)(3)(A) of the Act[8] and subparagraph (f)(2) of Rule 19b–4[9] 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.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–C2–2011–032 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–C2–2011–032. This file number should be included on the subject line if email is used.

To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room 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 offices of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–C2–2011–032, and should be submitted on or before November 29, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2011–28830 Filed 11–7–11; 8:45 am]

BILLING CODE 8011–01–P

[7] *See* Note 3.

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f)(2).

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–65666; File No. SR–Phlx–2011–118]

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing of Proposed Rule Change Relating to Transfer of Positions Off the Floor

November 2, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1], and Rule 19b–4[2] thereunder, notice is hereby given that on October 20, 2011, NASDAQ OMX PHLX LLC (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III, below, which Items have been

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

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, pursuant to Section 19(b)(1) of the Act [3] and Rule 19b–4 thereunder,[4] proposes a new Exchange Rule 1058 entitled ''Transfer of Positions'' to provide a process by which members and member organizations may transfer option positions in limited circumstances.

The text of the proposed rule change is available on the Exchange's Web site at *http://www.nasdaqtrader.com/micro.aspx?id=PHLXRulefilings,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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 provide members and member organizations a mechanism in which to transfer option positions in certain specified circumstances. The Exchange is proposing to amend its Rules to adopt a new Exchange Rule 1058, entitled ''Transfer of Positions.'' [5] The purpose of this Rule is to address narrowly-defined transfers of option positions between accounts, individuals, or entities and codify a current policy at the Exchange for off the floor transfers.

Currently, Exchange Rules do not specifically address transfers of option positions between accounts, individuals or entities. The Exchange, however, has made exceptions to allow off the floor transfers in situations similar to those permitted on other exchanges. The proposed rule would formalize the Exchange's policies with respect to off the floor transfers of options positions in certain limited circumstances.

Specifically, the Exchange would permit off the floor transfers of options listed on the books of member or member organization only if such transfer involves one or more of the following events: (i) The dissolution of a joint account in which the remaining member or member organization assumes the positions of the joint account; (ii) the dissolution of a corporation or partnership in which a former nominee of that corporation or partnership assumes the positions; (iii) positions transferred as part of a member or member organization's capital contribution to a new joint account, partnership, or corporation; (iv) the donation of positions to a not-for-profit corporation; (v) the transfer of positions to a minor under the Uniform Gifts to Minors Act; (vi) a merger or acquisition resulting in a continuity of ownership or management; or (vii) consolidation of accounts within a member or member organization. The members and member organizations would be required to provide the Exchange with prior written notice of the transfer, specifically the positions to be transferred and the reason for the transfer.

The proposed Exchange Rule 1058 provides that members and member organizations must transfer positions pursuant to this Rule at the same prices that appear on the books of the transferring member or member organization,[6] and the transfer must indicate the date when the original trade was made. In the course of transferring positions, no position shall net itself against another position.[7] Each member or member organization that is a party to a transfer of positions would be required to make and retain records which include: (i) The nature of the transaction; (ii) the name of the counter-party; and (iii) any other information required by the Exchange.[8]

The Exchange believes that permitting off the floor transfers in very limited circumstances such as where there is no change is beneficial ownership, to contribute to a non-profit corporation, to transfer to a minor or a transfer by operation of law is reasonable to allow a member or member organization to accomplish certain goals efficiently. The Exchange is seeking to memorialize its current policy regarding off the floor transfers in order to allow its members to transfer positions in the same manner as on other exchanges.[9]

The above-referenced exceptions would allow the Exchange to permit transfers in situations involving dissolutions of entities or accounts, for purposes of donations, mergers or by operation of law. For example, a member that is undergoing a structural change and a one-time movement of positions may require a transfer of positions or a member is leaving a firm that will no longer be in business may require a transfer of positions to another firm. Also, a member may require a transfer of positions to make a capital contribution. The above-referenced circumstances are situations where the transferor continues to maintain some ownership interest or manage the positions transferred.

To date, the Exchange has permitted such off-the floor transfers in limited circumstances and this Rule seeks to codify the specific circumstances where off the floor transfers of positions would be permitted.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act [10] in general, and furthers the objectives of Section 6(b)(5) of the Act [11] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest, by providing an accommodation for members and member organizations who desire to transfer options positions. The Exchange believes that establishing a new Rule which provides clear

[3] 15 U.S.C. 78s(b)(1).

[4] 17 CFR 240.19b–4.

[5] Exchange Rule 1058 is currently reserved. The Exchange proposes to delete the word ''Reserved'' and insert this new Rule in its place.

[6] The same cost basis would apply to the positions once they have been transferred.

[7] Long positions and short positions will not be permitted to ''net'' against each other. For example, if a member desired to transfer 100 long calls into another account that contained 100 short calls of the same options series along with other positions, and the transfer met one of the above permitted exceptions, that transfer of the offsetting options series could not occur pursuant to this Rule because those positions would net against each other resulting in a closing of the position. The member would be required to trade out of that position as per the Exchange's Rules, either on the floor or electronically.

[8] Records should be maintained in accordance with the member or member organization's books and records policy and in conformity with Rules 17a–3 and 17a–4 of the Act.

[9] The Chicago Board Options Exchange, Incorporated (''CBOE'') and NYSE Arca, Inc. (''NYSE Arca'') permit members to effect off-floor transfers in certain circumstances. *See* CBOE Rule 6.49A. *See also* NYSE ARCA Rule 6.78.

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

guidelines on when such off the floor transfers would be permissible would assist members and member organizations seeking to transfer positions and provide notification to the Exchange.

The primary reason that members prefer to transfer positions as opposed to trading out of them is that transferring positions affords a reduction in administrative overhead and cost. In the typical situation, a member is undergoing a structural change and a one-time movement of positions offers efficiency in that process. The Exchange believes that this new Exchange Rule 1058 would allow members and member organizations the opportunity to efficiently and effectively transfer their option positions in limited situations off the floor.

The Exchange believes that the proposed rule creates an orderly process for allowing such transfers. The Rule serves to protect investors and the public interest because the proposed Rule permits transfers off-floor only in limited instances.

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

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 Exchange consents, the Commission shall: (a) By order approve or disapprove such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–Phlx–2011–118 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–Phlx–2011–118. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 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–Phlx–2011–118 and should be submitted on or before November 29, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2011–28829 Filed 11–7–11; 8:45 am]

BILLING CODE 8011–01–P

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–65667; File No. SR–Phlx–2011–136]

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing of Proposed Rule Change Relating to Transfer of Exchange House Accounts

November 2, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 [2] thereunder, notice is hereby given that on October 19, 2011, NASDAQ OMX PHLX LLC (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange, pursuant to Section 19(b)(1) of the Act [3] and Rule 19b–4 thereunder,[4] proposes a new Exchange Rule 912 entitled ''Transfer of Accounts'' to codify a current Exchange policy with respect to the transfer of accounts.

The text of the proposed rule change is available on the Exchange's Web site at *http://www.nasdaqtrader.com/micro.aspx?id=PHLXRulefilings,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(1).

[4] 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 purpose of the proposed rule change is to codify the Exchange's current policy with respect to the transfer of accounts by memorializing the policy in a new Exchange Rule 912 entitled ''Transfer of Accounts.'' [5] The proposed new rule should provide member organizations guidance with respect to requests to transfer accounts either to or from a member organization.[6]

Proposed new Exchange Rule 912 would require a member organization to notify the Exchange's Membership Department, in writing, to transfer an account either to or from a member organization. The Exchange would also require member organizations to execute a Letter of Indemnity [7] in order to obligate the successor and assigns of the account(s) to accept full responsibility for payment of all outstanding Exchange fees, dues, fines and/or charges.

By way of example, if a member organization acquired another member organization and wished to maintain the acquired member's current account assignments, the surviving member organization would be required, pursuant to this proposed Rule, to submit a request to the Exchange's Membership Department for a transfer of those accounts to itself. Another example might be an individual currently employed as a member by one organization who elects to transfer his affiliation to another member organization. In that regard, that individual may wish to maintain the account that is already assigned and request that the Membership Department reassign the account to the new member organization. Any member organization may request an account transfer from the Exchange's Membership Department. However, both member organizations involved must consent to the transfer prior to it becoming effective.

[5] Exchange Rule 912 is currently reserved. The Exchange proposes to delete the word ''Reserved'' and insert this new Rule in its place.

[6] These accounts are Phlx member house accounts which are assigned by the Exchange's Membership Department. These Phlx house accounts are not customer accounts but rather are assigned to Phlx member firms and utilized by members to transact business on the Exchange. These accounts uniquely identify each member for various reasons, including but not limited to: audit trail, clearing and billing. This will have no impact on member registrations.

[7] This is a standard form that is required to be completed by members desiring to transfer their Phlx account.

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 promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest, by providing an accommodation for members and member organizations who desire to transfer accounts. The Exchange believes that memorializing its current policy within an Exchange Rule will provide member organizations clear guidelines on procedures related to transfers of accounts. In addition, the Exchange will require member organizations to execute a Letter of Indemnity to clearly delineate which firm has responsibility for liabilities associated with the accounts. The Exchange believes that the proposed rule creates an orderly process for allowing such transfers and reduces risk by clearly allocating financial responsibilities with respect to the accounts.

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

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 Exchange consents, the Commission shall: (a) By order approve or disapprove such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be disapproved.

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(5).

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–Phlx–2011–136 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–Phlx–2011–136. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10 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–Phlx–2011–136 and should be submitted on or before November 29, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2011–28828 Filed 11–7–11; 8:45 am]

BILLING CODE 8011–01–P

DEPARTMENT OF STATE

[Public Notice: 7680]

In the Matter of the Designation of Shamil Salmanovich Basayev as a Specially Designated Global Terrorist Pursuant to Section 1(b) of Executive Order 13224, as Amended

In accordance with section 1(b) of Executive Order 13224 of September 23, 2001, as amended (''the Order''), I hereby determine that the individual known as Shamil Salmanovich Basayev no longer meets the criteria for designation under the Order, and therefore I hereby revoke the designation of the aforementioned individual as a Specially Designated Global Terrorist pursuant to section 1(b) of the Order.

This notice shall be published in the **Federal Register**.

Dated: October 24, 2011.

Hillary Rodham Clinton,

Secretary of State.

[FR Doc. 2011–28922 Filed 11–7–11; 8:45 am]

BILLING CODE 4710–10–P

DEPARTMENT OF STATE

[Public Notice 7681]

In the Matter of the Designation of Mali Khan also known as Madi Khan as a Specially Designated Global Terrorist Pursuant to Section 1(b) of Executive Order 13224, as Amended

Acting under the authority of and in accordance with section 1(b) of Executive Order 13224 of September 23, 2001, as amended by Executive Order 13268 of July 2, 2002, and Executive Order 13284 of January 23, 2003, I hereby determine that the individual known as Mali Khan, also known as Madi Khan, committed, or poses 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.

Consistent with the determination in section 10 of Executive Order 13224 that ''prior notice to persons determined to be subject to the Order who might have a constitutional presence in the United States would render ineffectual the blocking and other measures authorized in the Order because of the ability to transfer funds instantaneously,'' I determine that no prior notice needs to be provided to any person subject to this determination who might have a constitutional presence in the United States, because to do so would render ineffectual the measures authorized in the Order.

This notice shall be published in the **Federal Register.**

Dated: October 24, 2011.

Hillary Rodham Clinton,

Secretary of State.

[FR Doc. 2011–28925 Filed 11–7–11; 8:45 am]

BILLING CODE 4710–10–P

[10] 17 CFR 200.30–3(a)(12).

TRADE AND DEVELOPMENT AGENCY

Notice of Request for Extension of a Currently Approved Information Collection

AGENCY: United States Trade and Development.

ACTION: Request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35 *et seq.*), the U.S. Trade and Development Agency has submitted a request to the Office of Management and Budget (OMB) to review and approve an extension for a currently approved information collection for Evaluation of USTDA Performance. USTDA published its first **Federal Register** Notice on this information request extension on July 7, 2011, at 76 FR 39975, at which time a 60-day comment period was announced. No comments were received in response to this notice at the end of the comment period.

Comments are again being solicited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information 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.

DATES: Comments must be received by OMB by December 8, 2011 to be assured of consideration.

ADDRESSES: Copies of the subject form and the request for extension prepared for submission to OMB may be obtained from the Agency Submitting Officer. Comments should be addressed as follows: Desk Officer for USTDA, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Washington, DC 20503.

FOR ADDITIONAL INFORMATION CONTACT: Contact Carolyn Hum, Administrative Officer, Attn: PRA, U.S. Trade and Development Agency, 1000 Wilson Blvd., Suite 1600, Arlington, VA 22209–3901; Tel.: (703) 875–4357, Fax: (703) 875–4009; Email: *chum@ustda.gov.*

SUPPLEMENTARY INFORMATION:

Summary Collection Under Review

Type of Request: Extension of a currently approved information collection.

Expiration Date of Previous Approval: 12/31/2011.

Title: Evaluation of USTDA Performance.

Form Number: USTDA 1000E–2011a.

Frequency of Use: annually for duration of project.

Type of Respondents: Business or other for profit; not-for-profit institutions; farms; Federal Government.

Estimated Number of Responses: 3,000 per year.

Estimated Total Annual Burden on Respondents: 1,000 hours per year.

Federal Cost: $416,289.

Authority for Information Collection: Government Performance and Results Act of 1993; 103 Public Law 62; 107 Stat. 285.

Abstract: USTDA and contractors will collect information from various stakeholders on USTDA-funded activities regarding development impact and/or commercial objectives as well as evaluate success regarding GPRA and OMB PART objectives.

Dated: November 1, 2011.

Carolyn Hum,

Administrative Officer.

[FR Doc. 2011–28783 Filed 11–7–11; 8:45 am]

BILLING CODE 8040–01–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Generalized System of Preferences (GSP): Initiation of a Review: Designation of the Republic of South Sudan as a Least Developed Beneficiary Developing Country

AGENCY: Office of the United States Trade Representative.

ACTION: Notice and solicitation of comments from the public.

SUMMARY: This notice announces the initiation of a review to consider designation of the Republic of South Sudan (''South Sudan'') as a beneficiary developing country under the GSP program, including whether South Sudan should also be designated as a Least Developed Beneficiary Country, and solicits comments from the public relating to whether South Sudan meets the criteria for both designations. The deadline for submitting comments is 5 p.m. EST, November 29, 2011.

FOR FURTHER INFORMATION CONTACT: Tameka Cooper, GSP Program, Office of the United States Trade Representative, 600 17th Street NW., Washington, DC 20508. The telephone number is (202) 395–6971; the fax number is (202) 395–9674, and the email address is *Tameka_Cooper@ustr.eop.gov.*

Public versions of all documents relating to this review will be made available for public viewing at *www.regulations.gov,* docket number USTR 2011–0016, on completion of processing and no later than approximately two weeks after the due date.

SUPPLEMENTARY INFORMATION: The GSP Subcommittee of the Trade Policy Staff Committee (TPSC) has initiated a review as to whether South Sudan meets the eligibility criteria of the GSP statute, as set out below. After considering the eligibility criteria, the President is authorized to designate South Sudan as a least developed beneficiary country for purposes of the GSP program. Interested parties are invited to submit comments regarding the eligibility of South Sudan for designation as a beneficiary developing country and as a least developed beneficiary country. To be considered in this review, documents should be submitted in accordance with the instructions below.

I. Eligibility Criteria

The trade benefits of the GSP program are available to any country that the President designates as a GSP ''beneficiary developing country.'' Additional trade benefits under the GSP are available to any country that the President also designates as a GSP ''least developed beneficiary developing country.'' In designating countries as GSP beneficiary developing countries, the President must consider the criteria in sections 502(b)(2) and 502(c) of the Trade Act of 1974, as amended (19 U.S.C. 2462(b)(2), 2462(c)) (''the Act''), including definitions found in section 507 of the Act (19 U.S.C. 2467). When determining whether to designate a country as a least developed beneficiary developing country, the President must consider the factors in sections 501 and 502(c) of the Act (19 U.S.C. 2461, 2462(c)). The relevant GSP provisions are available on the USTR Web site at: *http://www.ustr.gov/trade-topics/trade-development/preference-programs/generalized-system-preference-gsp/gsp-program-inf.*

II. Requirements for Submissions

All submissions must conform to the GSP regulations set forth at 15 CFR Part 2007, except as modified below. Comments must be submitted, in English, to the Chairman of the GSP Subcommittee of the TPSC as soon as possible, but not later than 5 p.m. EST, November 29, 2011. Submissions in response to this notice, including business confidential submissions, must be submitted electronically using *www.regulations.gov,* docket number USTR 2011–0016. Hand-delivered submissions will not be accepted.

To make a submission using *www.regulations.gov,* enter docket number USTR–2011–0016 in the ''Enter Keyword or ID'' field on the home page and click ''Search.'' The site will provide a search-results page listing all documents associated with this docket. Find a reference to this notice by selecting ''Notice'' under ''Document Type'' in the top-middle section of the search-results page, and click on the link entitled ''Submit a Comment.'' The *www.regulations.gov* Web site offers the option of providing comments by filling in a ''Type Comment'' field or by attaching a document using the ''Upload file(s)'' field. Submissions must be in English, with the total submission not to exceed 30 single-spaced standard letter-size pages in 12-point type, including attachments. Any data attachments to the submission should be included in the same file as the submission itself, and not as separate files. Submissions must include, at the beginning of the submission, or on the first page (if an attachment), the following text (in bold and underlined): ''*South Sudan GSP Eligibility Review*''.

Each submitter will receive a submission tracking number on completion of the submissions procedure at *www.regulations.gov.* The tracking number will be the submitter's confirmation that the submission was received into *www.regulations.gov.* The confirmation should be kept for the submitter's records. USTR is not responsible for any delays in a submission due to technical difficulties, nor is it able to provide any technical assistance for the Web site. Documents not submitted in accordance with these instructions may not be considered in this review. If unable to provide submissions as requested, please contact USTR's GSP Program office to arrange for an alternative method of transmission.

Business Confidential Submissions

A submitter requesting that information contained in a comment be treated as business confidential information must certify that such information is business confidential and provide an explanation as to why the information should be protected in accordance with 15 CFR 2007.7. Confidential business information must be clearly designated as such. The submission must be marked ''BUSINESS CONFIDENTIAL'' at the top and bottom of the cover page and each succeeding page, and the submission should indicate, via brackets, the specific information that is confidential. In addition, ''Business Confidential'' must be included in the ''Type Comment'' field. Anyone submitting a comment containing business confidential information must also submit as a separate submission a non-confidential version of the confidential submission, indicating where confidential information has been redacted. The non-confidential version will be placed in the docket and open to public inspection. Business confidential submissions that are submitted without the required markings, or are not accompanied by a properly marked non-confidential version, as set forth above, may not be accepted or may be considered public documents.

III. Public Viewing of Review Submissions

Submissions in response to this notice, except for information granted ''business confidential'' status under 15 CFR 2003.6, will be available for public viewing pursuant to 15 CFR 2007.6 at *www.regulations.gov* on completion of processing and no later than approximately two weeks after the relevant due date. Such submissions may be viewed by entering the docket number USTR–2011–0016 in the search field at: *www.regulations.gov* and clicking ''Search.''

William D. Jackson,

Deputy Assistant U.S. Trade Representative for the Generalized System of Preferences, Office of the U.S. Trade Representative.

[FR Doc. 2011–28826 Filed 11–7–11; 8:45 am]

BILLING CODE 3190–W2–P

DEPARTMENT OF TRANSPORTATION

[Docket No. DOT–OST–2004–16951]

Agency Request for Reinstatement of a Previously Approved Information Collection(s): Aircraft Accident Liability Insurance

AGENCY: Office of the Secretary (OST), DOT.

ACTION: Notice and request for comments.

SUMMARY: The Department of Transportation (DOT) invites public comments on our request to the Office of Management and Budget (OMB) for approval to reinstate a previously approved information collection. The collection involves the certificates of insurance that U.S. air carriers and foreign air carriers file with DOT as evidence that they are in compliance with DOT's liability insurance requirements. We are required to publish this notice in the **Federal Register** by the Paperwork Reduction Act of 1995, Public Law 104–13.

DATES: Written comments should be submitted by January 9, 2012.

ADDRESSES: You may submit comments [identified by Docket No. DOT–OST–2004–16951] through one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 1–(202)–493–2251.
- *Mail or Hand Delivery:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

FOR FURTHER INFORMATION CONTACT: Vanessa Balgobin, U.S. Department of Transportation, Office of the Secretary, 1200 New Jersey Avenue SE, Room W86–463, Washington, DC 20590. *Phone:* (202) 366–9721. *Email: vanessa.balgobin@dot.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control Number: 2106–0030.

Title: Aircraft Accident Liability Insurance.

Form Numbers: OST Forms 6410 and 6411.

Type of Review: Reinstatement of a previously approved information collection.

Background: 49 U.S.C. 41112 provides that an air carrier may not be issued or continue to hold air carrier authority unless it has filed with DOT evidence that it possesses insurance in accordance with DOT regulations. 14 CFR Part 205 establishes procedures for filing evidence of liability insurance for air carriers, and contains the minimum requirements for air carrier accident liability insurance to protect the public from losses. This insurance information is submitted to DOT using OST Form 6410 (U.S. air carriers) or OST Form 6411 (foreign air carriers).

Currently, OST Forms 6410 and 6411 are electronically available to the public; however, they cannot be filled out electronically. DOT is proposing to amend these forms so that they can be filled out electronically and saved for future amendments. However, these amended forms will still require original signatures and may not be filed electronically with DOT. By using fillable forms, DOT expects that most respondents will reduce their response times by half.

Approximately 5,308 air carriers (4,604 U.S. and 704 foreign) are registered with DOT. Generally, air carriers file insurance certificates annually, coinciding with the term of their insurance policy. However, approximately one in three of these respondents will amend their insurance certificates during the course of the year, usually to add or remove covered aircraft. Thus, DOT expects 7,059 responses to be filed each year (6,123 U.S. and 936 foreign).

Further, DOT expects 95 percent of the responses (6,706 responses) to be completed using the fillable form, which requires 15 minutes to complete, and 5 percent of the responses (353 responses) to be completed manually requiring 30 minutes, for a total of 1,854 burden hours.

Respondents: U.S. and foreign air carriers.

Number of Respondents: 5,308.

Frequency: On occasion.

Number of Responses: 7,059.

Total Annual Burden: 1,854 hours.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) whether the proposed collection of information is necessary for DOT's performance; (b) the accuracy of the estimated burden; (c) ways for DOT to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended; and 49 CFR 1:48.

Issued in Washington, DC on November 2, 2011.

Lauralyn Remo,

Chief, Air Carrier Fitness Division.

[FR Doc. 2011–28879 Filed 11–7–11; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Notice of Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits Filed Under Subpart B (Formerly Subpart Q) During the Week Ending September 24, 2011

The following Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits were filed under Subpart B (formerly Subpart Q) of the Department of Transportation's Procedural Regulations (See 14 CFR 301.201 *et. seq.*). The due date for Answers, Conforming Applications, or Motions to Modify Scope are set forth below for each application. Following the Answer period DOT may process the application by expedited procedures. Such procedures may consist of the adoption of a show-cause order, a tentative order, or in appropriate cases a final order without further proceedings.

Docket Number: DOT–OST–2011–0179.

Date Filed: September 19, 2011.

Due Date for Answers, Conforming Applications, or Motion to Modify Scope: October 11, 2011.

Description: Application of Federal Express Corporation (''FedEx Express'') requesting an amendment to its certificate of public convenience and necessity for Route 568 to engage in scheduled foreign air transportation of property and mail between a point or points in the United States and a point or points in Mexico. FedEx Express also requests an exemption to the extent necessary, authorizing scheduled foreign air transportation of property and mail (1) between Memphis, Tennessee, and Mobile, Alabama, on the one hand and Queretaro, Mexico, on the other hand, as of October 17, 2011 and (2) between Indianapolis, Indiana and Guadalajara, Mexico also as of October 17, 2011.

Docket Number: DOT–OST–2011–0180.

Date Filed: September 20, 2011.

Due Date for Answers, Conforming Applications, or Motion to Modify Scope: October 12, 2011.

Description: Application of Blue Panorama Airlines, S.p.A. (''Blue

Panorama'') requesting a foreign carrier permit and exemption authority authorizing Blue Panorama to conduct operations to and from the United States to the full extent authorized by the United States-European Union Air Transportation Agreement (''U.S.-E.U. Agreement''), including authority to engage in: (i) Scheduled and charter foreign air transportation of persons, property and mail from any point(s) behind any Member State(s) of the European Community, via any point(s) in any Member State(s) and via intermediate points to any point(s) in the United States and beyond; (ii) scheduled and charter foreign air transportation of persons, property and mail between any point(s) in the United States and any point(s) in any member of the European Common Aviation Area; (iii) other charters; and (iv) transportation authorized by any additional route or other right(s) made available to European Community carriers in the future.

Docket Number: DOT–OST–2011–0183.

Date Filed: September 21, 2011.

Due Date for Answers, Conforming Applications, or Motion to Modify Scope: October 13, 2011.

Description: Application of Icelandair ehf. (''lcelandair'') requesting the Department amend its foreign air carrier permit so that it can exercise new rights recently made available to Icelandic air carriers pursuant to the Air Transport Agreement between the United States of America and the European Union and its Member States and Iceland and Norway. lcelandair also requests an exemption to the extent necessary to enable it to provide the services covered by this application while lcelandair's request for an amended foreign air carrier permit is pending.

Renee V. Wright,

Program Manager, Docket Operations, Federal Register Liaison.

[FR Doc. 2011–28882 Filed 11–7–11; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Intent To Rule On Request To Release Airport Property at the Malden Regional Airport and Industrial Park (MAW), Malden, MO

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice.

SUMMARY: The FAA proposes to rule and invites public comment on the release of land at the Malden Regional Airport & Industrial Park (MAW), Malden, Missouri, under the provisions of 49 U.S.C. 47107(h)(2).

DATES: Comments must be received on or before December 8, 2011.

ADDRESSES: Comments on this application may be mailed or delivered to the FAA at the following address: Lynn D. Martin, Airports Compliance Specialist, Federal Aviation Administration, Airports Division, ACE–610C, 901 Locust Room 364, Kansas City, MO 64106.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to: Barbara Crayne, Airport Manager, Malden Regional Airport & Industrial Park, 3077 Mitchell Dr., P.O. Box 411, Malden, MO 63863–0411, (573) 276–2279

FOR FURTHER INFORMATION CONTACT: Lynn D. Martin, Airports Compliance Specialist, Federal Aviation Administration, Airports Division, ACE–610C, 901 Locust Room 364, Kansas City, MO 64106, (816) 329–2644, *lynn.martin@faa.gov* The request to release property may be reviewed, by appointment, in person at this same location.

SUPPLEMENTARY INFORMATION: The FAA invites public comment on the request to release approximately 2.4 acres of airport property at the Malden Regional Airport & Industrial Airport (MAW) under the provisions of 49 U.S.C. 47107(h)(2). On December 20, 2010, the Mayor of the City of Malden and the Airport Manager at the Malden Regional Airport requested from the FAA that approximately 2.4 acres of property be released for sale to Murphy Argo Investments. On Sept. 16, 2011, the FAA determined that the request to release property at Malden Regional Airport and Industrial Park (MAW) submitted by the Sponsor meets the procedural requirements of the Federal Aviation Administration and the release of the property does not and will not impact future aviation needs at the airport. The FAA may approve the request, in whole or in part, no sooner than thirty days after the publication of this Notice.

The following is a brief overview of the request:

Malden Regional Airport and Industrial Park (MAW) is proposing the release of two parcels, one of 0.8 acres and another of 1.6 acres, for a total of 2.4 acres. The release of land is necessary to comply with Federal Aviation Administration Grant Assurances that do not allow federally acquired airport property to be used for non-aviation purposes. The sale of the subject property will result in the land at the Malden Regional Airport and Industrial Park (MAW) being changed from aeronautical to nonaeronautical use and release the lands from the conditions of the AIP Grant Agreement Grant Assurances. In accordance with 49 U.S.C. 47107(c)(2)(B)(i) and (iii), the airport will receive fair market value for the property, which will be subsequently reinvested in another eligible airport improvement project for general aviation facilities at the Malden Regional Airport and Industrial Park.

Any person may inspect, by appointment, the request in person at the FAA office listed above under **FOR FURTHER INFORMATION CONTACT**. In addition, any person may, upon appointment and request, inspect the application, notice and other documents determined by the FAA to be related to the application in person at the Malden Regional Airport and Industrial Park.

Issued in Kansas City, MO, on October 31, 2011.

Jim A. Johnson,

Manager, Airports Division.

[FR Doc. 2011–28935 Filed 11–7–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

Petition to Modify an Exemption of a Previously Approved Antitheft Device; Porsche

AGENCY: National Highway Traffic Safety Administration, Department of Transportation (DOT).

ACTION: Grant of a petition to modify an exemption of a previously approved antitheft device.

SUMMARY: On May 25, 1989, the National Highway Traffic Safety Administration (NHTSA) granted in full Porsche Cars North America's (Porsche) petition for an exemption in accordance with § 543.9(c)(2) of 49 CFR part 543, *Exemption from the Theft Prevention Standard* for the Porsche 911 vehicle line beginning with model year (MY) 1990. On August 16, 2011, Porsche submitted a petition to modify its previously approved exemption for the Porsche 911 vehicle line and notified the agency that all new successor models within the 911 line will be installed with the proposed antitheft device beginning with MY 2012. NHTSA is granting Porsche's petition to modify the exemption in full, because it has determined that the modified device is also likely to be as effective in

reducing and deterring motor vehicle theft as compliance with the parts-marking requirements of the Theft Prevention Standard.

DATES: The exemption granted by this notice is effective beginning with the 2012 MY.

FOR FURTHER INFORMATION CONTACT: Carlita Ballard, Office of International Policy, Fuel Economy and Consumer Standards, NHTSA, 1200 New Jersey Avenue SE., West Building, W43–439, Washington, DC 20590. Ms. Ballard's telephone number is (202) 366–5222. Her fax number is (202) 493–2990.

SUPPLEMENTARY INFORMATION: On June 2, 1989, NHTSA published in the **Federal Register** a notice granting in full a petition from Porsche for an exemption from the parts-marking requirements of the Theft Prevention Standard (49 CFR 541) for the 911 vehicle line beginning with its MY 1990 vehicles. The Porsche 911 is equipped with a passive antitheft device and an audible and visible alarm. (See 54 FR 23727)

On April 4, 1990, Porsche submitted its first letter requesting deminimis treatment of a modification to its existing 911 vehicle line beginning with its MY 1991 vehicles. Porsche's modification added an alarm control unit integrated with central locking and an interior light control unit. The modification to the device also included improved diagnostic capabilities to accept inputs such as motion sensors and an alarm control unit that monitored the glove box for unauthorized opening. By letter dated May 31, 1990, the agency determined the changes to the antitheft device installed on the 911 line as standard equipment were de minimis.

On September 10, 1992, the agency received a second request for de minimis treatment of a proposed modification to Porsche's existing antitheft device for only one model within the Porsche 911 vehicle line for MY 1994. By letter dated December 4, 1992, the agency notified Porsche that its de minimis request was denied. The agency stated that the proposed change to the device was significant and warranted a petition for modification. Consequently, because of the denial of its request, Porsche met the parts-marking requirements of theft prevention standard for the entire 911 vehicle line for its MY 1994 vehicles.

Porsche subsequently informed the agency that beginning with its MY 1995 vehicles, it would no longer produce the 911 vehicle line with a feature exclusive to only one model within the line, and that for MY 1995, it would install the antitheft device as standard equipment under the agency's previous grant of exemption for its MY 1991 911 vehicle line.

On August 16, 2011, Porsche submitted its third petition to modify a previously approved exemption for the 911 vehicle line incorporating new successor models into the existing vehicle line. This notice grants in full Porsche's petition to modify the exemption for the 911 vehicle line. Porsche's submission is a complete petition, as required by 49 CFR 543.9(d), in that it meets the general requirements contained in 49 CFR 543.5 and the specific content requirements of 49 CFR 543.6. Porsche's petition provides a detailed description and diagram of the identity, design and location of the components of the antitheft device proposed for installation beginning with the 2012 MY.

Porsche will install its passive, transponder-based electronic engine immobilizer antitheft device as standard equipment on its Porsche 911 vehicle line. Key components of the modified antitheft device will include an electronic ignition switch, a central-locking control unit, an alarm indicator, a remote control unit, a transponder, an engine control unit and an electronic ignition switch. Porsche stated that the antitheft device consists of two major subsystems; a microprocessor based immobilizer device which prevents the engine management system from functioning when the device is engaged, and a central-locking and alarm system.

Porsche stated that the immobilizer device is automatically activated when removing the key from the ignition switch assembly. The key contains a radio signal transponder which signals the control unit to allow the engine to be started. Porsche stated that as an option, a keyless entry device can be provided for the 911 vehicle line. Porsche stated that the antitheft device will remain the same, but the ignition key is substituted with a special key that contains a radio signal transmitter similar to that in the standard ignition key. The immobilizer system is automatically activated after the engine is turned off with the optional keyless entry device. Porsche stated that only by inserting the correct key into the ignition switch or by having the special keyless entry device within the compartment of the car, will the correct signal be sent to the control unit allowing start and operation of the engine. When the key is removed from the ignition or the keyless entry key is removed from the vehicle, the device will return to its normal ''OFF'' state disallowing engine start and operation.

In order to ensure the reliability and durability of the device, Porsche conducted tests based on its own specified standards. Porsche provided a detailed list of tests conducted and believes that its device is reliable and durable since the device complied with its specified requirements for each test. The test conducted included extreme temperature tests, voltage spike tests, reverse polarity tests, electromagnetic interference tests, vibration tests and endurance tests. Porsche stated that its antitheft device also features a built-in self-diagnostic that constantly checks for system failures. If a failure is detected, the operator receives a signal via the alarm indicator.

In Porsche's petition to modify its exemption, it stated that for MY 2012, the 911 vehicle line will be modified to accommodate the introduction of the antitheft device and strategies provided for the previously exempted MY 2010 Panamera vehicle line (see 75 FR 22174). Specifically, Porsche stated that the MY 2012 device will include all of the antitheft features of the MY 2010 Panamera including an electronically activated parking brake. Porsche stated that if the control unit does not receive the correct signal from the key or keyless entry system, the parking brake will remain activated and the vehicle cannot be towed away. Porsche also stated that an alarm system will monitor the opening of the doors, rear luggage compartment, and front deck lid while monitoring interior movement through an ultrasonic sensor. If any violation of these areas is detected, the horn will sound and the lights will flash. Porsche also stated that disconnection of power to the antitheft device and/or engine management device does not affect the operation of either device. Therefore, an unauthorized person cannot operate the car unless they obtain the key or optional keyless entry device for the vehicle.

Porsche stated that another additional theft prevention feature to the 911 vehicle line is the implementation of a new off-board antitheft strategy which involves making it impossible to use stolen electronic control units to repair other Porsche vehicles. Porsche stated that the goal of the off-board theft protection strategy is to reduce the marketability of stolen electronic components. Specifically, Porsche explained that during the production process of the vehicle, initialization and registration of various antitheft related electronic components are recorded in a central database. Changes to these components are only possible with authorized on-line access to the central database. Porsche stated that if the

components have to be replaced or repaired while authorized access to the central database is unavailable or the components are unauthorized, further operation and use of the vehicle is restricted or even impossible.

In its MY 2012 modification, Porsche stated that it believes its new 911 antitheft device will prove to be even more effective in reducing and deterring theft than its antitheft devices have proven in the past. Porsche also compared its device with other devices without alarms that NHTSA has determined to be as effective in reducing and deterring motor vehicle theft as would compliance with the parts-marking requirements. Porsche stated that similar systems without alarms, (i.e., GM PASS-Key, Mercedes Benz 202 vehicle line, Porsche Boxster (Cayman) as well as earlier 911 vehicle line devices were determined to be as effective as parts-marking. Porsche also referenced the agency's theft rate data for the 911 vehicle line which indicates that its theft rates (2002–2009) are still below the median theft rate of 3.5826. The theft rate for the 911 vehicle line using the most current 3 MY's theft rate data is 0.6339.

The agency has evaluated Porsche's MY 2012 petition to modify the exemption for the 911 vehicle line from the parts-marking requirements of 49 CFR Part 541, and has decided to grant it. The agency believes that the proposed device will continue to provide the five types of performance listed in § 543.6(a)(3): Promoting activation; attracting attention to the efforts of unauthorized persons to enter or operate a vehicle by means other than a key; preventing defeat or circumvention of the device by unauthorized persons; preventing operation of the vehicle by unauthorized entrants; and ensuring the reliability and durability of the device.

If Porsche decides not to use the exemption for this line, it should formally notify the agency. If such a decision is made, the line must be fully marked according to the requirements under 49 CFR 541.5 and 541.6 (marking of major component parts and replacement parts).

NHTSA suggests that if the manufacturer contemplates making any changes, the effects of which might be characterized as *de minimis,* it should consult the agency before preparing and submitting a petition to modify.

Authority: 49 U.S.C. 33106; delegation of authority at 49 CFR 1.50.

Issued on: October 28, 2011.

Christopher J. Bonanti,

Associate Administrator for Rulemaking.

[FR Doc. 2011–28936 Filed 11–7–11; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. DOT–NHTSA–2011–0157, Notice 1]

Notice of Receipt of Petition for Decision that Nonconforming 1987–1994 ALPINA Burkard Bovensiepen GmbH B11 Sedan Model Passenger Cars Are Eligible for Importation

AGENCY: National Highway Traffic Safety Administration, DOT.

ACTION: Notice.

SUMMARY: This document announces receipt by the National Highway Traffic Safety Administration (NHTSA) of a petition for a decision that 1987–1994 ALPINA B11 sedan model passenger cars that were not originally manufactured to comply with all applicable Federal Motor Vehicle Safety Standards (FMVSS) are eligible for importation into the United States because they have safety features that comply with, or are capable of being altered to comply with, all such standards.

DATE: The closing date for comments on the petition is December 8, 2011.

ADDRESSES: Comments should refer to the docket and notice numbers above and be submitted by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility: U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001
- *Hand Delivery or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.
- *Fax:* (202) 493–2251

Instructions: Comments must be written in the English language, and be no greater than 15 pages in length, although there is no limit to the length of necessary attachments to the comments. If comments are submitted in hard copy form, please ensure that two copies are provided. If you wish to receive confirmation that your comments were received, please enclose a stamped, self-addressed postcard with the comments. Note that all comments received will be posted without change to *http://www.regulations.gov*, including any personal information provided. Please see the Privacy Act heading below.

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 (65 FR 19477–78).

How to Read Comments submitted to the Docket: You may read the comments received by Docket Management at the address and times given above. You may also view the documents from the Internet at *http://www.regulations.gov.* Follow the online instructions for accessing the dockets. The docket ID number and title of this notice are shown at the heading of this document notice. Please note that even after the comment closing date, we will continue to file relevant information in the Docket as it becomes available. Further, some people may submit late comments. Accordingly, we recommend that you periodically search the Docket for new material.

FOR FURTHER INFORMATION CONTACT: George Stevens, Office of Vehicle Safety Compliance, NHTSA (202) 366–5308).

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 30141(a)(1)(B), a motor vehicle that was not originally manufactured to conform to all applicable FMVSS, and has no substantially similar U.S.-certified counterpart, shall be refused admission into the United States unless NHTSA has decided that the motor vehicle has safety features that comply with, or are capable of being altered to comply with, all applicable FMVSS based on destructive test data or such other evidence as NHTSA decides to be adequate.

Petitions for eligibility decisions may be submitted by either manufacturers or importers who have registered with NHTSA pursuant to 49 CFR part 592. As specified in 49 CFR 593.7, NHTSA publishes notice in the **Federal Register** of each petition that it receives, and affords interested persons an opportunity to comment on the petition. At the close of the comment period, NHTSA decides, on the basis of the

petition and any comments that it has received, whether the vehicle is eligible for importation. The agency then publishes this decision in the **Federal Register**.

101 Innovations, LLC, of Ferndale, Washington (101 Innovations) (Registered Importer 07–350) has petitioned NHTSA to decide whether nonconforming 1987–1994 ALPINA B11 sedan model passenger cars are eligible for importation into the United States. 101 Innovations believes that these vehicles are capable of being modified to meet all applicable FMVSS.

In its petition, 101 Innovations described the 1987–1994 ALPINA B11 sedan as a modified version of the 1987–1994 BMW 7-series (e32) sedan that was manufactured for sale in the United States and certified by BMW as complying with all applicable FMVSS. The petitioner noted, however, that these vehicles were altered by ALPINA and, as altered, were assigned vehicle identification numbers (VINs) by ALPINA that differ from those assigned to the base vehicles manufactured by BMW. In view of these circumstances, the petitioner acknowledged that it could not base its petition on the substantial similarity of the 1987–1994 ALPINA B11 sedan to the U.S.-certified 1987–1994 BMW 7-series (e32) sedan, but would instead need to establish import eligibility on the basis that the vehicles have safety features that comply with, or are capable of being modified to comply with, the FMVSS based on destructive test data or such other evidence that NHTSA decides to be adequate. The petitioner did note, however, that the 1987–1994 ALPINA B11 sedan utilizes the same components as the U.S.-certified 1987–1994 BMW 7-series (e32) sedan in virtually all of the systems subject to the FMVSS.

101 Innovations submitted information with its petition intended to demonstrate that non-U.S. certified 1987–1994 ALPINA B11 sedans conform to many FMVSS and are capable of being altered to comply with all other standards to which they were not originally manufactured to conform.

Specifically, the petitioner claims that non-U.S. certified 1987–1994 ALPINA B11 sedans, as originally manufactured, conform to: Standard Nos. 102 *Transmission Shift Lever Sequence, Starter Interlock, and Transmission Braking Effect,* 103 *Windshield Defrosting and Defogging Systems,* 104 *Windshield Wiping and Washing Systems,* 105 *Hydraulic Brake Systems,* 106 *Brake Hoses,* 107 *Reflecting Surfaces,* 109 *New Pneumatic Tires,* 113 *Hood Latch System,* 116 *Motor Vehicle Brake Fluids,* 124 *Accelerator Control Systems,* 201 *Occupant Protection in Interior Impact,* 202 *Head Restraints,* 204 *Steering Control Rearward Displacement,* 205 *Glazing Materials,* 206 *Door Locks and Door Retention Components,* 207 *Seating Systems,* 210 *Seat Belt Assembly Anchorages,* 211 *Wheel Nuts, Wheel Discs and Hub Caps,* 212 *Windshield Mounting,* 214 *Side Impact Protection,* 216 *Roof Crush Resistance,* 219 *Windshield Zone Intrusion,* 301 *Fuel System Integrity,* and 302 *Flammability of Interior Materials.*

In addition, the petitioner claims that the vehicles comply with the Bumper Standard found in 49 CFR Part 581.

The petitioner also contends that the vehicles are capable of being altered to meet the following standards, in the manner indicated:

Standard No. 101 *Controls and Displays:* installation of U.S.-model instrument cluster and U.S.-version software.

Standard No. 108 *Lamps, Reflective Devices and Associated Equipment:* installation of U.S.-model: (a) headlamps; (b) front and rear side marker lamps; and (c) rear high mounted stop lamp and associated wiring.

Standard No. 110 *Tire Selection and Rims:* installation on the vehicle of a tire information placard.

Standard No. 111 *Rearview Mirrors:* installation of a U.S.-model passenger side rearview mirror, or inscription of the required warning statement on the face of that mirror.

Standard No. 114 *Theft Protection:* installation of U.S.-version software and a U.S.-model ignition switch to meet the requirements of this standard.

Standard No. 115 *Vehicle Identification:* installation of a vehicle identification plate near the left windshield post to meet the requirements of this standard.

Standard No. 118 *Power-Operated Window, Partition, and Roof Panel Systems:* inspection of all vehicles and modification or deactivation of any remote activation features that cause the system not to conform to the standard.

Standard No. 208 *Occupant Crash Protection:* (a) Installation of U.S.-model knee bolsters; and (b) inspection of all vehicles and replacement of any non U.S.-model air bag system components, including all warning systems, warning labels and telltales, with U.S.-model components on vehicles not already so equipped.

Standard No. 209 *Seat Belt Assemblies:* inspection of all vehicles and replacement of any non U.S.-model seat belt components on vehicles not already so equipped.

All comments received before the close of business on the closing date indicated above will be considered, and will be available for examination in the docket at the above addresses both before and after that date. To the extent possible, comments filed after the closing date will also be considered. Notice of final action on the petition will be published in the **Federal Register** pursuant to the authority indicated below.

Authority: 49 U.S.C. 30141(a)(1)(A) and (b)(1); 49 CFR 593.8; delegations of authority at 49 CFR 1.50 and 501.8.

Issued on: November 2, 2011.

Claude H. Harris,

Director, Office of Vehicle Safety Compliance.

[FR Doc. 2011–28893 Filed 11–7–11; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

Office of Hazardous Materials Safety; Notice of Delays in Processing of Special Permits Applications

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: List of Applications Delayed more than 180 days.

SUMMARY: In accordance with the requirements of 49 U.S.C. 5117(c), PHMSA is publishing the following list of special permit applications that have been in process for 180 days or more. The reason(s) for delay and the expected completion date for action on each application is provided in association with each identified application.

FOR FURTHER INFORMATION CONTACT: Ryan Paquet, Director, Office of Hazardous Materials Special Permits and Approvals, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, East Building, PHH–30, 1200 New Jersey Avenue Southeast, Washington, DC 20590–0001, (202) 366–4535.

Key to "Reason for Delay"

1. Awaiting additional information from applicant
2. Extensive public comment under review
3. Application is technically complex and is of significant impact or precedent-setting and requires extensive analysis
4. Staff review delayed by other priority issues or volume of special permit applications

Meaning of Application Number Suffixes

N—New application

M—Modification request

R—Renewal Request

P—Party To Exemption Request

Issued in Washington, DC, on November 1, 2011.

Donald Burger,

Chief, General Approvals and Permits.

Application No.	Applicant	Reason for delay	Estimated date of completion
	Modification to Special Permits		
14167–M	Trinityrail, Dallas, TX	4	03–31–2012
14741–M	Weatherford International, Fort Worth, TX	4	03–31–2012
8826–M	Phoenix Air Group, Inc., Cartersville, GA	4	03–31–2012
12561–M	Rhodia, Inc., Cranbury, NJ	4	03–31–2012
8815–M	Florex Explosives, Inc., Crystal River, FL	4	03–31–2012
14763–M	Weatherford International, Forth Worth, TX	4	03–31–2012
14860–M	Alaska Airlines, Seattle, WA	4	03–31–2012
14909–M	Lake Clark Air, Inc., Port Alsworth, AK	4	03–31–2012
10656–M	Conference of Radiation Control Program Directors, Inc., Frankfort, KY	4	03–31–2012
12629–M	TEA Technologies, Inc., Amarillo, TX	4	03–31–2012
11406–M	Conference of Radiation Control, Program Directors, Inc., Frankfort, KY	4	03–31–2012
10898–M	Hydac Corporation, Bethlehem, PA	3	03–31–2012
11670–M	Schlumberger Oilfield UK Plc, Dyce, Aberdeen Scotland, Ab	3	03–31–2012
14193–M	Honeywell International, Inc., Morristown, NJ	4	03–31–2012
13336–M	Renaissance Industries, Inc., Sharpsville Operations M–1102, Sharpsville, PA	4	03–31–2012
8723–M	Maine Drilling & Blasting, Auburn, NH	4	03–31–2012
14584–M	WavesinSolids LLC, State College, PA	4	03–31–2012
10646–M	Schlumberger Technologies Corporation, Sugar Land, TX		03–31–2012
9758–M	Coleman Company, Inc., The, Wichita, KS	4	03–31–2012
14921–M	ERA Helicopters LLC, Lake Charles, LA	4	03–31–2012
14457–M	Amtrol Alfa Metalomecanica SA, Portugal		03–31–2012
13736–M	ConocoPhillips, Anchorage, AK	4	03–31–2012
	New Special Permit Applications		
14813–N	Organ Recovery Systems, Des Plaines, IL	4	03–31–2012
14872–N	Arkema, Inc., King of Prussia, PA	4	03–31–2012
14929–N	Alaska Island Air, Inc., Togiak, AK	4	03–31–2012
14951–N	Lincoln Composites 1, Lincoln, NE	1	03–31–2012
15053–N	Department of Defense, Scott Air Force Base, IL	4	03–31–2012
15080–N	Alaska Airlines 1, Seattle, WA	1	03–31–2012
15233–N	ExpressJet Airlines, Inc., Houston, TX	4	03–31–2012
15229–N	Linde Gas North America LLC, New Providence, NJ	4	03–31–2012
15243–N	Katmai Air, LLC, Anchorage, AK	4	03–31–2012
15257–N	GFS Chemicals, Columbus, OH	4	03–31–2012
15274–N	Coastal Helicopters, Juneau, AK	4	03–31–2012
15283–N	KwikBond Polymers, LLC, Benicia, CA		03–31–2012
15334–N	Floating Pipeline Company, Incorporated, Halifax, Nova Scotia	4	03–31–2012
15322–N	Digital Wave Corporation, Englewood, CO	4	03–31–2012
15317–N	The Dow Chemical Company, Philadelphia, PA		03–31–2012
15338–N	Middle Fork Aviation, Challis, ID	4	03–31–2012
15360–N	FMC Corporation, Tonawanda, NY		03–31–2012
14839–N	Matheson Tri-Gas, Inc., Basking Ridge, NJ	3	03–31–2012
	Party to Special Permits Application		
10880–P	Southwest Energy LLC, Tucson, AZ	4	03–31–2012
9623–P	Austin Star Detonator Company (ASD), Brownsville, TX	4	03–31–2012
10880–P	Austin Star Detonator Company (ASD), Brownsville, TX	4	03–31–2012
7887–P	WES & T LLC, Tulsa, OK	4	03–31–2012
11984–P	GEM of Rancho Cordova, LLC, dba PSC Environmental Services, Cordova, CA	4	03–31–2012
13548–P	American Battery Corporation, Escondido, CA	4	03–31–2012
8445–P	GEM of Rancho Cordova, LLC, dba PSC Environmental Services, Cordova, CA	4	03–31–2012
8723–P	Maxam US, LLC, Salt Lake City, UT	4	03–31–2012
12134–P	Riceland Foods, Inc., Stuttgart, AR	4	03–31–2012
10048–P	Chemical Analytics, Inc., Romulus, MI	4	03–31–2012
12412–P	C.E.O. Performance Chemicals, LLC, DBA: ChemStation Texas Gulf Coast, Houston, TX	4	03–31–2012
11055–P	Stericycle Specialty Waste, Solutions Inc., Blaine, MN	4	03–31–2012
8196–P	International Equipment Leasing, Avenel, NJ	4	03–31–2012
12412–P	ChemStation of Kansas City, Grain Valley, MO	4	03–31–2012
12905–P	Gumderson, LLC, Portland, OR	4	03–31–2012
7616–P	Iowa Northern Railway, Greene, IA	4	03–31–2012
10880–P	WESCO, Midvale, UT		03–31–2012
8723–P	SLT Express Way Inc., Glendale, AZ	4	03–31–2012
11296–P	Waste Management National Services, Inc., Oak Park, IL	4	03–31–2012

Application No.	Applicant	Reason for delay	Estimated date of completion
8445–P	PSC Industrial Outsourcing LP dba Philip West Industrial Services, Long Beach, CA	4	03–31–2012
8445–P	Burlington Environmental, LLC, Tacoma, WA	4	03–31–2012
11984–P	Burlington Environmental, LLC, Tacoma, WA	4	03–31–2012
8445–P	Rho Chem, LLC, Inglewood, CA	4	03–31–2012
7887–P	21st Century Environmental Management of California, LP, Santa Clara, CA	4	03–31–2012
14173–P	Union Carbide Corporation, Hahnville, LA	4	03–31–2012
8445–P	Babcock & Wilcox Technical Services, Pantex, LLC, Amarillo, TX	4	03–31–2012
12325–P	United Oil Recovery D/B/A United Industrial Services, Meriden, CT		03–31–2012
10457–P	Thatcher Company of Nevada, Henderson, NV	4	03–31–2012
Renewal Special Permits Applications			
8445–R	Environmental Products & Services, Inc., Syracuse, NY	4	03–31–2012
6691–R	Praxair, Inc., Danbury, CT	4	03–31–2012
12443–R	Thatcher Company of Nevada, Henderson, NV	4	03–31–2012
14482–R	Classic Helicopters Limited, L.C., Woods Cross, UT	4	03–31–2012
11759–R	E.I. duPont de Neumours & Company, Inc., Wilmington, DE	4	03–31–2012
14550–R	Air Liquide Electronics Materials, F–71106 Chalon-sur-Saone Cedex	4	03–31–2012
12905–R	Union Tank Car Company, Alexandria, VA	4	03–31–2012
12905–R	American Railcar Leasing, St. Charles, MO	4	03–31–2012
8723–R	Nelson Brothers Mining Services, LLC, Birmingham, AL	4	03–31–2012
12905–R	American Railcar Industries, St. Charles, MO	4	03–31–2012
12905–R	GATX Rail Corporation, Chicago, IL	4	03–31–2012
12905–R	G. E. Capital Rail Services, Chicago, IL	4	03–31–2012
8445–R	Thunderbird Trucking, LLC, East Chicago, IL	4	03–31–2012
12905–R	Procor Limited, Oakville, ON	4	03–31–2012
12905–R	Trinity Industries, Inc., Dallas, TX	4	03–31–2012
11749–R	Occidental Chemical Corporation, Dallas, TX	4	03–31–2012
7891–R	Aldrich Chemical Company Inc., Milwaukee, WI	4	03–31–2012
6293–R	Dyno Nobel, Inc., Salt Lake City, UT	4	03–31–2012
11749–R	Union Tank Car Company, East Chicago, IN	4	03–31–2012
11502–R	Fed/Ex Express, Memphis, TN	4	03–31–2012
8697–R	TEMSCO Helicopters, Inc., Ketchikan, AK	4	03–31–2012
7835–R	Air Products & Chemicals, Inc., Allentown, PA	4	03–31–2012
7887–R	Quest Aerospace, Inc., Pagosa Springs, CO	4	03–31–2012
14385–R	Union Pacific Railroad Company, Omaha, NE	4	03–31–2012
12283–R	Interstate Battery of Alaska, Anchorage, AK	4	03–31–2012
11502–R	UPS, Inc., Atlanta, GA	4	03–31–2012
4884–R	Airgas, Inc., Cheyenne, WY	4	03–31–2012
7835–R	Airgas, Inc., Cheyenne, WY	4	03–31–2012
12726–R	FedEx Express Corporation, Memphis, TN	4	03–31–2012
9157–R	Matheson Tri-Gas, Basking Ridge, NJ	4	03–31–2012
7835–R	Robbie D. Wood Inc., Dolomite, AL	4	03–31–2012
10709–R	Nalco Company, Naperville, IL	4	03–31–2012
14691–R	FedEx Express, Memphis, TN	4	03–31–2012
11984–R	Heritage Transport, LLC, Indianapolis, IN	4	03–31–2012
5112–R	U.S. Department of Defense, Scott Air Force Base, IL	4	03–31–2012
7835–R	Air Liquide America L.P., Houston, TX	4	03–31–2012
6971–R	Chem Service, Inc., West Chester, PA	4	03–31–2012
11660–R	Olsen Tuckpointing Company, Barrington, IL	4	03–31–2012
11055–R	Disposal Consultant Services, Inc., Piscataway, NJ	4	03–31–2012
2787–R	Raytheon Company, Andover, MA	4	03–31–2012
7887–R	Republic Environmental Systems, (Pennsylvania), LLC, Hatfield, PA	4	03–31–2012
2709–R	U.S. Dept. of Defense (MSDDC), Scott AFB, IL	4	03–31–2012
10709–R	Schlumberger Technologies Corporation, Sugar Land, TX	4	03–31–2012
7887–R	EQ Industrial Services, Inc., Ypsilanti, MI	4	03–31–2012
11984–R	American Airlines, Inc., Tulsa, OK	4	03–31–2012
4850–R	Owen Oil Tools LP, Godley, TX	4	03–31–2012
8915–R	Praxair, Inc., Danbury, CT	4	03–31–2012
9623–R	Orica USA Inc., Watkins, CO	4	03–31–2012
10045–R	FedEx Express, Memphis, TN	4	03–31–2012
11227–R	Schlumberger Well Services, a Division of Schlumberger Technology Corporation, Sugar Land, TX.	4	03–31–2012
4850–R	Ensign-Bickford Aerospace & Defense Company, Simsbury, CT	4	03–31–2012
4850–R	Honeywell International, Inc., Morristown, NJ	4	03–31–2012
14741–R	Weatherford International, Fort Worth, TX	4	03–31–2012
3004–R	Air Products & Chemicals, Inc., Allentown, PA	4	03–31–2012
6443–R	Marsulex Sulfides, Fort Saskatchewan, AB	4	03–31–2012
9929–R	Alliant Techsystems Inc., Propulsion & Controls, (Former Grantee ATK Elkton), Elkton, MD	4	03–31–2012
11903–R	Comptank Corporation, Bothwell, ON	4	03–31–2012
11043–R	A & D Environmental Services, Inc., Archdale, NC	4	03–31–2012
4850–R	Schlumberger Technology Corporation, Sugar Land, TX	4	03–31–2012

Application No.	Applicant	Reason for delay	Estimated date of completion
8307–R	Sandia National Laboratories, Albuquerque, NM	4	03–31–2012
8445–R	Precision Industrial Maintenance, Inc., Schenectady, NY	4	03–31–2012
7972–R	E.I. Du Pont de Nemours & Company, Wilmington, DE	4	03–31–2012
11110–R	United Parcel Services Company, Louisville, KY	4	03–31–2012
11227–R	Baker Hughes Oilfield Operations, Inc dba Baker Atlas, (Former Grantee: Baker Hughes), Houston, TX.	4	03–31–2012
3004–R	Air Liquide America L.P., Houston, TX	4	03–31–2012
3004–R	Praxair Inc., Danbury, CT	4	03–31–2012
3004–R	Praxair Distribution, Inc., Danbury, CT	4	03–31–2012
4850–R	Department of Defense, Scott AFB, IL	4	03–31–2012
12283–R	Federal Aviation Administration, Alaskan Region (FAA), Anchorage, AK	4	03–31–2012
14755–R	Tanner Industries Inc., Southampton, PA	4	03–31–2012
4850–R	Halliburton Energy Services, Inc., Duncan, OK	4	03–31–2012
6691–R	nexAir, LLC, Memphis, TN	4	03–31–2012
6691–R	ABCO Welding & Industrial Supply, Inc., (Show Cause Letter), Waterford, CT	4	03–31–2012
10985–R	Domtar A.W. Corp., Ashdown, AR	4	03–31–2012
8445–R	AET Environmental, Inc., Denver, CO	4	03–31–2012
11073–R	E.I. du Pont de Nemours & Company, Wilmington, DE	4	03–31–2012
14791–R	Heliqwest International Inc., Montrose, CO	4	03–31–2012
970–R	Voltaix, Inc., North Branch, NJ	4	03–31–2012
10672–R	Burlington Packaging, Inc., Brooklyn, NY	4	03–31–2012
9623–R	Alaska Pacific Powder Company, Anchorage, AK	4	03–31–2012
8445–R	Heritage Transport, LLC, Indianapolis, IN	4	03–31–2012
4850–R	Accurate Energetic Systems, LLC, Mc Ewen, TN	4	03–31–2012
10048–R	Maine LabPack, South Portland, ME	4	03–31–2012
7887–R	Stericycle Specialty Waste Solutions Inc., Blaine, MN	4	03–31–2012
8445–R	Stericycle Specialty Waste Solutions Inc., Blaine, MN	4	03–31–2012
7954–R	Matheson Tri Gas, Inc., Basking Ridge, NJ	4	03–31–2012
8445–R	SET Environmental, Inc., Wheeling, IL	4	03–31–2012
8445–R	Clean Harbors Environmental Services, Inc., Norwell, MA	4	03–31–2012
9623–R	Austin Powder Company, Cleveland, OH	4	03–31–2012
13161–R	Honeywell International Inc., Morristown, NJ	4	03–31–2012
11043–R	AET Environmental, Inc., Denver, CO	4	03–31–2012
12095–R	Clean Harbors Environmental, Services, Inc., Norwell, MA	4	03–31–2012
7887–R	Northland Environmental, LLC, Providence, RI	4	03–31–2012
6691–R	Matheson Tr-Gas, Inc. 9, (Show Cause Letters), Basking Ridge, NJ	4	03–31–2012
7594–R	Bromine Compounds, Ltd., Beer Sheva, UT	4	03–31–2012
9623–R	Buckley Powder Company, Englewood, CO	4	03–31–2012
11348–R	BASF Corporation, Florham Park, NJ	4	03–31–2012
7887–R	Photo Waste Recycling Co., Inc., San Raafel, CA	4	03–31–2012
11296–R	Environmental Waste Services, Inc., Elburn, IL	4	03–31–2012
7887–R	Chemical Pollution Control of FL, LLC, Deerfield Beach, FL	4	03–31–2012
11296–R	Bay West, Inc., St. Paul, MN	4	03–31–2012
12283–R	AT&T Alascom, Anchorage, AK	4	03–31–2012
8156–R	Gas Dynamics, a division of the Argus Group. Inc., Chesterfield, MI	4	03–31–2012
7887–R	21st Century Environmental Management, LLC of RI, Providence, RI	4	03–31–2012
970–R	BASF Corporation, Florham, NJ	4	03–31–2012
7073–R	Afton Chemical Corporation, Richmond, VA	4	03–31–2012
7073–R	Ethyl Corporation, Richmond, VA	4	03–31–2012
8445–R	University of Vermont, Burlington, VT	4	03–31–2012
12905–R	Texana Tank Car & Mfg., Ltd., Nash, TX	4	03–31–2012
6805–R	Praxair Distribution Southeast, LLC, Tequesta, FL	4	03–31–2012
6691–R	Praxair Distribution Southeast, LLC, Tequesta, FL	4	03–31–2012
8445–R	Chemical Analytics, Inc., Romulus, MI	4	03–31–2012
12412–R	American Development Corporation, Fayetteville, TN	4	03–31–2012
7616–R	B&H Rail Corporation (BH), The, Lakeville, NY	4	03–31–2012
11984–R	American Eagle Airlines, Inc., DFW Airport, TX	4	03–31–2012
970–R	U.S. Department of Defense, Scott AFB, IL	4	03–31–2012
6805–R	Air Liquide America LP, Houston, TX	4	03–31–2012
8445–R	Chemical Pollution Control of FL, LLC, Deerfield Beach, FL	4	03–31–2012
7954–R	Solvay Fluorides, LLC, Houston, TX	4	03–31–2012
7954–R	Solvay Fluor Korea Co., Ltd., Uliju-Kun, Ulsan Korea	4	03–31–2012
8445–R	Northland Environmental, LLC, Providence, RI	4	03–31–2012
8445–R	21st Century Environmental Management, LLC of RI, Providence, RI	4	03–31–2012
8757–R	Milton Roy Company, Ivyland, PA	4	03–31–2012
10880–R	Buckley Powder Company, Englewood, CO	4	03–31–2012
11984–R	21st Century Environmental Management, LLC of RI, Providence, RI	4	03–31–2012
11984–R	Northland Environmental, LLC, (Northland), Providence, RI	4	03–31–2012
11984–R	Chemical Pollution Control of FL, LLC, Deerfield Beach, FL	4	03–31–2012
12095–R	Lyondell Basell Industeries, (former Grantee Lyondell Chemical), Houston, TX	4	03–31–2012
6691–R	Linde Gas Puerto Rico Inc, New Providence, NJ	4	03–31–2012
6691–R	Linde Gas North America LLC, New Providence, NJ	4	03–31–2012

Application No.	Applicant	Reason for delay	Estimated date of completion
5022–R	U.S. Department of Defense, Scott AFB, IL	4	03–31–2012
5022–R	Aerojet Corporation, Culpeper, VA	4	03–31–2012
5022–R	ATK Launch Systems Inc., Brigham City, UT	4	03–31–2012
10458–R	Chemtrade Logistics Inc., Toronto, ON	4	03–31–2012
10650–R	Loveland Products, Inc., Billings, MT	4	03–31–2012
10880–R	Hilltop Energy, Inc., Mineral City, OH	4	03–31–2012
15073–R	Utility Aviation, Inc., Loveland, CO	4	03–31–2012
8445–R	Philip Reclamation Services, Houston, LLC, Houston, TX	4	03–31–2012
8995–R	Flexible Products Company of Marietta, GA, a wholly owned subsidiary of The Dow Chemical Company, Philadelphia, PA.	4	03–31–2012
10880–R	Dyno Nobel, Inc., Salt Lake City, UT	4	03–31–2012
11043–R	Republic Environmental, Systems, PA. LLC, Hatfield, PA	4	03–31–2012
11043–R	A & D Environmental, Services (SC), LLC, Lexington, SC	4	03–31–2012
11984–R	Allworth, LLC, Birmingham, AL	4	03–31–2012
11984–R	Republic Environmental, Systems (Pennsylvania) LLC, Hatfield, PA	4	03–31–2012
11373–R	A & D Environmental, Services (SC), LLC, Lexington, SC	4	03–31–2012
13020–R	Bristol Bay Contractors, Inc., King Salmon, AK	4	03–31–2012
13192–R	A & D Environmental, Services (SC), LLC, Lexington, SC	4	03–31–2012
5022–R	ATK ABL, Rocket Center, WV	4	03–31–2012
8995–R	BASF Corporation, Florham Park, NJ	4	03–31–2012
12014–R	Trane Company, The, Charlotte, NC	4	03–31–2012
14193–R	Honeywell International, Inc., Morristown, NJ	4	03–31–2012
8445–R	Advanced Waste Carriers, Inc., West Allis, WI	4	03–31–2012
11215–R	Orbital Sciences Corporation, Mojave, CA	4	03–31–2012
14823–R	FedEx Ground Package System, Inc., Moon Township, PA	4	03–31–2012
12325–R	Air Liquide America L.P., Houston, TX	4	03–31–2012
12412–R	FMC Corporation, Philadelphia, PA	4	03–31–2012
5022–R	Custom Analytical Engineering, Systems, Inc., Flintstone, MD	4	03–31–2012
8915–R	Linde Gas North America LLC, Murray Hill, NJ	4	03–31–2012
11759–R	3M, Saint Paul, MN	4	03–31–2012
11966–R	FMC Corporation, Philadelphia, PA	4	03–31–2012
2709–R	Aerojet Corporation, Culpeper, VA	4	03–31–2012
3004–R	Air Liquide America, Specialty Gases LLC, Plumsteadville, PA	4	03–31–2012
8156–R	Air Liquide America, Specialty Gases LLC, Plumsteadville, PA	4	03–31–2012
8723–R	Western Explosive Systems Company DBA WESCO, Midvale, UT	4	03–31–2012
14828–R	Croman Corporation, White City, OR	4	03–31–2012
6805–R	Air Liquide America Specialty Gases LLC, Plumsteadville, PA	4	03–31–2012
8445–R	Effective Environmental, Inc., Mesquite, TX	4	03–31–2012
7887–R	PSC Recovery Systems, LLC, Dallas, TX	4	03–31–2012
8445–R	PSC Recovery Systems, LLC, Dallas, TX	4	03–31–2012
11984–R	PSC Recovery Systems, LLC, Dallas, TX	4	03–31–2012
8156–R	Airgas, Inc., Cheyenne, WY	4	03–31–2012
12325–R	Kraton Polymers, U.S. LLC, Belpre, OH	4	03–31–2012
8915–R	Air Liquide America Specialty Gases LLC, Plumsteadville, PA	4	03–31–2012
6670–R	Linde Gas North America LLC, Murray Hill, NJ	4	03–31–2012
7887–R	Philip Reclamation Services, Houston, LLC, Houston, TX	4	03–31–2012
6691–R	Industrial Gas Distributors, (Show Cause Letter), Billings, MT	4	03–31–2012
12858–R	Union Carbide, North Seadrift, TX	4	03–31–2012
10043–R	Texas Instruments, Incorporated (“IT”), Dallas, TX	4	03–31–2012
10880–R	Austin Powder Company, Cleveland, OH	4	03–31–2012
7887–R	Clean Harbors Caribe, Inc., Catano, PR	4	03–31–2012
12858–R	The Dow Chemical Company, Philadelphia, PA	4	03–31–2012
8445–R	EQ Industrial Services, Inc., Ypsilanti, MI	4	03–31–2012
12325–R	SNF Holding Company, Riceboro, GA	4	03–31–2012
7835–R	General Air Service & Supply, Denver, CO	4	03–31–2012
7648–R	American Aviation, Inc., Salt Lake City, UT		03–31–2012
12744–R	AFL Network Services, Inc., Duncan, SC	4	03–31–2012
10457–R	Thatcher Transportation, Inc., Salt Lake City, UT	4	03–31–2012
14204–R	Chemtura Corporation, Middlebury, CT		03–31–2012

[FR Doc. 2011–28632 Filed 11–7–11; 8:45 am]

BILLING CODE 4910–60–M

DEPARTMENT OF THE TREASURY

Proposed Collection; Comment Request; Race and National Origin Identification

AGENCY: Department of The Treasury, Departmental Offices.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed

and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). The Department of the Treasury is soliciting comments on this collection of information that is scheduled to expire January 31, 2012.

DATES: Written comments must be received on or before January 9, 2012 to be assured of consideration.

ADDRESSES: You may submit comments by any of the following methods:

http://www.PRAComment.gov. To provide your comments, selected the ''comment page'' link and follow the instructions for submitting comments.

email: Joann.Sokol@treasury.gov; subject line: Request for Comment—RNO Renewal.

Fax: Attn: Joann Sokol; Subject: Request for Comments—RNO Renewal; (202) 622–0149.

Mail: Attn: Joann Sokol, Career Connector, Departmental Offices/OCIO; Department of the Treasury, 1750 Pennsylvania Avenue NW, Washington, DC 20220.

All responses to this notice will be included in the request for OMB's approval. All comments will also become a matter of public record.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or request a copy of the information collection should be directed to Joann Sokol (202) 622–0814.

SUPPLEMENTARY INFORMATION:

OMB Number: 1505–0195.

Type of Review: Revision of a currently approved collection.

Title: Race and National Origin Identification.

Abstract: The Department's automated recruitment system, CareerConnector, is used to capture race and national origin information electronically from an applicant. The data will be used to help Treasury Bureaus identify barriers to selection and determine the demographics of the overall applicant pool.

Affected Public: Individuals and households.

Estimated Number of Respondents: 500,000.

Estimated Annual Responses: 500,000.

Estimated Hours Per Response: 0.083 (5 mins. per response).

Estimated Total Annual Burden Hours: 41,666.

Request for Comments

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information has practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology, and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Dated: November 2, 2011.

Dawn D. Wolfgang,

Treasury PRA Clearance Officer.

[FR Doc. 2011–28818 Filed 11–7–11; 8:45 am]

BILLING CODE 4810–25–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13(44 U.S.C. 3506(c)(2)(A)). The IRS is soliciting comments concerning information collection requirements related to Tax Shelter Regulations.

DATES: Written comments should be received on or before January 9, 2012 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette B. Lawrence, Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulations should be directed to Joel Goldberger at Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or at (202) 927–9368, or through the Internet at *Joel.P.Goldberger@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Tax Shelter Disclosure Regulations.

OMB Number: 1545–1685. *Regulation Project Number:* T.D. 9046

Abstract: These regulations finalize the rules relating to the filing by certain taxpayers of a disclosure statement with their Federal tax returns under section 6011(a), the rules relating to the registration of confidential corporate tax shelters under section 6111(d), and the rules relating to the list maintenance requirements under section 6112. These regulations affect taxpayers participating in reportable transactions, persons responsible for registering confidential corporate tax shelters, and organizers and sellers of potentially abusive tax shelters.

Current Actions: There is no change to these existing regulations.

Type of Review: Extension of currently approved collection.

Affected Public: Individual or households, Business or other for-profit organizations.

The estimated annual burden per respondent/recordkeeper for the collection of information in § 1.6011–4 will be reflected on Form 8886.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information

technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: October 17, 2011.

Yvette B. Lawrence,

IRS Reports Clearance Officer.

[FR Doc. 2011–28819 Filed 11–7–11; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13(44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form Request for Closing Agreement Relating to Advance Refunding Issue Under Sections 148 and 7121 and Revenue Procedure 96–41.

DATES: Written comments should be received on or before January 9, 2012 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette B. Lawrence, Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Joel Goldberger, at (202) 927–9368, or at Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet, at *Joel.P.Goldberger@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Request for Closing Agreement Relating to Advance Refunding Issue Under Sections 148 and 7121 and Revenue Procedure 96–41.

OMB Number: 1545–1492.

Abstract: This form is used in conjunction with a closing agreement program involving certain issuers of tax exempt advance refunding bonds. Revenue Procedure 96–41 established this voluntary compliance program and prescribed the filing of this form as a cover sheet to request a closing agreement.

Current Actions: There are no changes being made to the form at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: State, local or tribal governments, and not-for-profit institutions.

Estimated Number of Respondents: 100.

Estimated Time per Respondent: 3 hrs.

Estimated Total Annual Burden Hours: 300.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: November 1, 2011.

Yvette B. Lawrence,

IRS Reports Clearance Officer.

[FR Doc. 2011–28823 Filed 11–7–11; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13(44 U.S.C. 3506(c)(2)(A)). The IRS is soliciting comments concerning information collection requirements related to substantiation and reporting requirements for cash and noncash charitable contribution deductions.

DATES: Written comments should be received on or before January 9, 2012 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette B. Lawrence, Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulations should be directed to Joel Goldberger at Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or at (202) 927–9368, or through the Internet at *Joel.P.Goldberger@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Substantiation and Reporting Requirements for Cash and Noncash Charitable Contribution Deductions.

OMB Number: 1545–1953.

Regulation Project Number: REG–140029–07 (NPRM).

Abstract: These proposed regulations provide guidance concerning substantiation and reporting requirements for cash and noncash charitable contributions under section 170 of the Internal Revenue Code (Code). The regulations reflect the enactment of provisions of the American Jobs Creation Act of 2004 and the Pension Protection Act of 2006. The regulations provide guidance to individuals, partnerships, and corporations that make charitable contributions, and will affect any donor claiming a deduction for a charitable contribution after the date these regulations are published as final regulations in the **Federal Register**.

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of a currently approved collection.

Affected Public: Business, other for-profit organizations.

Estimated Number of Respondents: 201,920.

Estimated Total Annual Burden Hours: 226,419.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: October 19, 2011.

Yvette B. Lawrence,

IRS Reports Clearance Officer.

[FR Doc. 2011–28821 Filed 11–7–11; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). The IRS is soliciting comments concerning information collection requirements related to income attributable to domestic production activities.

DATES: Written comments should be received on or before January 9, 2012 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette B. Lawrence, Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulations should be directed to Joel Goldberger at Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or at (202) 927–9368, or through the Internet at *Joel.P.Goldberger@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Income Attributable to Domestic Production Activities.

OMB Number: 1545–1966. *Regulation Project Number:* T.D. 9263, as corrected by Announcement 2007–22.

Abstract: The regulations provide guidance with respect to section 199, which provides a deduction for income attributable to domestic production activities. A taxpayer receiving certain patronage dividends or certain qualified per-unit retain allocations from a cooperative (to which subchapter T of the Internal Revenue Code applies), which has manufactured, produced, grown, or extracted, in whole or in significant part, any agricultural or horticultural products, or has marketed any agricultural or horticultural product, is allowed a deduction under section 199. The collection of information in the proposed regulations involves a written notice mailed by a cooperative to its patrons during the payment period described in section 1382 which allows the patrons to claim the section 199 deduction.

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 3,000.

Estimated Time per Respondent: 3 Hours.

Estimated Total Annual Burden Hours: 9,000.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: October 19, 2011.

Yvette B. Lawrence,

IRS Reports Clearance Officer.

[FR Doc. 2011–28822 Filed 11–7–11; 8:45 am]

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Part II

Commodity Futures Trading Commission

17 CFR Parts 1, 21, 39 et al.

Derivatives Clearing Organization General Provisions and Core Principles; Final Rule

COMMODITY FUTURES TRADING COMMISSION

17 CFR Parts 1, 21, 39, and 140

RIN 3038–AC98

Derivatives Clearing Organization General Provisions and Core Principles

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rule.

SUMMARY: The Commodity Futures Trading Commission (Commission) is adopting final regulations to implement certain provisions of Title VII and Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) governing derivatives clearing organization (DCO) activities. More specifically, the regulations establish the regulatory standards for compliance with DCO Core Principles A (Compliance), B (Financial Resources), C (Participant and Product Eligibility), D (Risk Management), E (Settlement Procedures), F (Treatment of Funds), G (Default Rules and Procedures), H (Rule Enforcement), I (System Safeguards), J (Reporting), K (Recordkeeping), L (Public Information), M (Information Sharing), N (Antitrust Considerations), and R (Legal Risk) set forth in Section 5b of the Commodity Exchange Act (CEA). The Commission also is updating and adding related definitions; adopting implementing rules for DCO chief compliance officers (CCOs); revising procedures for DCO applications including the required use of a new Form DCO; adopting procedural rules applicable to the transfer of a DCO registration; and adding requirements for approval of DCO rules establishing a portfolio margining program for customer accounts carried by a futures commission merchant (FCM) that is also registered as a securities broker-dealer (FCM/BD). In addition, the Commission is adopting certain technical amendments to parts 21 and 39, and is adopting certain delegation provisions under part 140.

DATES: The rules will become effective January 9, 2012. DCOs must comply with §§ 39.11; 39.12; 39.13 (except for 39.13(g)(8)(i)); and 39.14 by May 7, 2012; with §§ 39.10(c); 39.13(g)(8)(i); 39.18; 39.19; and 39.20 by November 8, 2012; and all other provisions of these rules by January 9, 2012.

FOR FURTHER INFORMATION CONTACT: Phyllis P. Dietz, Deputy Director, (202) 418–5449, *pdietz@cftc.gov;* John C. Lawton, Deputy Director, (202) 418–5480, *jlawton@cftc.gov;* Robert B. Wasserman, Chief Counsel, (202) 418–5092, *rwasserman@cftc.gov;* Eileen A. Donovan, Associate Director, (202) 418–5096, *edonovan@cftc.gov;* Jonathan Lave, Special Counsel, (202) 418–5983, *jlave@cftc.gov,* Division of Clearing and Risk; and Jacob Preiserowicz, Special Counsel, (202) 418–5432, *jpreiserowicz@cftc.gov,* Division of Swap Dealer and Intermediary Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581; and Julie A. Mohr, Deputy Director, (312) 596–0568, *jmohr@cftc.gov;* and Anne C. Polaski, Special Counsel, (312) 596–0575, *apolaski@cftc.gov,* Division of Clearing and Risk, Commodity Futures Trading Commission, 525 West Monroe Street, Chicago, Illinois 60661.

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I. Background

A. Title VII of the Dodd-Frank Act

On July 21, 2010, President Obama signed the Dodd-Frank Act.[1] Title VII of the Dodd-Frank Act[2] amended the CEA[3] to establish a comprehensive statutory framework to reduce risk, increase transparency, and promote market integrity within the financial system by, among other things: (1) Providing for the registration and comprehensive regulation of swap dealers and major swap participants; (2) imposing clearing and trade execution requirements on standardized derivative products; (3) creating rigorous recordkeeping and real-time reporting regimes; and (4) enhancing the Commission's rulemaking and enforcement authorities with respect to all registered entities and intermediaries subject to the Commission's oversight.

Section 725(c) of the Dodd-Frank Act amended Section 5b(c)(2) of the CEA, which sets forth core principles with which a DCO must comply in order to be registered and to maintain registration as a DCO.

The core principles were added to the CEA by the Commodity Futures Modernization Act of 2000 (CFMA).[4] The Commission did not adopt implementing rules and regulations, but instead promulgated guidance for DCOs on compliance with the core principles.[5] Under Section 5b(c)(2) of the CEA, as amended by the Dodd-Frank Act, Congress expressly confirmed that the Commission may adopt implementing rules and regulations pursuant to its rulemaking authority under Section 8a(5) of the CEA.[6]

In light of Congress's explicit affirmation of the Commission's authority to adopt regulations to implement the core principles, the Commission has chosen to adopt regulations (which have the force of law) rather than guidance (which does not have the force of law). By issuing regulations, the Commission expects to increase legal certainty for DCOs, clearing members, and market participants, and prevent DCOs from lowering risk management standards for competitive reasons and taking on more risk than is prudent. The imposition of legally enforceable standards provides

[1] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010). The text of the Dodd-Frank Act may be accessed at *http://www.cftc.gov/LawRegulation/OTCDERIVATIVES/index.htm.*

[2] Pursuant to Section 701 of the Dodd-Frank Act, Title VII may be cited as the ''Wall Street Transparency and Accountability Act of 2010.''

[3] 7 U.S.C. 1 *et seq.*

[4] *See* Commodity Futures Modernization Act of 2000, Public Law 106–554, 114 Stat. 2763 (2000).

[5] *See* 66 FR 45604 (Aug. 29, 2001) (adopting 17 CFR part 39, app. A).

[6] Section 8a(5) of the CEA authorizes the Commission to promulgate such regulations ''as, in the judgment of the Commission, are reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes of [the CEA].'' 7 U.S.C. 12a(5).

assurance to market participants and the public that DCOs are meeting minimum risk management standards. This can serve to increase market confidence which, in turn, can increase open interest and free up resources that market participants might otherwise hold in order to compensate for weaker DCO risk management practices. Regulatory standards also can reduce search costs that market participants would otherwise incur in determining that DCOs are managing risk effectively.

B. Title VIII of the Dodd-Frank Act

Section 802(b) of the Dodd-Frank Act states that the purpose of Title VIII is to mitigate systemic risk in the financial system and promote financial stability. Section 804 authorizes the Financial Stability Oversight Council (FSOC) to designate entities involved in clearing and settlement as systemically important.[7]

Section 805(a) of the Dodd-Frank Act allows the Commission to prescribe regulations for those DCOs that the Council has determined are systemically important (SIDCOs). The Commission proposed heightened requirements for SIDCO financial resources and system safeguards for business continuity and disaster recovery.

Section 807(c) of the Dodd-Frank Act provides the Commission with special enforcement authority over SIDCOs, which the Commission proposed to codify in its regulations.

C. Regulatory Framework for DCOs

The Commission, now responsible for regulating swaps markets as well as futures markets, has undertaken an unprecedented rulemaking initiative to implement the Dodd-Frank Act. As part of this initiative, the Commission has issued a series of eight proposed rulemakings that, together, would establish a comprehensive regulatory framework for the clearing and settlement activities of DCOs. Through these proposed regulations, the Commission sought to enhance legal certainty for DCOs, clearing members, and market participants, to strengthen the risk management practices of DCOs, and to promote financial integrity for swaps and futures markets.

In this notice of final rulemaking, the Commission is adopting regulations to implement 15 DCO core principles: A (Compliance), B (Financial Resources), C (Participant and Product Eligibility),[8] D (Risk Management), E (Settlement Procedures), F (Treatment of Funds), G (Default Rules and Procedures), H (Rule Enforcement), I (System Safeguards), J (Reporting), K (Recordkeeping), L (Public Information), M (Information Sharing), N (Antitrust Considerations), and R (Legal Risk).[9] In addition, the Commission is adopting regulations to implement the CCO provisions of Section 725 of the Dodd-Frank Act.[10]

The final rules adopted herein were proposed in five separate notices of proposed rulemaking.[11] Each proposed rulemaking was subject to an initial 60-day public comment period and a re-opened comment period of 30 days.[12] After the second comment period ended, the Commission informed the public that it would continue to accept and consider late comments and did so until August 25, 2011. The Commission received a total of approximately 119 comment letters directed specifically at the proposed rules, in addition to many other comments applicable to the Dodd-Frank Act rulemaking initiative more generally.[13] The Chairman and Commissioners, as well as Commission staff, participated in numerous meetings with representatives of DCOs, FCMs, trade associations, public interest groups, traders, and other interested parties. In addition, the Commission has consulted with other U.S. financial regulators including the Board of Governors of the Federal Reserve System and Securities and Exchange Commission (SEC).

The Commission is mindful of the benefits of harmonizing its regulatory framework with that of its counterparts in foreign countries. The Commission has therefore monitored global advisory, legislative, and regulatory proposals, and has consulted with foreign regulators in developing the proposed and final regulations for DCOs.

The Commission is of the view that each DCO should be afforded an appropriate level of discretion in determining how to operate its business within the legal framework established by the CEA, as amended by the Dodd-Frank Act. At the same time, the Commission recognizes that specific, bright-line regulations may be necessary to facilitate DCO compliance with a given core principle and, ultimately, to protect the integrity of the U.S. derivatives clearing system. Accordingly, in developing the proposed regulations and in finalizing the regulations adopted herein, taking into consideration public comments and views expressed by U.S. and foreign regulators, the Commission has endeavored to strike an appropriate balance between establishing general prudential standards and specific requirements.

In determining the scope and content of the final rules, the Commission has taken into account concerns raised by commenters regarding the implications of specific rules for smaller versus larger DCOs, DCOs that do not clear customer positions versus those with a traditional customer model, clearinghouses that are registered as both a DCO and a securities clearing agency, and clearinghouses that operate in foreign jurisdictions as well as in the United States. The Commission addresses these issues in its discussion of specific rule provisions, below.

The Commission has carefully considered the costs and benefits associated with each proposed rule, with particular attention to public comments. For the reasons discussed in this notice of final rulemaking, in the analyses of specific rule provisions as well as in the formal cost-benefit analysis, the Commission has determined that the final rules appropriately balance the costs and benefits associated with oversight and supervision of DCOs pursuant to the CEA, as amended by the Dodd-Frank Act.

The Commission is herein adopting regulations to implement the core principles applicable to DCOs, to implement CCO requirements established under the Dodd-Frank Act, and to update the regulatory framework for DCOs to reflect standards and practices that have evolved over the past decade since the enactment of the

[7] *See* 76 FR 44763 (July 27, 2011) (FSOC authority to designate financial market utilities as systemically important; final rule).

[8] The Commission is reserving for a future final rulemaking certain proposed amendments relating to participant and product eligibility. *See* 76 FR 13101 (Mar. 10, 2011) (requirements for processing, clearing, and transfer of customer positions (Straight-Through Processing)); and 76 FR 45730 (Aug. 1, 2011) (customer clearing documentation and timing of acceptance for clearing (Customer Clearing)).

[9] The Commission is reserving for a future final rulemaking regulations to implement DCO Core Principles O (Governance Fitness Standards) and Q (Composition of Governing Boards) (76 FR 722 (Jan. 6, 2011) (Governance)); and Core Principle P (Conflicts of Interest) (75 FR 63732 (Oct. 18, 2010) (Conflicts of Interest)).

[10] *See* Section 5b(i) of the CEA, 7 U.S.C 7a–1(i).

[11] *See* 76 FR 13101 (Mar. 10, 2011) (Straight-Through Processing); 76 FR 3698 (Jan. 20, 2011) (Core Principles C, D, E, F, G, and I (Risk Management)); 75 FR 78185 (Dec. 15, 2010) (Core Principles J, K, L, and M (Information Management)); 75 FR 77576 (Dec. 13, 2010) (Core Principles A, H, N, and R (General Regulations)); and 75 FR 63113 (Oct. 14, 2010) (Core Principle B (Financial Resources)).

[12] *See* 76 FR 25274 (May 4, 2011) (extending or re-opening comment periods for multiple Dodd-Frank proposed rulemakings); *see also* 76 FR 16587 (Mar. 24, 2011) (re-opening 30-day comment period for reporting requirement with clause omitted in the notice of proposed rulemaking).

[13] Comment files for each proposed rulemaking can be found on the Commission Web site, *www.cftc.gov.*

CFMA. The Commission is largely adopting final rules as proposed, although there are a number of proposed provisions that, upon further consideration in light of comments received, the Commission has determined to either revise or decline to adopt. In the discussion below, the Commission highlights topics of particular interest to commenters and discusses comment letters that are representative of the views expressed on those topics. The discussion does not explicitly respond to every comment submitted; rather, it addresses the most significant issues raised by the proposed rulemakings and it analyzes those issues in the context of specific comments.

The final rules include a number of technical revisions to the proposed rule text, intended variously to clarify certain provisions, standardize terminology within part 39, conform terminology to that used in other parts of the Commission's rules, and more precisely state regulatory standards and requirements. These are non-substantive changes. For example, the proposed DCO rules used the terms ''contract'' and ''product'' interchangeably, and some provisions used the statutory language ''contracts, agreements and transactions'' to refer to the products subject to Commission regulation. In the final rules adopted herein, the Commission has revised the terminology to uniformly refer to ''products,'' which encompasses contracts, agreements, and transactions, except where the language of the rule codifies statutory language. In those cases, the rule text is unchanged.

For easy reference and for purposes of clarification, in this notice of final rulemaking the Commission is publishing the complete part 39 as currently adopted. This means that certain longstanding rules that are not being amended (*e.g.,* § 39.8 (formerly designated as § 39.7, fraud in connection with the clearing of transactions of a DCO), and rules recently adopted (§ 39.5, review of swaps for Commission determination on clearing requirement) are being re-published along with the newly-adopted rules. Rules that have been proposed but not yet adopted in final form are identified in part 39 as ''reserved.''

II. Part 1 Amendments—Definitions

The Commission proposed to amend the definitions of ''clearing member,'' ''clearing organization,'' and ''customer'' found in § 1.3 of its regulations to conform the definitions with the terminology and substantive provisions of the CEA, as amended by the Dodd-Frank Act. The Commission also proposed to add to § 1.3, definitions for ''clearing initial margin,'' ''customer initial margin,'' ''initial margin,'' ''margin call,'' ''spread margin,'' and ''variation margin.''

ISDA commented that the margin definitions are appropriate for futures and cleared derivatives, but less readily applicable in the uncleared OTC derivatives context. It suggested that the definitions should expressly provide that they apply only to cleared transactions. The Commission notes that some of the definitions by their terms already apply only to cleared trades, *e.g.,* ''clearing initial margin.'' Other terms, however, have applicability to both cleared and uncleared trades, *e.g.,* ''initial margin.''[14]

The Commission proposed to define ''spread margin'' as ''reduced initial margin that takes into account correlations between certain related positions held in a single account.'' Better Markets commented that the definition of ''spread margin'' omits key characteristics of netting initial margin which are needed to precisely define spread margin. Better Markets proposed to define it as ''initial margin relating to two positions in a single account that has been reduced from the aggregate initial margin otherwise applicable to the two positions by application of an algorithm that measures statistical correlations between the historic price movements of the two positions.'' The Commission is adopting the definition of ''spread margin'' as proposed because it believes that Better Markets' definition adds unnecessary details that could have the unintended effect of imposing substantive margin methodology requirements in a definition.

In light of proposed rulemakings issued after the Commission proposed the definition of ''customer; commodity customer; swap customer,'' the Commission is making certain technical modifications.[15] First, instead of placing the definition in § 1.3, which serves as the general definition section for all of the Commission's regulations, this definition is being moved to § 39.2, which sets forth definitions applicable only to regulations found in part 39 or as otherwise explicitly provided. This accommodates the need for further consideration of other proposals before a global definition is adopted, while satisfying the need for a definition for purposes of part 39 as adopted herein. Second, the Commission has made certain technical changes to the rule text in connection with the definition's redesignation in 39.2 and to conform phraseology when incorporating by reference definitions that appear in the CEA and § 1.3. These changes include limiting the term to ''customer,'' because the terms ''commodity customer'' and ''swap customer'' are not used in Part 39.

The Commission is adopting the other definitions as proposed.

III. Part 39 Amendments—General Provisions

A. Scope—§ 39.1

As originally proposed, § 39.1 included an updated statement of scope and definitions applicable to other provisions in part 39. The Commission later revised proposed § 39.1 to include only the statement of scope. The Commission did not receive any comments on the statement of scope, which was updated to include references to the definition of ''derivatives clearing organization'' in newly-renumbered Section 1(a)(15) of the CEA and § 1.3(d) of the Commission's regulations. The Commission is adopting § 39.1 as proposed.

B. Definitions—§ 39.2

The Commission proposed definitions of the terms ''back test,'' ''compliance policies and procedures,'' ''customer account '' or ''customer origin,'' ''house account'' or ''house origin,'' ''key personnel,'' ''stress test,'' and ''systemically important derivatives clearing organization.'' The definitions set forth in proposed § 39.2 would apply specifically to provisions contained in part 39 and such other rules as may explicitly cross-reference these definitions. The Commission is adopting the definitions as proposed, with the exceptions discussed below.

CME Group, Inc. (CME) commented that the proposed definition of ''compliance policies and procedures'' was too broad. That definition was proposed as an adjunct to the proposed rules for a DCO's CCO. The Commission is not adopting a definition of ''compliance policies and procedures,'' as it has concluded that a DCO's compliance policies and procedures will likely encompass a limited, self-evident body of documents, and a regulatory definition could invite more scrutiny than is necessary or helpful to the DCO or the Commission.

The Commission proposed to define ''stress test'' as ''a test that compares the impact of a potential price move, change

[14] *See* Section 4s of the CEA, 7 U.S.C. 6s.

[15] *See* 76 FR 33818 (June 9, 2011) (Protection of Cleared Swaps Customer Contracts and Collateral; Conforming Amendments to the Commodity Broker Bankruptcy Provisions); 76 FR 33066 (June 7, 2011) (Adaptation of Regulations to Incorporate Swaps).

in option volatility, or change in other inputs that affect the value of a position, to the financial resources of a [DCO], clearing member, or large trader to determine the adequacy of such financial resources.'' Better Markets, Inc. (Better Markets) expressed the view that a stress test can only be useful if it tests unprecedented circumstances of illiquidity, and that basing the test on historic price data would make it meaningless. In response to this comment, the Commission is modifying the definition in one respect. The word ''extreme'' is being inserted after the word ''potential'' to make clear that a stress test does not include typical events. The Commission further addresses Better Markets' concerns in its discussion of stress tests in § 39.13(h)(3).[16]

The Commission proposed to define the term ''systemically important derivatives clearing organization'' to mean ''a financial market utility that is a derivatives clearing organization registered under Section 5b of the Act (7 U.S.C. 7a–1), which has been designated by the Financial Stability Oversight Council to be systemically important.'' The Options Clearing Corporation (OCC) submitted a comment on this definition in connection with the Commission's proposed § 40.10 (special certification procedures for submission of certain risk-related rules by SIDCOs).[17] OCC pointed out that, under this proposed definition, a DCO could be a SIDCO even if the Commission were not its Supervisory Agency pursuant to Section 803(8) of the Dodd-Frank Act. The Commission, recognizing that some DCOs like OCC may be regulated by more than one federal agency, is adopting a revised definition to clarify that the term ''systemically important derivatives clearing organization'' means a ''financial market utility that is a derivatives clearing organization registered under Section 5b of the Act, which has been designated by the Financial Stability Oversight Council to be systemically important and for which the Commission acts as the Supervisory Agency pursuant to Section 803(8) of the Dodd-Frank Wall Street Reform and Consumer Protection Act.'' [18]

The Commission also is making a technical change to the definition of ''customer account or customer origin.'' The proposed definition would provide, in part, that ''[a] customer account is also a futures account, as that term is defined by Sec. 1.3(vv) of this chapter.'' The Commission is removing this reference and defining ''customer account or customer origin'' to mean ''a clearing member account held on behalf of customers, as that term is defined in this section, and which is subject to section 4d(a) or section 4d(f) of the Act.'' This clarifies that the term encompasses both customer futures accounts and customer cleared swaps accounts, respectively.

Similarly, the Commission is making a technical revision to the term ''house account or house origin'' to delete the proposed reference to proprietary accounts, which are currently defined in § 1.3(y) only in terms of futures and options (not swaps). The term ''house account or house origin'' is now defined as a ''clearing member account which is not subject to section 4d(a) or 4d(f) of the Act.''

In connection with the proposal to adopt a definitions section designated as § 39.2, the Commission proposed to rescind the existing § 39.2, which exempted DCOs from all Commission regulations except those explicitly enumerated in the exemption. This action would result in clarifying the applicability of § 1.49 (denomination of customer funds and location of depositories) to DCOs and, insofar as the rule exempted DCOs from regulations relating to DCO governance and conflicts of interest, those regulations are expected to themselves be replaced by rules to implement DCO Core Principles O (Governance Fitness Standards), P (Conflicts of Interest), and Q (Composition of Governing Boards).[19] The Commission did not receive any comments on the proposed rescission of the exemption provided by existing § 39.2 and is herein rescinding that exemption, as proposed.

C. Procedures for Registration as a DCO—§ 39.3

The Commission proposed several revisions to its procedures for DCO registration, including the elimination of the 90-day expedited review period and the required use of an application form, proposed Form DCO. The Commission is adopting § 39.3 as proposed, and is adopting the Form DCO with the revisions discussed below.

1. Form DCO

The Commission proposed to revise appendix A to part 39, ''Application Guidance and Compliance with Core Principles,'' by removing the existing guidance and substituting the Form DCO in its place. An application for DCO registration would consist of the completed Form DCO, which would include all applicable exhibits, and any supplemental information submitted to the Commission.

CME commented that the proposed Form DCO would require the applicant to create and submit to the Commission a large number of documents. It questioned why certain documents were necessary and whether Commission staff would be able to meaningfully review all of the materials within the 180-day timeframe contemplated in the proposed regulations.

The Commission is adopting the Form DCO as proposed, except for the modifications discussed below. The Commission notes that the Form DCO standardizes and clarifies the information that the Commission has required from DCO applicants in the past and the Form DCO Exhibit Instructions, in an effort to reduce the burden on applicants, state that ''If any Exhibit requires information that is related to, or may be duplicative of, information required to be included in another Exhibit, Applicant may summarize such information and provide a cross-reference to the Exhibit that contains the required information.'' Based on the Commission's experience with the DCO registration process over the past decade, it believes that its staff can meaningfully review the required information within the 180-day time frame. In addition, the Commission believes that by standardizing informational requirements, the Form DCO will allow the Commission to process applications more quickly and efficiently. This will benefit applicants as well as free Commission staff to handle other regulatory matters.

CME specifically questioned whether, as part of the Form DCO cover sheet, applicants should be required to identify and list ''all outside service providers and consultants, including accountants and legal counsel.'' This comment mischaracterizes the information required by the Form DCO, which requires contact information for enumerated outside service providers (Certified Public Accountant, legal counsel, records storage or management, business continuity/disaster recovery) and ''other'' outside service providers ''such as consultants, providing services related to this application.'' Such contact information is helpful to the Commission staff in processing the application and making a determination as to whether the applicant has obtained the services it needs to effectively

[16] *See* discussion of stress tests in section IV.D.7.c, below.

[17] *See* 76 FR 44776 at 44783–84 (July 27, 2011) (Provisions Common to Registered Entities; final rule).

[18] *See id.* for further discussion of this topic.

[19] *See* 76 FR 722 (Jan. 6, 2011) (Governance); and 75 FR 63732 (Oct. 18, 2010) (Conflicts of Interest).

operate as a DCO.[20] Nonetheless, in response to CME's comments and in order to clarify the scope of requesting contact information for ''any other outside service providers,'' the Commission has decided to revise section 12.e. of the Form DCO cover sheet to provide for contact information for any ''Professional consultant providing services related to this application.''

CME commented that proposed exhibit A–1, which would require the applicant to produce a chart demonstrating in detail how its rules, procedures, and policies address each DCO core principle, is not necessary. The Commission believes exhibit A–1 is necessary because it will provide a clear picture of which rules, procedures, and policies address each DCO core principle. The chart will greatly assist Commission staff in tracking and evaluating the materials supplied by the applicant and should reduce the need for staff to seek follow-up clarifications from the applicant. Again, this will also reduce the costs to the applicant.

CME commented that the Commission has not explained its reasons for requiring an applicant to supply ''telephone numbers, mobile phone numbers and email addresses of all officers, managers, and directors of the DCO,'' as provided in proposed exhibit A–6. The Commission notes that the exhibit A–6 instructions request contact and other information for ''current officers, directors, governors, general partners, LLC managers, and members of all standing committees.'' The exhibit is not directed at ''all managers'' or ''all directors,'' but rather at those persons who are in key decision-making positions (for example, key personnel, directors serving on a board of directors and a manager or managing member of a DCO organized in the form of a limited liability corporation). The purpose of obtaining contact information is to enable the Commission to start building an emergency contact database.

[20] This requirement focuses on outside services ''related to this application.'' Similarly, if the applicant intends to use the services of an outside service provider (including services of its clearing members or market participants), to enable it to comply with any of the core principles, the applicant must submit as exhibit A–10 all agreements entered into or to be entered into between the applicant and the outside service provider, and identify: (1) The services that will be provided; (2) the staff who will provide the services; and (3) the core principles addressed by such arrangement. This exhibit does not require that the applicant submit information and documentation related to all outside service providers. Rather, the requirement is directed at contractual arrangements related to compliance with the core principles, *i.e.,* the DCO's core business functions.

CME commented that proposed exhibit A–7 would require the applicant to list all jurisdictions where the applicant and its affiliates are doing business, and the registration status of the applicant and its affiliates. CME questioned the Commission's need for such information with respect to affiliates of the applicant. The Commission believes that such information is necessary because it allows the Commission to develop a more complete understanding of the applicant's entire corporate organizational structure including potential financial commitments and regulatory obligations of the applicant's affiliates inclusive of its parent organization.

CME commented that proposed exhibit B–3, which would require the applicant to provide proof that each of its physical locations meets all building and fire codes, and that it has running water and a heating, ventilation and air conditioning system, and adequate office technology, is not necessary. The Commission believes that it is important for an applicant to demonstrate that it has a physical presence capable of supporting clearing and settlement services and is not a ''shoestring'' operation. Typically, Commission staff will conduct a site visit to an applicant's headquarters and other facilities, and one of the purposes of such visits is to evaluate the suitability of the applicant's physical facilities. Site visits, however, are conducted after a DCO application is deemed to be materially complete, and there are instances when it might not be feasible to conduct a site visit. Accordingly, at a minimum, a narrative statement discussing the applicant's physical facilities and office technology must be submitted to the Commission as part of the application package so that staff can complete its initial review for ''adequate * * * operational resources'' under Core Principle B.

In response to CME's comments, the Commission has decided to revise exhibit B–3 to require the following:

(3) A narrative statement demonstrating the adequacy of Applicant's physical infrastructure to carry out business operations, which includes a principal executive office (separate from any personal dwelling) with a U.S. street address (not merely a post office box number). For its principal executive office and other facilities Applicant plans to occupy in carrying out its DCO functions, a description of the space (*e.g.,* location and square footage), use of the space (*e.g.,* executive office, data center), and the basis for Applicant's right to occupy the space (*e.g.,* lease, agreement with parent company to share leased space).

(4) A narrative statement demonstrating the adequacy of the technological systems necessary to carry out Applicant's business operations, including a description of Applicant's information technology and telecommunications systems and a timetable for full operability.

CME questioned the value of proposed exhibits C–1(9) and C–2(5), which would, respectively, require an applicant to provide a list of current and prospective clearing members, and to forecast expected volumes and open interest at launch date, six months, and one year thereafter. The Commission believes that this information is important because it would enable the Commission to understand the nature and level of the DCO's expected start-up activities and to appropriately evaluate whether the applicant has adequate resources to manage the expected volume of business.

CME questioned the benefits of what it termed the ''incredibly burdensome'' requirements of proposed exhibit D–2(b)(3), which would require an applicant to explain why a particular margin methodology was chosen over other potentially suitable methodologies, and to include a comparison of margin levels that would have been generated by using such other potential methodologies. To address CME's comment, the Commission is revising exhibit D–2(b)(3) to require an explanation of whether other margining methodologies were considered and, if so, explain why they were not chosen. This information will be sufficient in the first instance and, when evaluating an applicant's proposed margin methodology, Commission staff can request additional information if needed to complete its review for compliance with Core Principle D and § 39.13 (risk management).

The Commission proposed to require use of the Form DCO by a registered DCO when requesting an amendment to its DCO registration order. CME and Minneapolis Grain Exchange, Inc. (MGEX) suggested that the Form DCO be modified so that a currently registered DCO would not have to expend as much time and resources to complete an amendment request as a new applicant for DCO registration, unless there are extenuating circumstances. In response to this suggestion, the Commission is revising the Form DCO General Instructions to clarify that if the Form DCO is being filed as an amendment to a pending application for registration or for the purpose of amending an existing registration order, the applicant need only submit the information and exhibits relevant to the application

amendment or request for an amended registration order.

CME also noted that a DCO applicant would be required to represent that its Form DCO submission is true, correct, and complete. It suggested that the Commission modify this language so that the applicant is required to certify that, ''to the best of its knowledge,'' its Form DCO submission is true, correct, and complete ''in all material respects.'' The Commission is revising the language as suggested by CME, in recognition of the fact that some of the information contained in the exhibits may have been provided by third parties and there is a limit to the reach of an applicant's due diligence with respect to such information.

In addition to the above changes, the Commission has made non-substantive editorial changes to the Form DCO for purposes of internal consistency and conformity with the Form SDR for swap data repositories (SDRs) and proposed Form DCM and Form SEF for designated contract markets (DCMs) and swap execution facilities (SEFs), respectively.[21] The Commission also has made changes to Form DCO to remove references to proposed regulations that remain pending.[22]

2. Request for Transfer of Registration and Open Interest—§ 39.3(h)

The Commission proposed § 39.3(h) to clarify the procedures that a DCO must follow when requesting the transfer of its DCO registration and positions comprising open interest for clearing and settlement, in anticipation of a corporation change.[23] The Commission received a comment from OCC suggesting that a request to transfer a DCO's registration and open interest should be published in the **Federal Register** for public comment.

The Commission recognizes the value of public comment, but it has determined not to formalize the public comment process through publication in the **Federal Register**. This procedure could unnecessarily delay the review process and completion of the transfer, and the Commission believes that posting the request on its Web site, which it currently does for DCO registration applications, will provide an opportunity for public comment without potential delay.

3. Technical Amendments

The Commission proposed a set of technical amendments to § 39.3 to update filing procedures, to conform various provisions to reflect the elimination of the 90-day expedited review period for DCO applications, and to correct terminology in the delegation provisions of § 39.3(g). The Commission did not receive any comments on the proposed technical amendments and the Commission is adopting the amendments as proposed.

D. Procedures for Implementing DCO Rules and Clearing New Products—§ 39.4

1. Acceptance of Certain New Products for Clearing—§ 39.4(c)(2)

The Commission proposed a technical amendment to existing § 39.4(c)(2), which would require a DCO to certify to the Commission the terms and conditions of new over-the-counter (OTC) products that it intended to clear. The Commission proposed removing the reference to new products ''not traded on a designated contract market or a registered derivatives transaction execution facility'' and inserting a reference to new products ''not traded on a designated contract market or a registered swap execution facility.'' The proposed provision would retain the reference to filing the terms and conditions of the new product ''pursuant to the procedures of § 40.2 of this chapter.''

Since proposing that technical amendment, the Commission has adopted a new § 39.5 (review of swaps for Commission determination on clearing requirement)[24] and revisions to § 40.2 (listing products for trading by certification).[25] As a result, a DCO seeking to clear new products that are not traded on a designated contract market or swap execution facility must submit to the Commission the terms and conditions of the product pursuant to the procedures of § 39.5, not § 40.2. The Commission is therefore adopting a technical revision to conform § 39.4(c)(2) to the current procedural requirements.

2. Holding Securities in a Futures Portfolio Margining Account—§ 39.4(e)

The CEA, as amended by Section 713 of the Dodd-Frank Act, permits, pursuant to an exemption, rule or regulation, futures and options on futures to be held in a portfolio margining account that is carried as a securities account and approved by the SEC.[26] Reciprocally, the Securities Exchange Act of 1934 (SEA), as amended by Section 713 of the Dodd-Frank Act, permits, pursuant to an exemption, rule, or regulation, cash and securities to be held in a portfolio margining account that is carried as a futures account and approved by the Commission.[27] Those provisions of the CEA and SEA further require consultation between the Commission and the SEC in drafting implementing regulations. As a first step toward meeting this goal, proposed § 39.4(e) would establish the procedural requirements applicable to a DCO seeking approval for a futures portfolio margining account program.

OCC, Newedge USA, LLC (Newedge), New York Portfolio Clearing, LLC (NYPC), and MetLife Inc. urged the Commission to propose rules that would permit portfolio margining, not just establish procedural requirements. The Commission agrees that it should propose substantive portfolio margining rules, but it must move forward on proposing substantive rules with the SEC's participation.

Accordingly, the Commission is adopting the procedural requirements as proposed and anticipates consulting with the SEC in the future to determine the substantive requirements it would impose in approving a futures portfolio margining program and, additionally, in granting an exemption under Section 4(c) of the CEA to permit futures and options on futures to be held in a securities portfolio margining account. The Dodd-Frank Act does not set a deadline for these actions, and the Commission believes that it is important to give this matter due consideration, both in terms of consultation with the SEC and, more broadly, in obtaining industry views on the topic before

[21] *See* 76 FR 54538 (Sept. 1, 2011) (SDRs: Registration Standards, Duties and Core Principles; final rule); 75 FR 80572 (Dec. 22, 2010) (Core Principles and Other Requirements for Designated Contract Markets); 76 FR 1214 (Jan. 7, 2011) (Core Principles and Other Requirements for Swap Execution Facilities).

[22] For example, the Commission has removed the specific cross-references located in exhibit P to Form DCO to the proposed conflicts of interest rules, 75 FR 63732 (Oct. 18, 2010) (Conflicts of Interest), and replaced such references with a description of the required information. When the Commission finalizes such proposed rules, the Commission intends to make technical changes to the Form DCO to include cross-references to such final rules where, in the opinion of the Commission, doing so will facilitate compliance with the Form DCO, the CEA and/or Commission regulations.

[23] As a technical matter, the Commission is removing proposed § 39.3(g)(1) and adopting proposed § 39.3(h) as § 39.3(f); proposed § 39.3(g)(1) was a typographical error which repeats a delegation of authority already provided by § 39.3(b)(2)(i).

[24] *See* 76 FR 44464, at 44473–44474 (July 26, 2011) (Process for Review of Swaps for Mandatory Clearing; final rule).

[25] *See* 76 FR 44776 (July 27, 2011) (Provisions Common to Registered Entities; final rule).

[26] Section 4d(h) of the CEA, 7 U.S.C. 6d(h).

[27] Section 15(c)(3)(C) of the SEA, 15 U.S.C. 78o(c)(3).

proposing substantive regulations or other guidance.

E. Reorganization of Part 39

With the adoption of regulations relating to implementation of the core principles and other provisions of the Dodd-Frank Act, the Commission is reorganizing part 39 of its regulations into two subparts, with a new appendix.

Subpart A, ''General Provisions Applicable to Derivatives Clearing Organizations'' contains §§ 39.1 through 39.8, which are general provisions including procedural requirements for DCO applications and other activities such as transfer of a DCO registration, clearing of new products, and submission of swaps for a mandatory clearing determination. Subpart A also includes pre-existing provisions regarding enforceability and fraud in connection with clearing transactions on a DCO.[28] Subpart B, ''Compliance with Core Principles,'' contains §§ 39.9 through 39.27, which are rules that implement the core principles under Section 5b of the CEA, as amended by the Dodd-Frank Act.

As discussed above, the Commission is replacing appendix A ''Application Guidance and Compliance with Core Principles,'' with a new appendix to part 39, ''Form DCO Derivatives Clearing Organization Application for Registration.''

F. Technical Amendments

With the objective of listing all DCO reporting requirements in a new § 39.19, the Commission proposed redesignating § 39.5(a) and (b) (information relating to DCOs) as proposed §§ 39.19(c)(5)(i) and (ii), respectively, in substantially the same form. The Commission also proposed removing § 39.5(c) (large trader reporting by DCOs), redesignating § 39.5(d) (special calls) as § 21.04 (and current § 21.04 as § 21.05), and adding § 21.06, which would delegate authority under § 21.04 to the Director of the Division of Clearing and Risk.

The Commission did not receive any comments on these proposals. Therefore, the Commission is adopting these revisions as proposed, except for non-substantive changes to §§ 39.19(c)(5)(i) and (c)(5)(ii) to clarify the language.[29]

IV. Part 39 Amendments—Compliance With Core Principles

Proposed § 39.9 would establish the scope of the rules contained in subpart B of part 39, stating that all provisions of subpart B apply to DCOs. The Commission did not receive any comments on the statement of scope, and the Commission is adopting § 39.9 as proposed.

A. Core Principle A—Compliance With Core Principles—§ 39.10

1. Core Principle A

Core Principle A,[30] as amended by the Dodd-Frank Act, requires a DCO to comply with each core principle set forth in Section 5b(c)(2) of the CEA and any requirement that the Commission may impose by rule or regulation pursuant to Section 8a(5) of the CEA. Core Principle A also provides a DCO with reasonable discretion to establish the manner by which it complies with each core principle. Proposed §§ 39.10(a) and 39.10(b) would codify these provisions, respectively. The Commission received no comments on these proposed rules and is adopting the rules as proposed.

2. Designation of a Chief Compliance Officer—§ 39.10(c)(1)

Section 725(b) of the Dodd-Frank Act added a new paragraph (i) to Section 5b of the CEA to require each DCO to designate an individual as its CCO, responsible for the DCO's compliance with the CEA and Commission regulations and the filing of an annual compliance report.[31] In proposed § 39.10(c), the Commission set forth implementing requirements that would largely track the language of Section 5b(i).

Under the introductory provision of proposed § 39.10(c)(1), each DCO would be required to appoint a CCO with ''the full responsibility and authority to develop and enforce in consultation with the board of directors or the senior officer, appropriate compliance policies and procedures, as defined in § 39.1(b), to fulfill the duties set forth in the Act and Commission regulations.'' As previously noted, the Commission is not adopting the definition of ''compliance policies and procedures'' included in proposed § 39.1(b).

CME commented that the text of the Dodd-Frank Act does not require a CCO to ''enforce'' compliance policies and procedures and it suggested that § 39.10 should not do so. According to CME, it is important to separate the functions of monitoring and advising on compliance issues from what it considers ''senior management functions'' of enforcing and supervising compliance policies.

The Commission believes that Congress intended that the CCO have the full responsibility and authority to enforce compliance in consultation with the board of directors or the senior officer. Given the specified duties of the CCO set forth in Section 5b(i)(2), the Commission finds ample support for this interpretation and is adopting the rule as proposed.

First, one definition of the term ''enforce'' is ''to ensure observance of laws and rules,''[32] and among the CCO duties set forth by the Dodd-Frank Act is the requirement that the CCO ''ensure compliance.''[33] Second, Section 5b(i)(2)(C) requires a CCO to ''resolve any conflicts of interest that may arise'' in consultation with the board of the DCO or the senior officer of the DCO. This duty clearly indicates that the CCO is more than just an advisor to management and must have the ability to enforce compliance with the CEA and Commission regulations. The authority to resolve conflicts of interest is more an enforcement function than an audit function. Finally, Section 5b(i)(2)(D) requires the CCO to ''be responsible for administering each policy.''

While the CEA does not explicitly use the word ''enforce,'' the Commission believes that the use of this word in § 39.10(c)(1) is appropriate to capture the meaning of Section 5b(i)(2)(C), *i.e.,* that CCOs must have the authority to fulfill their statutory and regulatory obligations. Moreover, it is consistent with the statutory directive for the CCO to ensure compliance with the CEA. These considerations are particularly important given that the CCO of a DCO has unique responsibilities in connection with the DCO's critical role in providing financial integrity to derivatives markets. In particular, a CCO must have the ability to effectively address rules and practices that could compromise compliance with fair and open access requirements (Core Principle C), risk management

[28] As part of the reorganization of Part 39, § 39.6 (Enforceability) is being redesignated as § 39.7 and § 39.7 (Fraud in connection with the clearing of transactions on a derivatives clearing organization) is being redesignated as § 39.8.

[29] After these technical amendments were proposed, the Commission adopted a final rule governing the process for review of swaps for mandatory clearing. That rule was designated as § 39.5, and the former § 39.5 was redesignated as § 39.8. *See* 76 FR at 44473 (July 26, 2011) (Process for Review of Swaps for Mandatory Clearing; final rule). In connection with adoption of the technical amendments described above, the provisions regarding fraud in connection with the clearing of transactions on a DCO (former § 39.7) are now redesignated as § 39.8.

[30] Section 5b(c)(2)(A) of the CEA, 7 U.S.C. 7a–1(c)(2)(A).

[31] *See* Section 5b(i) of the CEA; 7 U.S.C. 7a–1(b)(i).

[32] *See http://www.websters-online-dictionary.org/definitions/enforce.*

[33] *See* Section 5b(i)(2)(E) of the CEA, 7 U.S.C. 7a–1(b)(i)(2)(E), which requires the CCO to ''ensure compliance with this Act (including regulations) relating to agreements, contracts, or transactions, including each rule prescribed by the Commission under this section.''

requirements (Core Principle D), and financial resource requirements (Core Principle B).

The Commission, however, recognizes that the term ''enforce'' could imply that the DCO's CCO must have direct supervisory authority over employees not otherwise in his or her direct chain of command, or that the CCO has independent authority to discipline employees or terminate employment to facilitate compliance with the CEA and the Commission's regulations. To avoid confusion, the Commission herein clarifies that the term ''enforce,'' as used in § 39.10(c)(1), is not intended to include the authority to supervise employees not in the CCO's direct chain of command, or the authority to terminate employment or discipline employees for conduct that results in noncompliance. The Commission notes that a DCO is not precluded from conferring such authority on its CCO; however, such action would be at the DCO's discretion and is not required by § 39.10(c)(1).[34]

3. Individuals Qualifying To Serve as a CCO—§ 39.10(c)(1)(i)

Proposed § 39.10(c)(1)(i) would require a DCO to designate an individual with the background and skills appropriate for fulfilling the responsibilities of the CCO position. The Commission asked whether additional qualifications should be imposed and, in particular, whether the Commission should restrict the CCO position from being held by an attorney who represents the DCO or its board of directors, such as an in-house or general counsel. The Commission explained that the rationale for such a restriction would be based on concern that the interests of representing the DCO's board of directors or management could be in conflict with the duties of the CCO. Related to this, the Commission specifically sought comment on whether there is a need for a regulation requiring the DCO to insulate a CCO from undue pressure and coercion. It further asked if it is necessary to adopt rules to address the potential conflict between and among compliance interests, commercial interests, and ownership interests of a DCO and, if there is no need for such rules, requested comment on how such potential conflicts would be addressed.

CME, OCC, MGEX, and the Kansas City Board of Trade Clearing Corporation (KCC) commented that additional restrictions should not be imposed. MGEX commented that smaller DCOs will need to maximize the utility of each employee. It also argued that there is little risk if a CCO serves as in-house counsel because attorneys have additional ethical duties which can complement the duties and obligations of a CCO. According to MGEX, if a conflict arose, the attorney could step out of one or both of the roles.

Better Markets commented that there is potential conflict between a CCO and in-house counsel because in-house counsel is an advocate for the DCO or its board of directors regarding any controversy that may relate to regulatory compliance, while a CCO's duty is to ensure compliance. It suggested that the Commission prohibit a CCO from serving as in-house counsel.

The Commission is adopting § 39.10(c)(1)(i) as proposed. The Commission has considered prohibiting a CCO from working in the DCO's legal department or serving as general counsel, consistent with the Commission's approach to the CCO of an SDR.[35] However, in response to public comments and in light of the fact that all currently registered DCOs have some form of compliance program already in place, with one or more staff members assigned to carry out compliance officer functions, the Commission has determined that the potential costs of hiring additional staff to satisfy such requirement could result in imposing an unnecessary burden on DCOs, particularly smaller ones. The Commission recognizes, however, that a conflict of interest could compromise a CCO's ability to effectively fulfill his or her responsibilities as a CCO. The Commission therefore expects that as soon as any conflict of interest becomes apparent, a DCO would immediately implement a back-up plan for reassignment or other measures to address the conflict and ensure that the CCO's duties can be performed without compromise.

MGEX and KCC also recommended that the Commission should permit the Chief Regulatory Officer to function as the CCO. Presumably, the commenters are referring to circumstances in which a DCO (which typically would not have a Chief Regulatory Officer) is also registered as a DCM (which typically would have a Chief Regulatory Officer). The Commission notes that the rule does not prohibit the person serving as CCO from also serving as the Chief Regulatory Officer.

4. CCO Reporting Structure—§ 39.10(c)(1)(ii)

Section 5b(i)(2)(A) of the CEA requires that a CCO report directly to the board of directors or the senior officer of the DCO.[36] Proposed § 39.10(c)(1)(ii) would codify this requirement. The proposed rule also would require the board of directors or the senior officer to approve the compensation of the CCO.

In the notice of proposed rulemaking, the Commission sought comment as to the degree of flexibility that should be provided in the reporting structure of the CCO. Specifically, the Commission requested comment on: (i) Whether it would be more appropriate for a CCO to report to the senior officer or the board of directors; (ii) as between the senior officer or board of directors, which generally is a stronger advocate of compliance matters within an organization; and (iii) whether the proposed rules allow for sufficient flexibility with regard to a DCO's business structure.

CME, MGEX, and KCC commented that the proposed rules would provide DCOs with the appropriate degree of flexibility. CME, however, believes it would be ''logical'' for a CCO to report to the senior officer, and that the board of directors should oversee implementation of compliance policies and ensure that compliance issues are resolved effectively and expeditiously by the senior officer with the assistance of the CCO. MGEX noted that each DCO may have a different business and reporting structure and believes that rigid rules may hinder the effectiveness and independence of the CCO.

Better Markets observed that, in the past, businesses have placed financial interests over other considerations like risk management and have created a climate where people were unwilling to speak out against financial considerations for fear of being fired. Better Markets suggested that there should be a strong reporting and working relationship between the CCO and independent directors, and suggested that independent directors have sole responsibility to designate or terminate the CCO and to set compensation levels for the CCO.

The Commission is adopting § 39.10(c)(1)(ii) as proposed, declining to prescribe whether the CCO can only report to the board of directors or to the senior officer. The Commission appreciates Better Markets' concern that a CCO who reports to the senior officer may be swayed by financial

[34] *See* further discussion of a CCO's duties in section IV.A.7, below.

[35] *See* 76 FR 54538 (Sept. 1, 2011) (SDRs: Registration Standards, Duties and Core Principles; final rule).

[36] 7 U.S.C. 7a–1(i)(2)(A).

considerations. However, the Dodd-Frank Act permits alternative reporting structures and the Commission has not been presented with a compelling reason to conclude that the structure and operations of a DCO require the imposition of this limitation on the ability of a DCO's board and management to establish lines of authority appropriate to the particular DCO.

CME asked the Commission to clarify that the term ''senior officer'' may apply to the senior officer of a division that is engaged in clearing activities. The Commission notes that Section 5b(i)(2)(A) of the CEA requires a CCO to ''report directly to the board or to the senior officer of the derivatives clearing organization.'' If the division engaged in clearing activities is the registered DCO, then the senior officer of that division would be the ''senior officer'' for purposes of this provision.

Finally, Better Markets suggested that compliance should be addressed on an entire-group basis by a senior CCO. According to Better Markets, a single senior CCO should have overall responsibility for each affiliated and controlled entity, even if the individual entities within the group have CCOs. The final rules do not require a business organization to have a ''senior'' CCO as Better Markets suggested. The Commission believes this would be overly prescriptive and that a DCO should have the flexibility to manage compliance functions across divisions or affiliates to accommodate its particular organizational structure.

5. Annual Compliance Meeting—§ 39.10(c)(1)(iii)

Proposed § 39.10(c)(1)(iii) would require a CCO to meet with the board of directors or the senior officer at least once a year to discuss the effectiveness of the DCO's compliance policies and procedures, as well as the administration of those policies and procedures by the CCO. Better Markets suggested that a CCO meet with the board of directors at least quarterly. No comments were received on the proposed topics to be discussed at the annual meeting.

The Commission is adopting § 39.10(c)(1)(iii) in modified form. The final rule retains the requirement that the CCO meet with the board of directors or senior officer annually, but eliminates the required topics to be discussed at the meeting. As the Commission noted in the notice of proposed rulemaking, the requirement for an annual discussion would not preclude the board of directors or the senior officer from meeting with the CCO more frequently. While more frequent communication between the CCO and the DCO's board or senior officer may be desirable, the Commission has concluded that adopting requirements to that effect would be overly prescriptive. Similarly, upon further consideration, the Commission has concluded that the purpose of the meeting should be self-evident (*i.e.,* compliance) and it is not necessary for the Commission, by regulation, to prescribe the business that must be conducted at that meeting.

6. Change in the Designation of the CCO—§ 39.10(c)(1)(iv)

Proposed § 39.10(c)(1)(iv) would require that a change in the designation of the individual serving as the CCO be reported to the Commission, in accordance with the requirements of proposed § 39.19(c)(4)(xi). The Commission received no comments on the proposed rule and is adopting the provision as proposed.[37]

7. Duties of the CCO—§ 39.10(c)(2)

Section 5b(i)(2) of the CEA, added by Section 725(a) of the Dodd-Frank Act, sets forth the duties of a CCO,[38] and proposed § 39.10(c)(2) would codify those enumerated duties in paragraphs (c)(2)(i)–(vii).

The Commission received comments on the CCO's duties from CME, KCC, and OCC. In general, the commenters expressed the view that the proposed regulations are too broad because they improperly provide the CCO with what CME calls ''senior management functions'' like enforcing and supervising compliance policies. Instead, the commenters believe that the role of a CCO is only to serve as an auditor who monitors compliance and informs senior management of noncompliance. The Commission has carefully considered the comments and is adopting the rule as proposed, except as discussed below.

CME acknowledged that proposed § 39.10(c)(2)(ii) mirrors the language in the Dodd-Frank Act. However, CME believes that Congress did not intend to mean ''resolve'' in the executive or managerial sense such that the CCO alone would examine the facts and determine and affect the course of action. CME believes that Congress intended the CCO to identify, advise, and escalate, as appropriate, and to assist senior management in resolving conflicts of interest.

KCC also believes that the board of directors or senior officer should resolve any conflict of interest in consultation with the CCO. KCC commented that compliance policies and procedures should be administered by DCO staff and not by the CCO. According to KCC, a DCO's staff is most familiar with the day-to-day operations of the DCO and is in the best position to manage the policies and procedures. KCC believes that a CCO's role should be that of oversight of the DCO's compliance program and filing an annual report.

The Commission disagrees with assertions that a CCO should only assist senior management in resolving conflicts of interest or that the board or senior management should resolve conflicts of interest in consultation with the CCO. Section 5b(i)(2)(C) of the CEA states that a CCO shall ''in consultation with the board of the derivatives clearing organization, a body performing a function similar to the board of the derivatives clearing organization, or the senior officer of the derivatives clearing organization, resolve any conflicts of interest that may arise.'' Given this express statutory direction, the Commission is not revising the proposed rule.

The Commission points out that a CCO's duty to administer compliance policies and procedures is set forth in Section 5b(i)(2)(D) of the CEA. It requires a CCO to ''be responsible for administering each policy and procedure that is required to be established pursuant to this section.'' By administering compliance policies and procedures, a CCO is not required to perform staff functions that have compliance implications. Rather, the CCO is responsible for oversight of such functions.

The Commission is revising § 39.10(c)(2)(iii) to require a CCO to have the duty of ''[e]stablishing and administering written policies and procedures reasonably designed to prevent violation of the Act.'' This does not change the substance of the requirement or alter the implementation of the statutory standard, as it is consistent with § 39.10(c)(1) which requires a CCO to ''develop * * * appropriate policies and procedures * * * to fulfill the duties set forth in the Act and Commission regulations.'' The Commission believes that the revised language eliminates the possibility of ambiguity and prevents too narrow a reading of the reference to policies and procedures that are ''required'' under the CEA.

CME described as ''impracticable'' the proposed standard that a CCO must ''ensure'' a DCO's compliance and

[37] *See* discussion in section IV.J.5.h. (The Commission is adopting proposed § 39.19(c)(4)(xi) as a renumbered § 39.19(c)(4)(ix)).

[38] 7 U.S.C. 7a–1(i)(2).

suggested that an appropriate and ''achievable'' standard would be to require a CCO to put in place measures ''reasonably designed to ensure compliance'' with the CEA and Commission regulations.

The Commission is revising § 39.10(c)(2)(iv) in response to CME's comment. Although Section 5b(i)(2)(E) of the CEA requires a CCO to ''ensure'' compliance, the Commission agrees that a CCO cannot fully guarantee compliance because, as a practical matter, he or she will have to rely to some extent on information provided by other DCO employees or representatives of the DCO's service providers. Accordingly, § 39.10(c)(2)(iv) is being modified to include as a duty of the CCO, ''[*t]aking reasonable steps to ensure compliance* with the Act and Commission regulations * * *'' (added text in italics). The Commission believes that this revision addresses CME's concern while retaining the emphasis on the CCO's actions rather than focusing on the nature of measures put in place by the CCO.[39]

CME recommended that the Commission revise proposed § 39.10(c)(2)(vi) to require a CCO to ''[e]stablish[] appropriate procedures [for] the handling, management response, remediation, retesting, and closing of noncompliance issues,'' and to eliminate the requirement that a CCO ''follow[]'' such procedures. According to CME, this is a function of senior management and Congress did not intend for a CCO to exercise senior management functions. OCC agrees with CME.

Specifically, CME suggested that proposed § 39.10(c)(2)(vi) be modified to eliminate the requirement that a CCO ''follow'' appropriate procedures because following procedures is a function of senior management. However, a CCO's performance of this ''senior management'' function is explicitly set forth in Section 5b(i)(2)(G) of the CEA, which states that ''[t]he chief compliance officer shall * * * establish and follow appropriate procedures for the handling, management response, remediation, retesting, and closing of noncompliance issues.'' The Commission does not believe that CME has provided a persuasive basis for its suggested modification of § 39.10(c)(2)(vi), and the Commission is adopting the provision as proposed.

Finally, the Commission, on its own initiative, is revising § 39.10(c)(2)(vii) to eliminate the requirement that a CCO establish a compliance manual. While having a compliance manual is a good practice, incorporating this requirement into a regulation may be overly prescriptive and the Commission has concluded that a DCO should have discretion as to the vehicles through which it will carry out its compliance program.

8. Annual Report—§ 39.10(c)(3)

Section 5b(i)(3) of the CEA, added by Section 725(b) of the Dodd-Frank Act, requires a CCO to prepare an annual report that describes the DCO's compliance with the CEA, regulations promulgated under the CEA, and each policy and procedure of the DCO, including the code of ethics and conflicts of interest policies.[40] Implementation of these statutory requirements was addressed at proposed § 39.10(c)(3)(i), (c)(3)(ii)(A), and (c)(3)(v) and (v).

With respect to proposed § 39.10(c)(3)(i), CME suggested that the Commission eliminate it and KCC commented that the requirement for a DCO to show compliance with respect to the CEA and Commission regulations is ambiguous and overreaching. KCC also suggested that the scope of the annual report should not go beyond reviewing the DCO core principles and identifying the compliance policies and procedures that are in place to satisfy the core principles.

Although paragraph (i) mirrors the language and requirements set forth in Section 5b(i)(3)(A)(i) of the CEA, to address CME's and KCC's comments, the Commission has decided to revise the language of §§ 39.10(c)(3)(i) and (ii) to avoid submission of duplicative information and to clarify the scope of the annual report content requirements without altering the nature of the information that must be included in the report pursuant to the CEA. Final § 39.10 (c)(3)(i) requires that the annual report ''[c]ontain a description of the derivatives clearing organization's written policies and procedures, including the code of ethics and conflict of interest policies.'' Final § 39.10 (c)(3)(ii) requires that the report '' [r]eview each core principle and applicable Commission regulations, and with respect to each: (A) Identify the compliance policies and procedures that are designed to ensure compliance with the core principle.'' The Commission notes that by specifying ''written'' policies and procedures, the rule more precisely establishes the scope of § 39.10(c)(3)(i).

Proposed §§ 39.10(c)(3)(iii) and (c)(3)(iv) would require that the annual report list any material changes to compliance policies and procedures since the last annual report and describe the DCO's financial, managerial, and operational resources for compliance with the Act and Commission regulations, respectively. The Commission did not receive any comments on these provisions and is adopting §§ 39.10(c)(3)(iii) and (c)(3)(iv) as proposed.

Proposed § 39.10(c)(3)(v) would require that the annual report ''[d]escribe any material compliance matters, including incidents of noncompliance, since the date of the last annual report and describe the corresponding action taken.'' CME suggested that the provision be revised to require that the annual report identify only material compliance issues that were not properly addressed by the DCO.

The Commission is adopting § 39.10(c)(3)(v) as proposed because receiving such information will enable the Commission to assess whether the DCO is addressing compliance matters effectively. It also will enable the Commission to become aware of possible future compliance issues across DCOs and to proactively identify best practices. An annual report that identifies only material compliance issues would not provide sufficient information.

Finally, the Commission on its own initiative is not adopting proposed § 39.10(c)(3)(vi) because information of this nature is not essential to the Commission's evaluation of the DCO's compliance program and, if it is relevant to a material compliance matter, it will be provided to the Commission pursuant to § 39.10(c)(3)(v).

9. Submission of Annual Report to the Commission—§ 39.10(c)(4)

Proposed § 39.10(c)(4) would set forth the requirements for submitting an annual report to the Commission. Except as noted below, the Commission is adopting the rule as proposed.

Better Markets suggested that the Commission change proposed § 39.10(c)(4)(i) to require a CCO to present the finalized annual report to the board of directors and executive management prior to its submission to the Commission. Better Markets also suggested that the independent directors as well as the entire board should be required to review and approve the report in its entirety and to detail any disagreement with any portion. In

[39] *See also* 76 FR at 54584 (Sept. 1, 2011) (SDRs: Registration Standards, Duties and Core Principles; final rule) (adopting § 49.22(d)(4), which applies this standard to the CCO of an SDR).

[40] 7 U.S.C. 7a–1(i)(3).

addition, Better Markets commented that a CCO should be required to file the report with the Commission, either as approved or with statements of disagreement.

The Commission is not revising proposed § 39.10(c)(4)(i) per Better Markets' suggestion. The Commission believes that a DCO should have the flexibility to determine whether the annual report will be provided to the board of directors, the senior officer, or both. The Commission also is not requiring the board of directors to approve or submit comments on the report given that the board of directors might not have sufficient information to approve or disagree with the report. In addition, there is a risk that the board might try to influence the CCO to change the report if it were required to express approval. The Commission notes that the rules do not prohibit the board, any of its members, or the senior officer from approving or disagreeing with aspects of the annual report.

Proposed § 39.10(c)(4)(ii) would require that the annual report include a certification by the CCO that, to the best of his or her knowledge and reasonable belief, and under penalty of law, the annual report is accurate and complete. CME commented that the Commission should require the DCO's senior officer, and not the CCO, to make the necessary certification in the annual compliance report. According to CME, ''the best way to achieve the goal of a robust effective compliance program, and to close the loop on creating a culture of compliance, is to require the registrant's senior officer—and not the CCO—to complete the required certification.''

KCC commented that a CCO should not have to certify ''under penalty of law'' that the annual report is accurate and complete, and a CCO should certify instead that to the best of his or her knowledge and belief the annual report is accurate and complete.

The Commission is adopting § 39.10(c)(4)(ii) as proposed. The CEA requires (1) the CCO to sign the annual report and (2) that the annual report contain a certification that, under penalty of law, the compliance report is accurate and complete.[41] Accordingly, the Commission believes the regulation accurately reflects Congressional intent.

10. Annual Report Confidentiality

CME suggested that Commission regulations should expressly state that annual reports are confidential documents that are not subject to public disclosure by listing annual reports as a specifically exempt item in part 145 of the Commission's regulations. The Commission has not proposed and is not adopting CME's proposal, which would provide blanket confidentiality to all annual reports submitted by CCOs of DCOs, even though the Commission may determine that there is information contained in a report that should be public. Accordingly, a DCO must petition for confidential treatment of its annual report under § 145.9 if it wants the Commission to determine that a particular annual report should be subject to confidentiality.

11. Insulating the CCO From Undue Influence

The notice of proposed rulemaking solicited comments as to whether the Commission should adopt regulations that require a DCO to insulate its CCO from undue pressure and coercion. CME commented that the current regulations are sufficient to protect a CCO from undue influence and it does not believe additional regulations are necessary. The Commission agrees with CME and is not adopting such regulations.

12. Recordkeeping—§ 39.10(c)(5)

Proposed § 39.10(c)(5) would require a DCO to maintain: (i) A copy of the policies and procedures adopted in furtherance of compliance with the CEA and Commission regulations; (ii) copies of materials, including written reports provided to the board of directors or the senior officer in connection with review of the annual report; and (iii) any records relevant to the DCO's annual report, including work papers and financial data. The DCO would be required to maintain these records in accordance with § 1.31 and proposed § 39.20. The Commission did not receive any comment letters discussing proposed § 39.10(c)(5). The Commission has adopted § 39.10(c)(5) as proposed, except that the Commission has modified § 39.10(c)(5)(A) to refer to ''all compliance policies and procedures'' rather than ''the compliance policies and procedures, as defined in § 39.1(b)'' in light of the Commission's decision not to adopt a definition of compliance policies and procedures, as discussed in section III.B, above.

B. Core Principle B—Financial Resources—§ 39.11

Core Principle B,[42] as amended by the Dodd-Frank Act, requires a DCO to possess financial resources that, at a minimum, exceed the total amount that would enable the DCO to meet its financial obligations to its clearing members notwithstanding a default by the clearing member creating the largest financial exposure for the DCO in extreme but plausible market conditions and to cover its operating costs for a period one year, as calculated on a rolling basis. Proposed § 39.11 would codify these requirements. The Commission received a total of 18 comments on the proposed regulations. The Commission considered each of these comments in formulating the final regulations discussed below.

1. Amount of Financial Resources Required—§§ 39.11(a) and 39.11(b)(3)

Proposed § 39.11(a)(1) would require a DCO to maintain sufficient financial resources to meet its financial obligations to its clearing members notwithstanding a default by the clearing member creating the largest financial exposure for the DCO in extreme but plausible market conditions, and proposed § 39.11(a)(2) would require a DCO to maintain sufficient financial resources to cover its operating costs for at least one year, calculated on a rolling basis. Proposed § 39.11(b)(3) would allow a DCO to allocate a financial resource, in whole or in part, to satisfy the requirements of either proposed § 39.11(a)(1) or proposed § 39.11(a)(2), but not both, and only to the extent that use of that financial resource is not otherwise limited by the CEA, Commission regulations, the DCO's rules, or any contractual arrangements to which the DCO is a party.

The Futures Industry Association (FIA) recommended that all DCOs be required to maintain resources sufficient to withstand the default of the two clearing members representing the largest financial exposure to the DCO, but that the Commission give DCOs reasonable time to come into compliance with the enhanced requirement.

The International Swaps and Derivatives Association (ISDA) also suggested that, in the clearing of certain OTC derivatives such as eligible credit default swaps and interest rate swaps, a DCO should have sufficient financial resources that, at a minimum, enable it to withstand a potential default by two of its largest clearing members, as measured by the two clearing members with the largest obligations to the DCO in extreme but plausible market conditions. ISDA further suggested, however, that this heightened financial resource level may not be appropriate for all other OTC or other derivatives products, and offered to work with the Commission to determine the

[41] *See* Section 5b(i)(3)(B)(ii) of the CEA, 7 U.S.C. 7a–1(i)(3)(B)(ii).

[42] Section 5b(c)(2)(B) of the CEA, 7 U.S.C. 7a–1(c)(2)(B).

appropriate standard for derivatives in other asset classes.

Similarly, Mr. Chris Barnard recommended that consideration be given to differentiating risk, and therefore resource requirements by broad derivative/product class, or at least by exchange-traded and OTC derivative types.

Better Markets suggested that the default rate used in the stress test for DCOs should be the larger of (1) the member representing the largest exposure to the DCO, and (2) the members constituting at least 25 percent of the exposures in aggregate to the DCO. Americans for Financial Reform (AFR) stated that the calculation in proposed § 39.11(a)(1) should be based on risk exposure as well as number of defaults.

LCH.Clearnet Group Limited (LCH) concurred with all the provisions set forth by the Commission under proposed § 39.11(a). NYPC also expressed support for proposed §§ 39.11(a)(1) and 39.11(a)(2).

The Commission is adopting § 39.11(a) as proposed. Section 39.11(a) is consistent with Core Principle B as amended by the Dodd-Frank Act. As the Commission noted in its notice of proposed rulemaking, § 39.11(a)(1) is also consistent with the Bank for International Settlements' Committee on Payment and Settlement Systems and the Technical Committee of the International Organization of Securities Commissions (CPSS–IOSCO) Recommendations for Central Counterparties (CCPs), issued in 2004 (2004 CPSS–IOSCO Recommendations).[43] The Commission recognizes that those recommendations eventually will be replaced by the Principles for Financial Market Infrastructures (FMIs), which are currently being developed by CPSS and IOSCO and are expected to be finalized in 2012.[44] For financial resources requirements for CCPs, CPSS and IOSCO are considering three alternatives: (1) A ''cover one'' minimum requirement for all CCPs; (2) a ''cover two'' minimum requirement for all CCPs; and (3) either a ''cover one'' or a ''cover two'' minimum requirement for a particular CCP, depending upon the risk and other characteristics of the particular products it clears, the markets it serves, and the number and type of participants it has.[45] The Commission may reconsider § 39.11(a)(1) once CPSS and IOSCO have finished their work.

MGEX noted that proposed § 39.11(b)(3) would prohibit a DCO from using a financial resource for both default and operating cost purposes. While MGEX agreed this seems a logical approach to take to avoid counting an asset's value for two different purposes, MGEX stated that there are practical implications to consider. As a DCM and DCO, MGEX keeps one basic set of financial records that are compliant with various accounting standards. MGEX recommended that the Commission's proposal should not be interpreted to require a DCO to formally divide some assets and accounts. The Commission confirms that § 39.11(b)(3) does not require a DCO to formally divide its assets or accounts. The Commission is adopting § 39.11(b)(3) as proposed.

2. Treatment of Affiliated Clearing Members—§ 39.11(a)(1)

Proposed § 39.11(a) would state, in part: ''A [DCO] shall maintain financial resources sufficient to cover its exposures with a high degree of confidence and to enable it to perform its functions in compliance with the core principles set out in Section 5b of the [CEA] * * * Financial resources shall be considered sufficient if their value, at a minimum, exceeds the total amount that would: (1) Enable the [DCO] to meet its financial obligations to its clearing members notwithstanding a default by the clearing member creating the largest financial exposure for the [DCO] in extreme but plausible market conditions; *Provided that* if a clearing member controls another clearing member or is under common control with another clearing member, the affiliated clearing members shall be deemed to be a single clearing member for purposes of this provision * * *''

In the notice of proposed rulemaking, the Commission stated: ''There may be some instances in which one clearing member controls another clearing member or in which a clearing member is under common control with another clearing member. The Commission proposes to treat such affiliated clearing members as a single entity for purposes of determining the largest financial exposure because the default of one affiliate could have an impact on the ability of the other to meet its financial obligations to the DCO. However, to the extent that each affiliated clearing member is treated as a separate entity by the DCO, with separate capital requirements, separate guaranty fund obligations, and separate potential assessment liability, the Commission requests comment on whether a different approach might be warranted.''

CME noted that it treats affiliated clearing members as separate entities, with separate capital requirements, separate guaranty fund obligations, and separate potential assessment liability. While CME acknowledged that the default of one affiliate may impact the ability of another affiliated clearing member to meet its financial obligations to the DCO, CME suggested that circumstances may exist in which a clearing member is sufficiently independent to continue operating notwithstanding a default by an affiliate. CME rules allow, but do not require, emergency action to be taken against a clearing member based upon the financial or operational condition of an affiliate (whether or not that affiliate is also a clearing member). CME urged the Commission to take a similar approach by revising the language of proposed § 39.11(a) to state that ''if a clearing member controls another clearing member or is under common control with another clearing member, the affiliated clearing members may be deemed to be a single clearing member * * *.''

LCH agreed with the Commission's proposed requirement that the DCO must treat any clearing member, either controlled by another clearing member or under common control with another clearing member, as a single clearing member for the purposes of § 39.11(a)(1).

The Commission is adopting § 39.11(a)(1) as proposed. The Commission believes this treatment appropriately addresses the potential risks of affiliates. The Commission notes that aggregating the potential losses of affiliated clearing members for purposes of this calculation would provide more coverage in the event of a default.

3. Operating Costs—§ 39.11(a)(2)

Proposed § 39.11(a)(2) would require a DCO to maintain sufficient financial resources to cover its operating costs for at least one year, calculated on a rolling basis.

OCC commented that while the statutory requirement that a DCO have one year of operating costs, based on a rolling period, may be a reasonable

[43] *See* Bank for International Settlements' Committee on Payment and Settlement Systems and Technical Committee of the International Organization of Securities Commissions, ''Recommendations for Central Counterparties,'' CPSS Publ'n No. 64 (November 2004), available at *http://www.bis.org/publ/cpss64.pdf.*

[44] *See* Bank for International Settlements' Committee on Payment and Settlement Systems and Technical Committee of the International Organization of Securities Commissions, ''Principles for financial market infrastructures: Consultative report,'' CPSS Publ'n No. 94 (March 2011), available at *http://www.bis.org/publ/cpss94.pdf* (CPSS–IOSCO Consultative Report).

[45] CPSS–IOSCO Consultative Report, Principle 4: Credit Risk, at 30.

standard to ensure that a DCO is not forced out of business while there is still open interest in the contracts it clears, the requirement should be calculated based on essential operating expenses for the rolling period. According to OCC, an appropriate wind-down budget would include projected revenues during the wind-down and would not include expenses associated with activities having value only to a DCO that intends to remain in business (*e.g.,* product development, technological enhancements, lobbying activities, investor education, etc.).

ISDA stated that it is appropriate that a DCO hold equity capital sufficient to cover its operating costs and likely exit costs during any liquidation and this capital should be separate from any DCO equity contribution to the required default resources.

Eurex Clearing AG (Eurex) agreed that having a requirement for operating resources is reasonable, especially in view of the flexibility implied in the Commission's proposed rules for types of financial resources, but cautioned that the one-year time frame may be unnecessarily long.

FIA supported this aspect of the Commission's proposal, including the requirement that a DCO not be permitted to ''double-count'' its resources to cover both this and the default resources requirement.

The Commission is adopting § 39.11(a)(2) as proposed. The Commission notes that the language in § 39.11(a)(2) is virtually identical to that of Core Principle B.

4. Types of Financial Resources—§ 39.11(b)

Proposed § 39.11(b)(1) lists the types of financial resources that would be available to a DCO to satisfy the requirements of proposed § 39.11(a)(1): (1) The margin of the defaulting clearing member; (2) The DCO's own capital; (3) the guaranty fund deposits of the defaulting clearing member and non-defaulting clearing members; (4) default insurance; (5) if permitted by the DCO's rules, potential assessments for additional guaranty fund contributions on non-defaulting clearing members; and (6) any other financial resource deemed acceptable by the Commission. Proposed § 39.11(b)(2) lists the types of financial resources that would be available to a DCO to satisfy the requirements of proposed § 39.11(a)(2): (1) The DCO's own capital and (2) any other financial resource deemed acceptable by the Commission.

In the notice of proposed rulemaking, the Commission noted that a DCO would be able to request an informal interpretation from Commission staff on whether or not a particular financial resource may be acceptable to the Commission. The Commission also invited commenters to recommend particular financial resources for inclusion in the final regulation.

ISDA encouraged the Commission to give prudent consideration to the use of standby letters of credit as an additional financial resource, given that many letter-of-credit issuing banks will be an affiliate of a clearing member.

Natural Gas Exchange Inc. (NGX) requested that the Commission consider the acceptability of letters of credit as an asset of the guaranty fund and clarify in the final rule that letters of credit are acceptable as an asset of the guaranty fund if subject to certain safeguards. NGX also requested that the Commission make clear in the final regulation that it will interpret proposed §§ 39.11(b)(1)(vi) and 39.11(b)(2)(ii) broadly so as to permit a demonstration, on a case-by-case basis, that a DCO meets the overall policies of the regulation through a specific mix of financial resources.

Mr. Barnard recommended splitting the types of financial resources permitted under proposed § 39.11(b)(1) into two classes: Class A would consist of the financial resources listed in paragraphs (b)(i) through (b)(iii), and would be required to make up the significant part of the total financial resources, and class B would consist of the financial resources listed in paragraphs (b)(iv) through (b)(vi), on which larger prudential haircuts would be required. MGEX suggested that proposed § 39.11(b)(2) should retain the ability for a DCO to provide its explanation and methodology for including a particular financial resource. MGEX further suggested that the list of potential financial resources should be broad and not pruned too quickly, particularly by initial regulation.

Eurex commented that the Commission's proposed list of financial resources in proposed § 39.11(b)(1) is appropriate.

The Commission is adopting § 39.11(b) as proposed, except for a technical amendment to clarify the scope of the use of margin as a financial resource to cover a default. As proposed, the Commission is not including letters of credit as an acceptable financial resource because they are only a promise by a bank to pay and not an asset that can be sold.[46] However, both § 39.11(b)(1) and § 39.11(b)(2) permit ''any other financial resource deemed acceptable by the Commission,'' which means that the Commission could evaluate the use of letters of credit on a case-by-case basis.[47]

The Commission also received inquiries from a few DCOs as to whether the Commission would deem projected revenue an acceptable financial resource to satisfy the requirements of § 39.11(a)(2). The Commission expects that projected revenue generally would be deemed acceptable for established DCOs that can demonstrate a historical record of revenue, but not for DCO applicants or relatively new DCOs with no such record.

With respect to any financial resource that is not enumerated in § 39.11(b) and for which a DCO seeks a determination as to its acceptability based on the DCO's particular circumstances, DCO staff should contact Commission staff prior to submitting the DCO's quarterly financial resources report.

The Commission is modifying § 39.11(b)(1)(i) to more precisely reflect the fact that the use of margin as a financial resource available to satisfy the requirements of paragraph (a)(1) is subject to limitations imposed by the Commission and a DCO, *e.g.,* relating to the use of customer margin to cover a default. As proposed, § 39.11(b)(1)(i) would permit the use of ''[m]argin of a defaulting clearing member.'' The provision now refers to ''[m]argin to the extent permitted under parts 1, 22, and 190 of this chapter and under the rules of the derivatives clearing organization.''

5. Capital Requirement

Proposed §§ 39.11(b)(1) and (b)(2) list the DCO's own capital as a type of financial resource that would be available to a DCO to satisfy the requirements of proposed §§ 39.11(a)(1) and (a)(2), respectively. In the notice of proposed rulemaking, the Commission noted that Commission regulations do not prescribe capital requirements for DCOs. The Commission invited

[46] The Commission recognizes that assessment powers are also a promise to pay, but as the Commission noted in the notice of proposed rulemaking, a clearing member may have a strong financial incentive to pay an assessment. If a clearing member failed to pay its assessment obligation, that failure would be treated as a default and the clearing member would be subject to liquidation of its positions and forfeiture of the margin in its house account. Thus, in addition to a potential general interest in maintaining the viability of the DCO going forward, a non-defaulting clearing member may have a specific incentive to pay an assessment, depending on the size and profitability of its positions and the margin on deposit relative to the size of the assessment.

[47] *See* discussion of the prohibition on accepting letters of credit as initial margin in section IV.F.5, below.

comment on whether it should consider adopting such requirements and if so, what those requirements should be.

J.P. Morgan Chase & Co. (J.P. Morgan) commented that if a DCO enumerates its own capital as part of its waterfall, that DCO should be required to provide sufficient assurances that the capital will be available to meet those obligations and will not be reallocated to serve other purposes at the DCO's discretion. In a separate comment letter on the proposed risk management requirements for DCOs, J.P. Morgan offered its support for regulations that would require a DCO to retain in a segregated deposit account, on a rolling basis, 50 percent of its earnings from the previous 4 years. In addition, J.P. Morgan stated that it would be appropriate for at least 50 percent of the retained earnings to have a first loss position. J.P. Morgan also recommended that the DCO contribution be subject to a minimum floor of $50 million.

Mr. Michael Greenberger recommended that the Commission require DCOs to set aside a reasonable amount of capital, equal to an average size of one contract for that DCO, so that a DCO would have sufficient financial resources to absorb a default. In addition, Mr. Greenberger suggested that capital requirements for DCOs must require that the DCOs' capital be highly liquid so that a DCO can cure a default in a timely manner.

Eurex noted that clearing organizations exhibit a variety of organizational and capital structures and suggested the Commission should allow DCOs to determine their own mixes of protective measures, which might include the DCO's own capital. Nevertheless, Eurex expressed support for an initial capital requirement of $25 million for DCOs.

OCC commented that an equity capital requirement for DCOs is not appropriate because DCOs rely primarily on member-supplied resources, such as clearing fund deposits and margin, to meet their obligations. According to OCC, most, if not all, DCOs have little capital in relation to their obligations. OCC suggested that the critical question from a safeness and soundness standpoint is whether DCOs have adequate financial resources, not the form in which such resources are held.

CME stated that the financial resources requirements contained in Core Principle B are better suited to achieve the goal of ensuring adequate capitalization of DCOs, and that further capital requirements would be unnecessary and essentially duplicative.

KCC commented that, with proposed § 39.11(a)(1) requiring a DCO to maintain sufficient financial resources to meets its financial obligations, a separate capital requirement would be redundant. KCC also stated that onerous capital requirements placed on DCOs could have an anti-competitive effect.

NYPC cautioned that mandating that DCOs hold specific forms or amounts of capital could have a chilling effect on competition, at odds with the principles of the CEA by potentially shutting out various forms of organizational structures for DCOs. NYPC noted that Core Principle B requires that DCOs maintain sufficient financial resources to perform their functions as central counterparties in compliance with the CEA. NYPC suggested that whether such financial resources are derived from a DCO's own capital or other financial resources deemed acceptable to the Commission should be inconsequential to the extent such statutorily prescribed functions are fulfilled.

MGEX stated that it does not support adopting specific capital requirements for DCOs. MGEX noted that the proposed regulation already requires a DCO to be able to withstand the default of its largest clearing member in extreme but plausible market conditions. MGEX further noted that a DCO's capital is only one element of the financial resources necessary to cover that risk, and suggested that a DCO should be able to determine how it best needs to allocate that risk among its various financial resources.

The Commission is not adopting a capital requirement for DCOs at this time. The Commission believes that it is appropriate to provide flexibility to DCOs in designing their financial resources structure so long as the aggregate amount is sufficient. The Commission notes, however, that one of the principles in the CPSS–IOSCO Consultative Report would require an FMI to ''hold sufficiently liquid net assets funded by equity to cover potential general business losses so that it can continue providing services as a going concern.'' [48] CPSS and IOSCO are considering, and requesting comment on, the establishment of a specific minimum quantitative requirement for liquid net assets funded by equity. If such a requirement is established, the Commission may consider a similar requirement for DCOs at that time.

[48] *See* CPSS–IOSCO Consultative Report, Principle 15: General Business Risk, at 70.

6. Assessments—§§ 39.11(b)(1)(v) and 39.11(d)(2)

Proposed § 39.11(b)(1)(v) would list ''potential assessments for additional guaranty fund contributions, if permitted by the [DCO]'s rules'' as a type of financial resource that would be available to a DCO to satisfy the requirements of proposed § 39.11(a)(1). Proposed § 39.11(d)(2) would require a DCO: (i) To have rules requiring that its clearing members have the ability to meet an assessment within the time frame of a normal variation settlement cycle; (ii) to monitor, on a continual basis, the financial and operational capacity of its clearing members to meet potential assessments; (iii) to apply a 30 percent haircut to the value of potential assessments; and (iv) to only count the value of assessments, after the haircut, to meet up to 20 percent of its default resources requirement. The Commission requested comment on whether these limits and requirements are appropriate and, more generally, whether assessment powers should be considered to be a financial resource available to satisfy the requirements of proposed § 39.11(a)(1).

With regard to proposed §§ 39.11(d)(2)(i) and (ii), OCC commented that the requirement that clearing members be able to meet an assessment within the time frame of a normal variation settlement cycle is an aggressive but appropriate standard that its clearing members would be able to meet in most circumstances, but that DCOs should have discretion to extend this deadline on a case-by-case basis where appropriate to avoid severe strains on clearing member liquidity in unusual circumstances. OCC objected to the requirement that DCOs must monitor ''on a continual basis'' a clearing member's ability to meet potential assessments, which OCC claimed is overly burdensome and difficult to administer. OCC suggested that a monthly review is reasonable and adequate.

NYPC requested that the Commission clarify how the requirement of proposed § 39.11(d)(2)(i) would be imposed on DCOs that conduct both end-of-day and intraday settlements each business day. In order to ensure that a uniform standard is applied across clearing members of all DCOs, whether the DCO conducts one or two settlements per business day, NYPC recommended that the Commission clarify that a DCO's rules should require clearing members to have the ability to meet an assessment within one business day.

With regard to proposed § 39.11(d)(2)(ii), NYPC requested that

the Commission provide guidance as to how it expects DCOs to determine whether a clearing member has the capacity to meet a potential assessment. In addition, NYPC expressed concern that the ''continual'' monitoring of clearing members' ability to meet potential assessments, which NYPC believes implies daily or even real-time monitoring, would be extremely difficult, if not impossible, to administer. NYPC suggested that it would be reasonable and more practicable for the Commission to require that monitoring of clearing members' ability to meet potential assessments be included as a mandatory component of the periodic financial reviews of clearing members that DCOs already conduct in the ordinary course of business.

In response to these comments, the Commission is revising § 39.11(d)(2)(i) to read as follows (added text in italics): ''The derivatives clearing organization shall have rules requiring that its clearing members have the ability to meet an assessment within the time frame of a normal end-of-day variation settlement cycle.'' In response to OCC's comment, the Commission notes that § 39.11(d)(2)(i) requires a DCO to have rules requiring that its clearing members have the ability to meet an assessment within the time frame of a normal end-of-day variation settlement cycle, but would permit a DCO, in its discretion, to provide some flexibility to clearing members as to timing.

In addition, the requirement in § 39.11(d)(2)(ii) that a DCO must monitor the financial and operational capacity of its clearing members to meet potential assessments ''on a continual basis'' was intended to mean only that the DCO must perform such monitoring often enough to enable it to become aware of any potential problems in a timely manner. To eliminate possible ambiguity, the Commission is revising the final rule by removing the phrase ''on a continual basis.'' Thus, § 39.11(d)(2)(ii) establishes a standard whereby a DCO must monitor its clearing members, but the DCO can meet the standard through the exercise of its judgment in response to particular circumstances, *e.g.,* a DCO might have reason to evaluate certain clearing members on a daily basis and evaluate others only as part of routine, periodic financial reviews.

With regard to proposed §§ 39.11(d)(2)(iii), FIA commented that the 30 percent haircut and 20 percent cap are reasonable and prudent safeguards, sufficient to ensure that a DCO does not unduly rely on its assessment power. J.P. Morgan supported the proposal and also recommended that regulators adopt a risk-based analysis to determine the likelihood that a clearing member will be able to meet its assessment obligations across all DCOs. Mr. Greenberger, citing J.P. Morgan's comments, agreed that it is absolutely critical that the Commission promulgate rules that would determine a clearing member's risk of default and its availability of financial resources across all clearinghouses. Similarly, ISDA suggested that the Commission evaluate the potential impact of multiple assessments from different DCOs on the same clearing member or affiliate group in a short time-frame.

CME suggested that a DCO should be required to completely exclude the potential defaulting firm's assessment liability in calculating its available assessment resources. CME also commented that, in light of the requirements of proposed §§ 39.11(d)(2)(i) and (ii), and the fact that a clearing member that failed to pay an assessment would itself be in default to the DCO, it does not believe that a further haircut on assessments is necessary, and it is aware of no valid reason to cap the use of assessments at 20 percent as proposed.

KCC noted that the inclusion of assessment powers as financial resources is necessary for it to meet its obligations in the unlikely event of a default. KCC agreed that a reasonable haircut on the value of a DCO's assessment power may be a prudent measure, but stated that the proposed limits are unreasonable and excessive and seem arbitrary. KCC suggested that a better approach would be for the DCO to be allowed the latitude to determine clearing member assessment haircuts on an individual basis, based on each clearing member's financial capabilities.

MGEX recommended that the Commission allow each DCO to provide its methodology and support for why any assessment might be considered a financial resource and how much. MGEX stated that the 30 percent haircut and 20 percent cap seem arbitrary and prescriptive. MGEX stated that the DCO should have the discretion to determine an appropriate haircut based on the clearing member's liquidity.

Better Markets commented that the proposed haircuts for assessments are inadequate. According to Better Markets, it would be far more prudent to require funding of risk that can be anticipated in stress tests and rely on assessments as a financial resource only for conditions that are not anticipated in stress tests.

LCH recommended that potential assessments not be allowed to satisfy the requirements of proposed § 39.11(a)(1) because, in LCH's view, it is of the utmost importance that a DCO's resources following a clearing member default be immediately and unconditionally available. LCH suggested that assessments should be allowed as part of the DCO's ''waterfall'' of protections, but should not be taken into account to meet the specific test outlined under proposed § 39.11(a)(1).

AFR urged the Commission to prohibit DCOs from including assessment powers in their calculation of financial resources because it is unclear, in a time of broad market distress, whether a DCO's members would be willing and able to pay their assessments.

The Commission is adopting § 39.11(d)(2)(iii) as proposed. In view of the wide range of comments on this issue, the Commission believes the rule strikes an appropriate balance. The 30 percent haircut recognizes that the defaulting firm, which by definition will not be paying an assessment, might represent a significant segment of the DCO's total risk. The 20 percent cap recognizes that given the contingent nature of assessments, they should only be relied upon as a last resort. In response to ISDA's comment, the Commission expects that as part of the evaluation of a clearing member's risk profile, a DCO would take into consideration the potential exposure of the clearing member at other DCOs, to the extent that it is able to obtain such information, including the possibility of assessments. The Commission notes, in response to MGEX's and KCC's comments, that a DCO may determine clearing member assessment haircuts on an individual basis because § 39.11(d)(2)(iii) only requires a 30 percent haircut on an aggregate basis.

7. Computation of the Financial Resources Requirement—§ 39.11(c)(1)

Proposed § 39.11(c)(1) would require a DCO to perform stress testing on a monthly basis in order to make a reasonable calculation of the financial resources it needs to meet the requirements of proposed § 39.11(a)(1). The DCO would have reasonable discretion in determining the methodology used to make the calculation, but would be required to take into account both historical data and hypothetical situations. In the notice of proposed rulemaking, the Commission requested comment on whether monthly tests are appropriate.

MGEX commented that monthly reporting seems reasonable as it already

performs stress tests on a routine basis. MGEX further commented that allowing DCOs discretion in selecting stress test scenarios is appropriate.

CME suggested that annual stress testing would suffice for operating costs because operating costs are generally static. With regard to default coverage, CME suggested that stress testing should be done no less than monthly.

LCH expressed concern over the requirement that the DCO perform stress testing only on a monthly basis. In LCH's view, stress testing should be carried out by the DCO on at least a daily basis, and LCH strongly urged the Commission to amend its proposal accordingly. LCH suggested that monthly stress testing is inadequate, as experience has shown that market conditions and member positions can change rapidly during periods of market turmoil.

ISDA suggested that reverse stress tests [49] should be required for determining the size of the financial resources package and that there should be public disclosure of the stress tests and their results.

Mr. Barnard agreed that stress testing should be carried out at least monthly, and suggested that back testing should be carried out daily. Mr. Barnard also suggested that the Commission specifically refer to reverse stress testing in proposed § 39.11(c)(1) because, in his view, it is a useful tool for managing expectations and for helping the DCO to anticipate financial resources requirements in extreme conditions.

FIA recommended that the Commission make clear its expectation that the DCOs will, at a minimum: (1) Conduct a range of stress tests that reflect the DCO's product mix; (2) include the most volatile periods that have been experienced by the markets for which the DCO provides clearing services; (3) take into account the distribution of cleared positions between clearing members and their customers; and (4) test for unanticipated levels of volatility and for breakdowns in correlations within and across product classes.

Mr. Greenberger recommended that historical market data that led up to the passage of the Dodd-Frank Act be taken into account in determining market conditions that could be defined as extreme but plausible.

Better Markets commented that the passive role of the Commission in measuring the financial requirements for a DCO is inappropriate in light of the importance of this function. Better Markets proposed that the methodology, the historical data set, and the hypothetical scenarios be: (1) Jointly developed by the DCO and the Commission and (2) reviewed whenever ordered by the Commission, but no less frequently than quarterly. Better Markets also recommended that the Commission explicitly recognize the importance of illiquidity in developing hypothetical scenarios.

AFR stated that it is critical that the Commission play a central role in establishing the standards by which DCOs will measure their exposure to future risks. AFR urged the Commission to define minimal standards that will ensure that DCO stress tests are stringent and incorporate realistic metrics of worst-case scenarios that DCOs may experience.

The Commission is adopting § 39.11(c)(1) as proposed. The Commission believes it is appropriate to allow the DCO discretion in designing stress tests because stress testing is an exercise that inherently entails the exercise of judgment at various stages. Furthermore, § 39.11(c)(1) allows the Commission to evaluate the testing and require changes as appropriate. In response to the LCH comment, the Commission notes that there is a distinction between the type of stress testing carried out under this rule for the purpose of sizing the overall financial resource package and the type of stress testing carried out under § 39.13(h)(3) for the purpose of ascertaining the risks that may be posed to the DCO by individual traders and clearing members. The former is a comprehensive test across all clearing members and all products with the goal of identifying the firms posing the greatest risk to the DCO and quantifying that risk. The regulations would require such testing to be completed monthly. The latter is targeted testing addressing the specific risks of specific positions at specific firms. The regulations would require such testing to be completed on either a daily or weekly basis, as described in § 39.13(h)(3).[50]

8. Valuation of Financial Resources—§ 39.11(d)(1)

Proposed § 39.11(d)(1) would require a DCO, no less frequently than monthly, to calculate the current market value of each financial resource used to meet its obligations under proposed § 39.11(a). When valuing a financial resource, a DCO would be required to reduce the value, as appropriate, to reflect any market or credit risk specific to that particular resource, *i.e.,* apply a haircut. The Commission would permit each DCO to exercise its discretion in determining the applicable haircuts. However, the haircuts would have to be evaluated on a monthly basis, would be subject to Commission review, and would have to be acceptable to the Commission.

OCC suggested that the proposed regulations should be modified or interpreted to accommodate the use of a true portfolio margining model that values collateral based on its relationship to an overall portfolio in lieu of applying fixed haircuts on margin collateral.

ISDA stated that it would support an appropriate haircut for default insurance, potential assessments, and possibly other financial resources deemed acceptable by the Commission, as determined by the Commission upon review of the relevant DCO.

FIA expressed reservations about the ability of a DCO to be paid promptly under the terms of a default insurance policy. FIA therefore recommended that default insurance coverage be subjected to a 30 percent haircut and a 20 percent cap, similar to the policies that the Commission has proposed to apply to a DCO's assessment power.

In discussions with Commission staff, Federal Reserve and Federal Reserve Bank of New York staff suggested that the liquidity of a financial resource should be an additional factor in determining an appropriate haircut. Considerations should include whether it is easy to value the financial resource (*e.g.,* whether the pricing is transparent) and whether the financial resource could be divested in a short time period under normal market conditions. The Commission agrees that liquidity is an important factor in valuing financial resources.

Accordingly, the Commission is revising § 39.11(d)(1) to read as follows (added text in italics): ''At appropriate intervals, but not less than monthly, a derivatives clearing organization shall compute the current market value of each financial resource used to meet its obligations under paragraph (a) of this section. Reductions in value to reflect

[49] Reverse stress tests are stress tests that require a firm to assess scenarios and circumstances that would render its business model unviable, thereby identifying potential business vulnerabilities. Reverse stress testing starts from an outcome of business failure and identifies circumstances where this might occur. This is different from general stress testing, which tests for outcomes arising from changes in circumstances. *See http://www.fsa.gov.uk/pages/About/What/International/stress_testing/firm_s/reverse_stress_testing/index.shtml.*

[50] *See* discussion of § 39.13(h)(3) in section IV.D.7.c, below.

credit, market, and *liquidity* risks (haircuts) shall be applied as appropriate and evaluated on a monthly basis.'' In response to OCC's comments, the Commission notes that § 39.11(d)(1) does not prohibit the valuation method described by OCC in its comment letter.

The Commission believes § 39.11(d)(1) takes a balanced approach by permitting a DCO to exercise its discretion in determining applicable haircuts for each of its financial resources but making those haircuts subject to Commission review and approval. Section 39.11(d)(1) requires a DCO to perform such valuations no less frequently than monthly, which means the Commission would expect a DCO to perform such valuations more frequently when appropriate, such as during periods of market volatility.

9. Liquidity of Financial Resources—§ 39.11(e)

Proposed § 39.11(e)(1) would require a DCO to have financial resources sufficiently liquid to enable the DCO to fulfill its obligations as a central counterparty during a one-day settlement cycle, including sufficient capital in the form of cash to meet the average daily settlement variation pay per clearing member over the last fiscal quarter. The DCO would be permitted to take into account a committed line of credit or similar facility for the purpose of meeting the remainder of the liquidity requirement. In the notice of proposed rulemaking, the Commission requested comment on whether the liquidity requirement should cover more than a one-day cycle. The Commission also requested comment on what standards might be applicable to lines of credit—*e.g.,* should the Commission require that there be a diversified set of providers, or that a line of credit have same-day drawing rights?

Proposed § 39.11(e)(2) would require a DCO to maintain unencumbered liquid financial assets in the form of cash or highly liquid securities, equal to six months' operating costs. The DCO would be permitted to take into account a committed line of credit or similar facility to satisfy this requirement.

Proposed § 39.11(e)(3) would require that: (i) Assets in a guaranty fund have minimal credit, market, and liquidity risks and be readily accessible on a same-day basis, (ii) cash balances be invested or placed in safekeeping in a manner that bears little or no principal risk, and (iii) letters of credit not be a permissible asset for a guaranty fund.

OCC recommended that the proposed regulations be modified or interpreted to provide DCOs some flexibility in determining the means of managing their ''cash'' liquidity needs by allowing DCOs to use secured credit facilities and tri-party repo facilities in addition to cash held in demand deposit accounts to satisfy the cash requirement. OCC observed that permitting these alternatives would allow a DCO to hold a significant portion of its financial resources in the form of U.S. Treasuries, with the ability to convert the Treasuries to cash as needed. According to OCC, cash must generally be held at banks, which presents a credit risk.

NGX suggested that immediately accessible bank lines of credit should be acceptable to cover the cash requirement where the underlying commodity is itself traded in a liquid market.

CME suggested the phrase ''average daily settlement variation pay per clearing member over the last fiscal quarter'' in proposed § 39.11(e)(1) is somewhat ambiguous. CME assumed that the Commission intended to refer to the average daily variation pay for a single clearing member, not the average daily settlement variation pay for all clearing members.

CME also commented that the Commission's approach is not warranted given the potential amount of cash at issue and the reliability of liquidity facilities for short-term cash needs. CME suggested that the Commission revise the last sentence of proposed § 39.11(e)(1) to read as follows: ''If any portion of such financial resources is not sufficiently liquid, the derivatives clearing organization may take into account a committed line of credit or similar facility for purposes of meeting these requirements.''

In response to the Commission's request for comment on what standards might be applicable to a liquidity facility, CME stated that reviews and evaluations by Commission staff during regular DCO audits are a sufficient check on the adequacy and soundness of a committed line of credit, and that the Commission should not attempt to prescribe the terms and conditions of a DCO's liquidity facility.

KCC found the language in proposed § 39.11(e) to be ambiguous. KCC interpreted the average daily settlement variation pay per clearing member over the last fiscal quarter to mean the cumulative average of the pay-ins per each clearing member divided by the number of clearing members. In KCC's view, a line of credit with same-day drawing rights should be considered as liquid as cash and therefore should be allowed to be used by the DCO to fulfill its financial obligations during a one-day settlement cycle. KCC commented that the liquidity requirement should cover no more than one day of market price movement.

LCH was unclear on what the Commission intends to mean in proposed § 39.11(e)(1) by requiring that the DCO should allocate financial resources to meet the requirements of § 39.11(a)(1) and fulfill its arising obligations during a ''one-day settlement cycle.'' LCH suggested that the requirement instead should be that the DCO is obliged to fulfill its arising obligations ''as they fall due.'' Additionally, LCH suggested that the requirement that the DCO must have ''sufficient capital in the form of cash to meet the average daily settlement variation pay per clearing member over the last fiscal quarter'' is insufficient. LCH recommended that this requirement be replaced by a test that the DCO can meet its liquidity requirements ''following the default of the clearing member(s) creating the largest liquidity requirement under stressed market conditions over the quarter.''

Mr. Greenberger suggested that the standards for a committed line of credit or similar facility must be narrowly and strictly defined, so that the party can easily use such highly liquid line of credit or similar facility. Mr. Greenberger further suggested that greater participation by clearing members in a committed line of credit or a similar instrument at times of market distress would not provide necessary liquidity but rather would increase systemic risk.

Eurex noted that proposed § 39.11(e) requires DCOs to monitor the liquidity of assets and agreed that low-credit risk, highly liquid assets should comprise guaranty funds and that this rule would serve important purposes.

FIA recommended that the Commission clarify that the cash requirement is intended to measure the average (and not the aggregate) clearing member variation margin requirement. FIA further recommended that the Commission permit a DCO to satisfy this requirement through the use of cash or cash equivalents, including U.S. government securities and repurchase agreements involving highly liquid securities if such repurchase agreement matures within one business day or is reversible upon demand. FIA additionally recommended that this aspect of the Commission's proposal be modified to clarify that DCOs are permitted to satisfy the liquidity requirement through the establishment of committed repo facilities. FIA supported allowing a DCO to obtain a

committed line of credit or similar credit facility to cover the remainder of its default resources requirement, but recommended that this proposal be strengthened by the diversification of credit providers, with concentration limits of 25 percent per provider.

MGEX commented that proposed § 39.11(e)(1) requires some clarity. MGEX interpreted it to mean that a DCO must have cash that will cover the average of all the clearing members' average daily settlement variation pays, which to MGEX would seem a logical and practical application. Rather than adopting multiple liquidity requirements (*i.e.,* cash, clearing member default coverage, six months' worth of operating expenses), MGEX suggested the process could be simplified to address the most relevant, which appeared to MGEX to be the clearing member default coverage. In addition, MGEX recommended that proposed § 39.11(e) should permit combining and then totaling its liquidity of financial resources as a single-entity DCO/DCM.

AFR stated that DCOs should be required to have sufficient cash to fulfill their obligations for 10 business days and that lines of credit should not count toward liquidity requirements.

NYPC commented that, to the extent the proposed requirement is intended to exclude cash equivalents, such as U.S. Treasury securities, the standard is inappropriate. NYPC recommended that the Commission allow DCOs to satisfy their liquidity needs through the use of any combination of cash held in demand deposit accounts, bank accounts meeting the requirements of CFTC Interpretative Letter 03–31,[51] and secured credit facilities and repurchase agreements that allow DCOs to convert U.S. Treasury securities and other high quality collateral into cash on a same-day basis.

In response to the comments, the Commission is revising § 39.11(e)(1) to provide greater clarity. In addition, the Commission is modifying the ''cash'' requirement to include ''U.S. Treasury obligations and high quality, liquid, general obligations of a sovereign nation.'' This conforms the requirement to existing liquidity practices and, in particular, it accommodates acceptable practices of foreign-based DCOs. However, the Commission is not including bank lines of credit as an acceptable financial resource for meeting the ''cash'' requirement because they are only a promise by the bank to pay and not an asset that can be sold. The Commission is revising § 39.11(e)(1) by deleting the following language: ''The derivatives clearing organization shall have sufficient capital in the form of cash to meet the average daily settlement pay per clearing member over the last fiscal quarter. If any portion of the remainder of the financial resources is not sufficiently liquid, the derivatives clearing organization may take into account a committed line of credit or similar facility for the purpose of meeting this requirement.''

The Commission is replacing the deleted language with the following: ''[(ii)] The derivatives clearing organization shall maintain cash, U.S. Treasury obligations, or high quality, liquid, general obligations of a sovereign nation, in an amount greater than or equal to an amount calculated as follows: (A) Calculate the average daily settlement pay for each clearing member over the last fiscal quarter; (B) Calculate the sum of those average daily settlement pays; and (C) Using that sum, calculate the average of its clearing members' average pays. (iii) The derivatives clearing organization may take into account a committed line of credit or similar facility for the purpose of meeting the remainder of the requirement under paragraph (e)(1)(ii) of this section.''

The Commission notes that, in the CPSS–IOSCO Consultative Report, CPSS and IOSCO are considering a minimum liquidity requirement for CCPs that would be either: (1) A ''cover one'' minimum requirement for all CCPs; (2) a ''cover two'' minimum requirement for all CCPs; or (3) a ''cover one'' or ''cover two'' minimum requirement for an individual CCP, depending on the particular risk and other characteristics of the particular products that it clears, the markets it serves, and the number and type of participants it has.[52] The Commission might revisit the issue after CPSS and IOSCO determine what standard they will adopt.

10. Reporting Requirements—§ 39.11(f)

Proposed § 39.11(f) would require a DCO to report to the Commission, at the end of each fiscal quarter or at any time upon Commission request: (i) The amount of financial resources necessary to meet the requirements set forth in the regulation; and (ii) the value of each financial resource available to meet those requirements. The DCO would be required to include with its report a financial statement (including the balance sheet, income statement, and statement of cash flows) of the DCO or its parent company. A DCO would have 17 business days from the end of the fiscal quarter to file its report, but would also be able to request an extension of time from the Commission.

NYPC suggested that, in light of the scope of information required to be submitted in the quarterly report (*i.e.,* information regarding default risk financial resources and operating financial resources), the Commission should require that such reports be filed not later than 30 calendar days, rather than 17 business days, following the end of the DCO's fiscal quarter.

ISDA suggested that a DCO seeking an extension of the 17-day reporting deadline should be required to request the extension at least seven business days before the deadline.

KCC noted that it does not prepare a statement of cash flows on a monthly basis, only on an annual basis as part of its audited financial statements. KCC commented that a monthly profit/loss statement is sufficient for determining its financial operating needs.

MGEX suggested the Commission should consider a DCO's privacy concerns when permitting reasonable discretion in the data the DCO provides in the monthly reports required by the proposed regulations. MGEX stated that some detail as to projected revenue and expenses must remain proprietary if it involves potential business opportunities or other strategic business decisions, and that DCOs have a legitimate concern that confidential financial information could be subject to Freedom of Information Act requests.

The Commission is adopting § 39.11(f) as proposed. The Commission notes that the 17-business-day filing deadline is consistent with the deadline imposed on FCMs for the filing of monthly financial reports under § 1.10(b). Moreover, a DCO may request an extension if it is unable to meet the deadline. The Commission does not believe it is appropriate to require a DCO to request an extension at least seven business days before the deadline, because a DCO may not know that far in advance that it will be unable to meet the deadline. With regard to the confidentiality of the information contained in the reports, the Commission notes that Core Principle L

[51] CFTC Interpretative Letter 03–31 concerned a bank that requested an interpretation that a trust deposit account product it developed would be acceptable for the deposit of customer segregated funds in accordance with Commission Regulation 1.20. Based on an analysis of the account, staff of the Commission's Division of Clearing and Intermediary Oversight issued an interpretation that the account would be acceptable as a deposit location because the account would be properly titled and covered by appropriate acknowledgements by the bank, and the funds in the account would at all times be immediately available for withdrawal on demand.

[52] *See* CPSS–IOSCO Consultative Report, Principle 7: Liquidity Risk, at 46.

and § 39.21(c)(4) require a DCO to publicly disclose the size and composition of the financial resources package available in the event of a clearing member default. A DCO may request confidential treatment under § 145.9 for other information submitted to the Commission under these regulations.

11. SIDCOs—§ 39.29

Proposed § 39.29(a) would require a SIDCO to maintain sufficient financial resources to meet its financial obligations to its clearing members notwithstanding a default by the two clearing members creating the largest combined financial exposure for the SIDCO in extreme but plausible market conditions. Proposed § 39.29(b) would require that a SIDCO not count the value of assessments to meet the obligations arising from a default by the clearing member creating the single largest financial exposure and only count the value of assessments, after a 30 percent haircut, to meet up to 20 percent of the obligations arising from a default by the clearing member creating the second largest financial exposure. The Commission believes that it would be premature to take action regarding § 39.29 at this time. The FSOC has not yet designated any DCOs as systemically important. As previously noted, the CPSS–IOSCO Principles for Financial Market Infrastructures, which are expected to be finalized in 2012, will address minimum financial resources requirements for CCPs. Similarly, certain foreign regulators, including the European Union, are also considering requirements in this area for the CCPs they regulate. The Commission is concerned that SIDCOs would be put at a competitive disadvantage if they are forced to comply with these requirements before non-U.S. CCPs are subject to comparable standards. The Commission is closely monitoring developments on this issue and is prepared to revisit the issue if the European Union or other foreign regulators move closer to implementation. Moreover, because it may be some time before any DCO is designated a SIDCO, the Commission believes it would be prudent to reconsider the regulation of SIDCOs in light of developments that may occur in the interim. The Commission expects to consider all the proposed rules relating to SIDCOs together.

C. Core Principle C—Participant and Product Eligibility—§ 39.12

1. Participant Eligibility

Core Principle C,[53] as amended by the Dodd-Frank Act, requires each DCO to establish appropriate admission and continuing eligibility standards for members of, and participants in, the DCO,[54] including sufficient financial resources and operational capacity to meet the obligations arising from participation. Core Principle C further requires that such participation and membership requirements be objective, be publicly disclosed, and permit fair and open access. Core Principle C also requires that each DCO establish and implement procedures to verify compliance with each participation and membership requirement, on an ongoing basis. Proposed § 39.12(a) would codify these requirements and establish the minimum requirements that a DCO would have to meet in order to comply with Core Principle C.

Although there is potential tension between the goals of ''fair and open access'' and ''sufficient financial resources and operational capacity to meet obligations arising from participation in the derivatives clearing organization,'' the Commission believes the rules that it is adopting herein strike an appropriate balance. The Commission has crafted the provisions of § 39.12 and related rules, *e.g.,* the risk management requirements, to establish a regulatory framework that it believes can ensure that a DCO's participation requirements do not unreasonably restrict any entity from becoming a clearing member while, at the same time, limiting risk to the DCO and its clearing members. The Commission expects that more widespread participation will reduce the concentration of clearing member portfolios, thereby diversifying risk, increasing market liquidity, and increasing competition among clearing members.

[53] Section 5b(c)(2)(C) of the CEA, 7 U.S.C. 7a–1(c)(2)(C).

[54] Core Principle C, as well as the other core principles that are discussed herein, refer to ''members of, and participants in'' a DCO. The Commission interprets this phrase to mean persons with clearing privileges, and has used the term ''clearing member'' in describing the requirements of each core principle and in the text of the proposed regulations described herein. The Commission is also amending the definition of ''clearing member'' in § 1.3(c), adopted herein, to mean ''any person that has clearing privileges such that it can process, clear and settle trades through a derivatives clearing organization on behalf of itself or others. The derivatives clearing organization need not be organized as a membership organization.''

a. Fair and Open Access—§ 39.12(a)(1)

Proposed § 39.12(a) would require a DCO to establish appropriate admission and continuing participation requirements for clearing members of the DCO, which are objective, publicly disclosed, and risk-based. Proposed § 39.12(a)(1) would require a DCO to have participation requirements that permit fair and open access, setting forth specific standards.

The Managed Funds Association (MFA), BlackRock, Inc. (BlackRock), State Street Corporation (State Street), and the Committee on Capital Markets Regulation (CCMR) supported the proposed rules. J.P. Morgan, ISDA, and FIA expressed support for the fair and open access provisions as long as there is prudent risk management.

According to MFA, more inclusive DCO participation requirements would benefit DCOs and the markets by: (1) Reducing DCO concentration risk; (2) increasing diversity of market participants involved in DCO governance; (3) enhancing competition in the provision of clearing services; and (4) lowering overall costs for non-clearing members. State Street agreed that more widespread participation could increase competition by allowing more entities to become clearing members. Blackrock commented that the proposed rule would allow a diverse group of entities to become clearing members, which would increase competition, promote more inclusive DCO participation requirements, and lower costs to customers of clearing members.

Each of the provisions of § 39.12(a)(1) are discussed below.

b. Less Restrictive Standards—§ 39.12(a)(1)(i)

To achieve fair and open access, proposed § 39.12(a)(1)(i) would prohibit a DCO from adopting a particular restrictive participation requirement if it could adopt a less restrictive requirement that would not materially increase risk to the DCO or its clearing members. BlackRock, the Swaps & Derivatives Market Association (SDMA), CME, LCH, Citadel, and CCMR supported the proposed rule. CCMR commented that the proposed rule would help to encourage an open marketplace.

KCC, ICE, and MGEX did not support the proposed rule. According to KCC, the test is highly subjective and would be difficult to implement in practice. ICE commented that the proposal would require a DCO to dilute current prudent risk management practices. MGEX commented that the proposed rule

would require DCOs to consider only objective, hard number risk factors, which would force DCOs to bear other risks such as financial fraud convictions. MGEX suggested that the Commission should provide DCOs with latitude when determining the risks to which it will expose itself.

The Commission is adopting § 39.12(a)(1)(i) as proposed, except for the addition of clarifying language to provide that a DCO shall not adopt restrictive clearing member standards if less restrictive requirements ''that achieve the same objective and'' that would not materially increase risk to the derivatives clearing organization or clearing members could be adopted. The rule balances the dual Congressional mandate to provide for fair and open access while ensuring that such increased access does not materially increase risk. Because the rule does not require a DCO to provide access that materially increases risk to the DCO or clearing members, the Commission does not agree with ICE that the rule will subject a DCO to increased risk.

The Commission does not agree with KCC that the rule will be highly subjective or difficult to implement in practice. The rule provides a DCO with discretion to balance restrictions on participation with legitimate risk management concerns and, in this regard, a DCO is in the best position in the first instance to determine the optimal balance. Only in circumstances where there is a question as to the impact of the rule would the Commission ask a DCO to justify the balance that the DCO has struck.

In response to MGEX's comment, the Commission notes that the rule does not require a DCO to rely solely on objective, hard number risk factors. The rule permits a DCO to rely on both qualitative and quantitative analyses, providing each DCO with latitude to determine how it can facilitate open access while determining the risks to which it will expose itself.

Except for certain bright-line participation requirements (*e.g.,* capital requirements for clearing members), the Commission has not provided more specific guidance as to what participant eligibility requirements are permissible under Core Principle C. Such a clarification would only serve to limit a DCO's flexibility to formulate participation requirements.

The Commission encourages each DCO to conduct a self-assessment to make sure that it can provide reasoned support to justify a conclusion that its rules do not violate the ''less restrictive'' standard contained in § 39.12(a)(1)(i). Such an analysis should take into consideration the interaction of this provision with the other provisions of § 39.12(a).

c. Clearing Member Qualification—§ 39.12(a)(1)(ii)

Proposed § 39.12(a)(1)(ii) would require a DCO to permit a market participant to become a clearing member if it meets the DCO's participation requirements. SDMA, LCH, and CCMR supported the proposed rule. According to CCMR, the proposed rule would help to encourage an open marketplace.

KCC commented that the proposed rule is not workable because a DCO may not have the operational capacity to admit all applicants that satisfy the DCO's membership requirements. KCC proposed that the regulation clarify that a DCO may set limits on the number of market participants that may be admitted in light of the DCO's own operational constraints.

The Commission is adopting § 39.12(a)(1)(ii) as proposed. The Commission is concerned that permitting a DCO to set a limit on the number of market participants that may become clearing members could enable a DCO to evade the open access requirement imposed by Core Principle C. If a DCO were able to demonstrate that operational constraints prevented it from admitting additional clearing members, the DCO could petition the Commission for an exemption.

d. Non-Discriminatory Treatment—§ 39.12(a)(1)(iii)

Proposed § 39.12(a)(1)(iii) would prohibit participation requirements that have the effect of excluding or limiting clearing membership of certain types of market participants unless the DCO can demonstrate that the restriction is necessary to address credit risk or deficiencies in the participants' operational capabilities that would prevent them from fulfilling their obligations as clearing members. LCH and SDMA supported the proposed rule. CME commented that in addition to credit risk and deficiencies in operational capabilities, legal risk should be included in the text of this regulation as a basis upon which a DCO may exclude or limit clearing membership of certain types of participants.

KCC did not support the proposed rule, commenting that a DCO's right to exclude or place limitation on certain clearing members should not be subject to ex-post determinations as to the necessity of such restrictions, as the DCO itself is in the best position to monitor the risks posed by the activities of its clearing members. According to KCC, the proposed rule would limit the risk management capabilities of a DCO, and DCOs should be accorded flexibility in their assessments of the operational capabilities of potential clearing members.

The Commission is adopting § 39.12(a)(1)(iii) as proposed. CME's concerns regarding heightened legal risk, such as the inability to attach property of a foreign clearing member under foreign law, are encompassed within the ''credit risk'' consideration. The Commission expects that most, if not all, bases for membership exclusion or limitation will fall within either financial or operational considerations. In addition, the Commission does not believe the rule would limit a DCO's risk management capabilities as KCC suggested because it would not prevent a DCO from excluding or limiting certain types of market participants from clearing if such participation would introduce genuine risk that cannot be adequately managed by the DCO. The Commission expects that DCOs will review their existing participation requirements for compliance with this rule.

e. Prohibition of Swap Dealer Requirement—§ 39.12(a)(1)(iv)

Proposed § 39.12(a)(1)(iv) would prohibit a DCO from requiring that clearing members be swap dealers. LCH commented that, in the event of default, it relies on non-defaulting clearing members to hedge the defaulting member's swap portfolio; to provide liquidity for such hedging; to bid on hedged portfolios; and, in extreme circumstances, to accept a forced allocation of swaps, which could be a risky, unhedged swaps portfolio. LCH commented that a clearing member who is not a swap dealer may not be able to participate in a DCO's default management process.

The Commission is adopting § 39.12(a)(1)(iv) as proposed. It is important to note that the regulation would not preclude participation by swap dealers (on which LCH currently relies). It simply requires that a DCO provide clearing access to other entities that could also participate in a DCO's default management process, even if to a lesser extent. Broader access is supported by other Commission regulations, *e.g.,* § 39.12(a)(3), which mandates that a DCO require its clearing members to have adequate operational capacity to participate in default management activities; § 39.12(b)(5), which requires a DCO to select contract units for clearing purposes that maximize liquidity, facilitate

transparency in pricing, promote open access, and allow for effective risk management; and § 39.16(c)(2)(iii), which permits a DCO to require its clearing members to accept an allocation, provided that any allocation must be proportional to the size of the clearing member's positions at the DCO. Thus, a DCO should be able to establish participation requirements that allow it to rely on non-defaulting clearing members to hedge a defaulting member's swap portfolio, to provide liquidity for such hedging, to bid on hedged portfolios, and to accept a forced allocation of swaps.

f. Prohibition of Swap Portfolio or Swap Transaction Volume Requirements—§ 39.12(a)(1)(v)

Proposed § 39.12(a)(1)(v) would prohibit a DCO from requiring clearing members to maintain a swap portfolio of any particular size, or that clearing members meet a swap transaction volume threshold.

According to State Street, such requirements are intended to systematically favor membership for financial institutions that are also substantial dealers in swaps. They do not take into account the risk management capabilities of many DCO members such as State Street, which are able to closely monitor risk exposures and effectively liquidate exposures through networks of interdealer relationships. The Commission believes that such requirements would have the effect of permitting only large swap dealers to provide clearing services. This would be inconsistent with Core Principle C. Accordingly, the Commission is adopting § 39.12(a)(1)(v) as proposed.

g. Financial Resources—§ 39.12(a)(2)(i)

Core Principle C mandates that each DCO must ensure that its clearing members have ''sufficient financial resources and operational capacity to meet obligations arising from participation in the [DCO].'' [55] Proposed § 39.12(a)(2)(i) would require a DCO to establish participation requirements that require clearing members to have access to sufficient financial resources to meet obligations arising from participation in the DCO in extreme but plausible market conditions. The financial resources could include a clearing member's capital, a guarantee from a clearing member's parent, or a credit facility funding arrangement.

CME commented that it supports the inclusion of parent guarantees and credit facility funding arrangements as acceptable financial resources for clearing members, provided that each DCO retains the flexibility to determine the particular terms and conditions of such arrangements. LCH, however, commented that credit facilities or funding arrangements should not be allowed for the purposes of fulfilling financial participation requirements. According to LCH, all clearing members' resources should be immediately and unconditionally available. ISDA also commented that a credit facility funding arrangement from an unaffiliated entity should not be available to satisfy clearing member financial resource requirements. ISDA did not believe that such funding would be reliable.

MGEX commented that testing for extreme but plausible market conditions would have minimal value because the test would be based on historical records or it would be based on future assumptions that are based on static conditions. MGEX believes that the proposed rule would require a DCO to devise tests for clearing members to use and would require a DCO to conduct the tests and provide the results to clearing members. MGEX commented that this specific rule seems unnecessary because DCOs have other methods to address risk, like increasing and decreasing margin. It noted further that it already requires clearing members to be in good financial standing, which includes minimum capital requirements and a requirement to provide a parent guarantee in certain circumstances.

The Commission is adopting § 39.12(a)(2)(i) with the modification described below. Per CME's comment, the rule provides a DCO with the flexibility to determine what constitutes sufficient financial resources to meet obligations arising from participation in the DCO in extreme but plausible market conditions, and to determine what financial resources are available to a clearing member to satisfy this requirement.

Regarding the comments of LCH and ISDA, the rule does not require a DCO to allow clearing members to use a credit facility funding arrangement to meet financial resource requirements. Because such arrangements can serve as an important source of liquidity for clearing members, the Commission has not prohibited their possible use to satisfy clearing member financial resource requirements. The Commission is modifying § 39.12(a)(2)(i) to clarify a DCO's discretion, by rephrasing the second sentence to read as follows: ''A derivatives clearing organization may permit such financial resources to include, without limitation, a clearing member's capital, a guarantee from the clearing member's parent, or a credit facility funding arrangement.'' To address concerns about reliability, a DCO can consider requiring that a credit facility funding arrangement be supported by multiple lenders.

Finally, the Commission does not believe that MGEX's comment provides a basis for revising the proposed rule. As an initial matter, Core Principle C requires each DCO to establish participation standards that require a clearing member to have sufficient financial resources to meet obligations arising from participation in the DCO. Core Principle B requires a DCO to maintain financial resources that would enable it to meet its financial obligations in ''extreme but plausible'' market conditions. The Commission believes that it is appropriate for a DCO to subject its clearing members to a comparable financial standard to support its own compliance with statutory requirements. A DCO would have discretion in setting the terms of any tests to determine whether clearing members' financial resources are sufficient to meet their obligations in extreme but plausible market conditions.

h. Capital Requirements Must Match Capital to Risk—§ 39.12(a)(2)(ii)

Proposed § 39.12(a)(2)(ii) would require a DCO to establish capital requirements that are based on objective, transparent, and commonly accepted standards, which appropriately match capital to risk. The capital requirements also would have to be scalable so that they are proportional to the risks posed by clearing members.

J.P. Morgan, MFA, ISDA, State Street, SDMA, Citadel LLC (Citadel), Better Markets, and FIA supported the proposed rule. According to Better Markets, the proposed rule is an important change of practices that will open DCO membership to more market participants while protecting the risk management system. FIA commented that a DCO, when it sets capital requirements, should take into account a clearing member's risk-derived exposures and its potential assessment obligations at each clearing organization of which it is a member. FIA recommended that a DCO should allow an FCM to clear positions in proportion to its capital net of those other risk-derived exposures and assessment obligations.

The Commission is adopting § 39.12(a)(2)(ii) as proposed, with one modification. In response to a comment from staff of the Federal Reserve and the Federal Reserve Bank of New York, the

[55] Section 5b(c)(2)(C)(i)(I) of the CEA; 7 U.S.C. 7a–1(c)(2)(C)(i)(I).

Commission is deleting the phrase ''so that they are proportional'' from the rule. This is to make clear that a DCO should take into account nonlinear risk. In response to FIA's comment, the Commission notes that in setting scalable requirements, a DCO should take into consideration risks that a clearing member carries as a result of positions cleared at other DCOs, to the extent that it is able to obtain such information.

i. Minimum Capital Requirement—§ 39.12(a)(2)(iii)

Proposed § 39.12(a)(2)(iii) would prohibit a DCO from setting a minimum capital requirement of more than $50 million for any person that seeks to become a clearing member in order to clear swaps. Pierpont Securities LLC (Pierpont), Better Markets, SDMA, Newedge, MFA, Citadel, and Jefferies & Company (Jefferies) supported the proposed rule.

Jefferies commented that the proposed rule would allow it to participate more actively in the swap market. Jefferies believes that taken together, the provisions of proposed § 39.12(a) provide a DCO with more than sufficient authority to assure the financial integrity and efficient operation of its swaps clearing activities.

Newedge commented that the proposed rule should not increase risk to a DCO because a DCO can mitigate risk by, among other things, imposing position limits, stricter margin requirements, or stricter default deposit requirements on lesser capitalized clearing members. Newedge proposed that the Commission prohibit DCOs from imposing a requirement that clearing members have an internal trading desk capable of liquidating or hedging a defaulting clearing member's positions. It said that there is no need for such a requirement because a non-defaulting member can handle a default event in a variety of ways, including having a contingent default manager. Newedge noted that under proposed § 39.16(c)(2)(iii), any obligation of a clearing member to participate in an auction, or to accept the allocation of a defaulting clearing member's positions, would be proportionate to the size of the clearing member's own position at the DCO. Thus, a clearing member should be able to hedge an allocated position and carry the position over time without having to take a substantial charge to its capital.

MFA commented that the threshold should not impose additional risk on a DCO because a DCO could ensure the safety of itself and clearing members by scaling each clearing member's net capital obligation in proportion to that clearing member's risk exposure. MFA expressed concern that a DCO could comply with the $50 million net capital requirement but impose a non-risk-based and excessive threshold guaranty fund contribution requirement that would unnecessarily exclude clearing members. MFA proposed that the regulations require that such scaling be determined by objective, risk-based methodologies that are based on reasonable stress and default scenarios, and the tests be consistently applied to all clearing members, without use of ''tiers'' that could have discriminatory or anti-competitive effects.

J.P. Morgan, the U.K. Financial Services Authority (FSA), CME, KCC, ISDA, IntercontinentalExchange, Inc. (ICE), State Street, Federal Home Loan Banks (FHLBanks), the Securities Industry and Financial Markets Association (SIFMA), and LCH expressed the view that the proposed rule could increase risk and the probability of default, and require DCOs to accept members who might not be able to participate in the default management process. FSA, KCC, and CME commented that a DCO must have reasonable discretion to determine the appropriate capital requirements for its clearing members based upon the DCO's analysis of the particular characteristics of the swaps that it clears.

J.P. Morgan, however, commented that a cap on a member's minimum capital requirement would not impact the systemic stability of a DCO as long as: (1) Clearing members clear house and client business in proportion to their available capital; (2) DCOs employ real-time risk management processes to ensure compliance with this principle; (3) DCOs hold a sufficient amount of margin and funded default guarantee funds; and (4) the Commission monitors clearing members to ensure that they are able to meet their financial obligations with respect to all DCOs of which they are members.

LCH and ISDA commented that the lower threshold could increase risk because a $50 million threshold would allow a clearing member to meet the eligibility requirements of multiple DCOs.

LCH, CME, and FSA commented that the smaller firms may be unable to participate in the default management process. LCH and ISDA also commented that members should not be able to outsource default management to third parties because they may not be sufficiently reliable in times of stress.

In addition, according to ISDA, there could be conflict-of-interest issues because the unaffiliated third party would not have ''skin in the game.'' As a result, through the actions of the unaffiliated third party, a clearing member could be assigned an unsuitable part of a defaulting clearing member's proprietary portfolio and/or at a sub-optimal valuation and/or wrongly accept customer positions from the defaulting clearing member. This conflict-of-interest concern is exacerbated where the entity to whom the default management obligations are outsourced is a ''competing'' clearing member in the same DCO.

State Street and SDMA, however, commented that clearing members should be permitted to enter into committed arrangements with non-affiliated firms to perform default management functions. According to SDMA, there is no evidence to suggest that a legal arrangement with a third-party dealer somehow lessens the integrity to the system. Assuming the legal and financial arrangements between such firms are sufficiently strong to ensure performance when needed, State Street commented that there is no appreciable difference between the default management capacity of the traditional dealer-affiliated clearing member and a non-dealer clearing member outsourcing certain functions to a non-affiliate.

Finally, SIFMA commented that the appropriate minimum capital requirement would be $300 million, while ISDA commented that if the Commission cannot monitor risk across all DCOs, a $1 billion capital requirement would be appropriate.

After carefully considering the comments, the Commission is adopting § 39.12(a)(2)(iii) as proposed. The Commission believes, as noted in numerous comments, that the rule will increase the number of firms clearing swaps, which will make markets more competitive, increase liquidity, reduce concentration, and reduce systemic risk. The Commission also believes that, as explained below, the $50 million threshold will not significantly increase risk or lead to admission of clearing members who are unable to meaningfully and responsibly participate in the clearing process.

As an initial matter, the Commission emphasizes that the $50 million threshold is not arbitrary. That number was arrived at by reviewing the capital of registered FCMs.[56] This amount

[56] *See* transcript of December 16, 2010 Commission meeting at 77–81 available at *www.cftc.gov* (discussing $50 million threshold; Commission staff stating that of 126 FCMs, 63 currently have capital above $50 million and most

Continued

captures firms that the Commission believes have the financial, operational, and staffing resources to participate in clearing swaps without posing an unacceptable level of risk to a DCO. This capital threshold is considered to be appropriate, particularly in light of other proposed rules (such as scaling capital and risk exposure and breaking down large swap positions into smaller units for more diversified allocation in the event of a clearing member default).

The Commission considered whether to increase the capital threshold to $300 million as proposed by SIFMA or $1 billion as proposed by ISDA. The Commission analyzed the reduction in the number of firms that would be eligible to clear at CME, ICE Clear US, KCC, MGEX, and OCC using these thresholds. As set forth in the table below, depending on the basis used to measure capital, a capital threshold of $300 million would reduce the number of firms able to clear by 38–51 percent. A capital threshold of $1 billion would reduce the number of firms able to clear by 62–65 percent. The Commission believes that this reduction in participation would be contrary to the Congressional mandate for open access to clearing.[57]

	Ownership Equity			Adjusted Net Capital				Excess Net Capital			
	FCM	Non-clearing FCMs	Δ	FCM	Non-clearing FCMs	Clearing non-FCMs	Δ	FCM	Non-clearing FCMs	Clearing Non-FCMs	Δ
$50 Million	40	32		38	27	12		31	25	10	
$300 Million	26	13	-46%	21	10	7	-51%	24	10	7	-38%
$1 Billion	17	8	-65%	18	5	5	-64%	15	5	5	-62%

The Commission does not believe that the rule will increase risk. Section 39.12(a)(2)(ii) requires DCOs to impose capital requirements that are scalable to the risks posed by clearing members. Accordingly, a small clearing member should not be able to expose a DCO to significant risk even if it is able to clear at multiple DCOs because its exposure at each DCO would be limited. DCOs that participate in the Shared Market Information System (SHAMIS) will be able to see a clearing member's pays and collects across participating DCOs, and a DCO also could on its own initiative require clearing members to directly report their clearing activity at other DCOs. The Commission also will be able to monitor clearing member exposure by means of DCO end-of-day reporting under the reporting requirements of § 39.19(c)(1)(i), which the Commission is adopting herein. It will also be able to monitor the financial strength of clearing members that are registrants pursuant to financial reporting requirements.

In addition, the Commission is adopting other rules that will reinforce a DCO's oversight of its clearing members. In this regard, § 39.12(a)(4) requires a DCO to verify, on an ongoing basis, the compliance of each clearing member with each participation requirement; § 39.12(a)(5) requires a DCO to require all clearing members to file periodic financial statements and timely information that concerns any financial or business developments that may materially affect the clearing members' ability to continue to comply with participation requirements; and § 39.13(h)(5) further requires a DCO to adopt rules that require clearing members to maintain current risk management policies and procedures and requires a DCO to review such policies and procedures on a periodic basis. The Commission also has proposed requirements for clearing member risk management.[58]

The Commission does not believe that the $50 million threshold would lead to a DCO having to admit clearing members that are unable to participate in the default management process. As discussed above, the regulation does not preclude highly-capitalized entities (such as swap dealers) from participating in a DCO as clearing members. Thus, the addition of smaller clearing members does not eliminate the role that larger clearing members can play in default management—it merely spreads the risk.

The Commission wishes to emphasize that it will review DCO membership rules as a package in light of all of the provisions of § 39.12(a). Thus, a DCO may not circumvent § 39.12(a)(2)(iii) by enacting some additional financial requirement that effectively renders the $50 million threshold meaningless for some potential clearing members. Such an arrangement would violate § 39.12(a)(1)(i) (less restrictive alternatives), or § 39.12(a)(1)(iii) (exclusion of certain types of firms).

As discussed below, under § 39.12(a)(3), a DCO's participation requirements must include provisions for adequate operational capacity. This requirement should be read in conjunction with § 39.12(a)(1)(i), which prohibits restrictive clearing member standards if less restrictive standards could be adopted; § 39.12(a)(1)(iii), which prohibits DCOs from excluding certain types of market participants from clearing membership if they can fulfill the obligations of clearing membership; and § 39.16(c)(2)(iii), which permits a DCO to require a clearing member to participate in an auction or to accept allocations of a defaulting clearing member's customer or house positions, provided the allocated positions are proportional to the size of the clearing member's positions at the DCO and are permitted to be outsourced to a qualified third party subject to safeguards imposed by the DCO.

Several commenters discussed the use of outsourcing to satisfy default management obligations. The Commission believes that open access to clearing and effective risk management need not be viewed as conflicting goals. Subject to appropriate safeguards, outsourcing of certain obligations can be an effective means of harmonizing these goals. For example, a small clearing member might have less ability to contribute meaningfully to a DCO's

FCMs with capital below that amount are not clearing members).

[57] Clearing FCM and non-clearing FCM data for adjusted net capital and excess net capital was provided by FCM registrants and is available on the Commission Web site. The other data is non-public. Ownership equity data was provided by FCM registrants through the monthly financial statements that are submitted to the Commission. The data from the monthly financial statements reside in the Commission's RSR Express system, and all data for clearing non-FCMs was provided by the DCOs to the Commission's Risk Surveillance Group during the course of its routine oversight activities.

[58] *See* 76 FR 45724 (Aug. 1, 2011) (Clearing Member Risk Management).

auction process acting on its own than if an entity with greater expertise in the relevant markets acted in its place.

Therefore, the Commission believes that it would be inconsistent with § 39.12(a)(1)(i) and § 39.12(a)(1)(iii) for a DCO to prohibit outsourcing. Accordingly, as discussed below, the Commission is adopting revised default procedure rules to require a DCO to permit outsourcing to qualified third parties of obligations to participate in auctions or in allocations, subject to appropriate safeguards imposed by the DCO.[59]

Finally, the Commission has determined that it will not permit a DCO to require members to post a minimum amount of liquid margin or default guarantee contributions, or to participate in a liquidity facility per J.P. Morgan's suggestion. The Commission believes that the rules are sufficient to ensure that each member has adequate resources to withstand another member's default and such requirements could be used by a DCO to evade the open access to clearing intended by the Dodd-Frank Act.

j. Operational Requirements—§ 39.12(a)(3)

Proposed § 39.12(a)(3) would require a DCO to require its clearing members to have adequate operational capacity to meet their obligations arising from participation in the DCO. The requirements would include, but not be limited to: The ability to process expected volumes and values of transactions cleared by a clearing member within required time frames, including at peak times and on peak days; the ability to fulfill collateral, payment, and delivery obligations imposed by the DCO; and the ability to participate in default management activities under the rules of the DCO and in accordance with proposed § 39.16.

LCH, FIA, Jefferies, and SDMA commented that the Commission has correctly identified the operational requirements. Jefferies commented that demonstrating sufficient operational capacity is more important than capital considerations. According to SDMA, these operational requirements are directly related to the core business of the clearing member and provide the services needed and relied upon by the DCO to clear trades. SDMA also believes that DCOs should be prohibited from imposing operational requirements that are not part of a clearing member's core business because they create discriminatory barriers to clearing, and it points to the following as examples of discriminatory operational eligibility requirements: Clearing members must (1) Have both execution and clearing capabilities; (2) provide end-of-day prices to mark its positions; and (3) have extensive experience in clearing swaps or ''sophistication.''

J.P. Morgan and FIA commented that a DCO must ensure that each member has risk management resources to assist the DCO in its risk management process, and FIA suggested that the final rules add appropriate risk management requirements as a participant eligibility criterion, or make clear that nothing in the proposed rules is intended to prevent a DCO from adopting such requirements.

ISDA commented that the ability to bid for portfolios of other clearing members of the DCO is critically important. According to ISDA, an appropriate risk management framework for a clearing member may be broadly categorized as follows: (1) Board and senior management oversight; (2) organizational structure; and (3) strong systems and procedures for controlling, monitoring and reporting risk.

Finally, State Street commented that a clearing member must be able to demonstrate it can carry out its obligations to a DCO under a default scenario. That demonstration could include having the capacity to trade swaps using experienced swap traders, and the ability to execute transactions in the market by having appropriate trading relationships. A clearing member must also demonstrate an ability to monitor positions, calculate potential losses and market risk, perform stress tests, and maintain liquidity, among numerous other requirements.

The Commission is adopting § 39.12(a)(3) as proposed. The Commission believes that the rule correctly identifies the necessary operational requirements and is concerned that the heightened operational requirements suggested by some commenters could allow a DCO to evade the open access to DCO clearing intended by the Dodd-Frank Act. The Commission emphasizes that under the rule, any operational requirements must be necessary to meet clearing obligations. In addition, the Commission is adopting § 39.13(h)(5) herein, which requires a DCO to adopt rules requiring clearing members to maintain current written risk management policies and procedures.[60] The Commission has also proposed rules requiring clearing members that are FCMs (proposed § 1.73) and swap dealers and major swap participants (proposed § 23.609) to engage in specific risk management activities.[61]

k. Monitoring, Reporting, and Enforcement—§ 39.12(a)(4)

Core Principle C requires each DCO to ''establish and implement procedures to verify, on an ongoing basis, the compliance of each clearing member with each participation requirement of the derivatives clearing organization.''[62] Proposed § 39.12(a)(4) would codify these requirements.

OCC supported the proposed rule ''if interpreted reasonably.'' J.P. Morgan commented that a clearing member may have committed to additional unfunded assessments at more than one clearinghouse and proposes that the Commission and DCOs monitor clearing members to ensure that they have sufficient liquid resources to support the business they clear at each DCO. According to J.P. Morgan, a DCO should monitor exposures against risk-based position limits on a real-time basis.

The Commission is adopting § 39.12(a)(4) as proposed. In response to J.P. Morgan's comments, the Commission notes that in monitoring firms, a DCO should take into consideration risks that the firm faces outside of that DCO. The Commission further notes that it is not prescribing the means by which DCOs should monitor compliance.

l. Reporting Requirements—§ 39.12(a)(5)

Proposed § 39.12(a)(5)(i) would mandate that a DCO require all clearing members, including those that are not FCMs, to file with the DCO periodic financial reports containing any financial information that the DCO determines is necessary to assess whether participation requirements are met on an ongoing basis. The proposed rule also would mandate that a DCO require clearing members that are FCMs to file the financial reports that are specified in § 1.10 of the Commission's regulations with the DCO, and would require the DCO to review all such financial reports for risk management purposes. Proposed § 39.12(a)(5)(i) would also require a DCO to require its clearing members that are not FCMs to make the periodic financial reports that they file with the DCO available to the Commission upon the Commission's

[59] *See* discussion of revised § 39.16(c)(2)(iii) in section IV.G.4, below.

[60] *See* discussion of § 39.13(h)(5) in section IV.D.7.e, below.

[61] *See* 76 FR at 45729–45730 (Aug. 1, 2011) (Clearing Member Risk Management).

[62] *See* Section 5b(c)(2)(C)(ii) of the CEA; 7 U.S.C. 7a–1(c)(2)(C)(ii).

request. Proposed § 39.12(a)(5)(ii) would mandate that a DCO adopt rules that require clearing members to provide to the DCO, in a timely manner, information that concerns any financial or business developments that may materially affect the clearing members' ability to continue to comply with participation requirements.

LCH commented that a DCO based outside the U.S. may have clearing members that are not subject to the Commission's jurisdiction and would be regulated in their home jurisdiction. LCH proposed this provision be revised such that only FCMs and U.S.-based members that are not FCMs are required to provide this information to the Commission upon request. According to LCH, all other members should be required to submit the information to the DCO only or to their equivalent local regulator.

LCH and MGEX commented that proposed § 39.12(a)(5)(ii) would be more appropriately imposed on clearing members themselves, rather than on the DCO. KCC suggested that the Commission should evaluate its statutory authority to enact the proposed rule. MGEX commented that the proposed rules appear to require clearing members to report to each DCO with which they clear, which would create an additional, duplicative burden on clearing members. MGEX suggested that the Commission regulate the clearing members directly. As an alternative, MGEX proposed a new industry group similar to the Joint Audit Committee (JAC) in which each DCO would be represented and participate in developing an overall risk management program that would be used in fulfilling the new proposed requirements.

The Commission is adopting § 39.12(a)(5) with modifications to (1) provide that the financial information provided by non-FCM clearing members may be submitted by the clearing members to the Commission pursuant to DCO rules or may be submitted to the Commission by the DCO, in either case, upon the Commission's request; and (2) eliminate the proposed requirement that the DCO must review clearing members' financial reports for risk management purposes.

The rule is intended to address circumstances where the Commission must obtain information in the possession of a clearing member. The Commission anticipates such requests will be few in number. However, when those occasions arise, the Commission must be able to obtain the information as expeditiously as possible. The rule addresses this need by allowing the Commission to obtain the information directly from the source and to minimize the burden on DCOs. In response to the comments, the Commission is revising the rule to provide that a DCO may either provide the requested information directly to the Commission or require clearing members to provide the information to the Commission.

The Commission is eliminating the requirement that the DCO must review clearing members' financial reports for risk management purposes. Upon further consideration, the Commission has concluded that although a DCO may review such financial reports for several reasons, including risk management and to ensure that clearing members continue to meet participation requirements, it is not necessary to be prescriptive in this regard.

In response to MGEX suggestion of a new industry group, Commission staff is considering such a step.

The Commission is making certain technical revisions to § 39.12(a)(5) in connection with these changes.

m. Enforcement of Participation Requirements—§ 39.12(a)(6)

Proposed § 39.12(a)(6) would require a DCO to enforce compliance with its participation requirements and establish procedures for the suspension and orderly removal of clearing members that no longer meet the requirements. MGEX commented that the proposed rule goes beyond the language of the Dodd-Frank Act.

The Commission is adopting § 39.12(a)(6) as proposed. A DCO must have the ability to enforce compliance with its participation requirements or its clearing members may not satisfy these requirements. A DCO also must have procedures for the suspension and orderly removal of clearing members that no longer meet the requirements. Otherwise, the enforcement process may not be orderly and could introduce additional risk to the DCO. This requirement complements § 39.17, adopted herein, which implements Core Principle H (Rule Enforcement).[63]

2. Product Eligibility

Core Principle C requires that each DCO establish appropriate standards for determining the eligibility of agreements, contracts, or transactions submitted to the DCO for clearing. Proposed § 39.12(b) would codify these requirements.

a. General Comments

Citadel and MFA supported the proposed rules. To ensure non-discriminatory clearing, Citadel and MFA recommended the Commission make explicit that a DCO must provide highly standardized mechanisms and procedures for establishing connectivity with SEFs and any other permitted trading venue. According to Citadel, these mechanisms and procedures must be objective, commercially reasonable, publicly available, and treat all applicant execution facilities in an unbiased manner. Citadel and MFA also proposed that the rules mandate that a DCO keep the clearing acceptance process anonymous (*i.e.,* without the customer's clearing member knowing the identity of the customer's executing counterparty).

The Commission agrees that a DCO must provide mechanisms for establishing connectivity with SEFs and DCMs, which would provide executing counterparties with fair and open access. The Commission has proposed rules addressing this issue.[64] The Commission also has proposed rules that address the anonymity issue.[65]

b. Products Eligible for Clearing—§ 39.12(b)(1)

Proposed § 39.12(b)(1) would require a DCO to establish appropriate requirements for determining the eligibility of agreements, contracts, or transactions submitted to the DCO for clearing, taking into account the DCO's ability to manage the risks associated with such agreements, contracts, or transactions. Factors to be considered in determining product eligibility would include but would not be limited to: (1) Trading volume; (2) liquidity; (3) availability of reliable prices; (4) ability of market participants to use portfolio compression with respect to a particular swap product; (5) ability of the DCO and clearing members to gain access to the relevant market for purposes of creating and liquidating positions; (6) ability of the DCO to measure risk for purposes of setting margin requirements; and (7) operational capacity of the DCO and clearing members to address any unique risk characteristics of a product.[66]

OCC noted that the factors to be considered are already among the factors that a DCO would naturally consider and that OCC in fact considers, and it suggested that the application of

[63] *See* discussion of § 39.17 in section IV.H, below.

[64] *See* 76 FR 13101 (Mar. 10, 2011) (Straight-Through Processing).

[65] *See* 76 FR 45730 (Aug. 1, 2011) (Customer Clearing).

[66] As proposed, § 39.12(b)(1)(vii) referred to addressing any ''unique'' risk characteristics of a product. The Commission is revising this provision in the final rule to refer to any ''unusual'' risk characteristics to clarify that such characteristics are not limited to those that are one of a kind.

this new rule be limited to swaps. OCC also noted that the trading volume of new products is often unknown and unpredictable and suggested that factor not be a barrier to accepting a product for clearing.

MGEX commented that the proposed rule considers legitimate factors, but mandating that a DCO establish eligibility requirements is not necessary, other than requirements for the contract size of swaps. Like OCC, MGEX noted that DCOs already use these factors as part of their sound business judgment in making these types of decisions. MGEX recommended that the Commission issue suggested guidelines or core principles and, on an as-needed basis, request that a DCO file with the Commission the rationale supporting its conclusion that a contract qualifies for clearing.

LCH expressed concerns with proposed § 39.12(b)(1)(iv) and commented that compression services have been developed only when swap markets are relatively large and well-established, and the introduction of cleared facilities has largely pre-dated the introduction of compression services. According to LCH, making swap clearing contingent on swap portfolio compression may have the effect of permitting fewer swaps to be cleared. LCH proposed that the Commission encourage the use of compression services where suitable and available, but not constrain the ability of a DCO to clear a given swap based on the availability of such services.

LCH also commented that it is imperative that a DCO have the ability to ''transfer,'' ''auction,'' or ''allocate'' cleared swaps. LCH proposed that the factor listed in proposed § 39.12(b)(1)(v), the ''[a]bility of the [DCO] and clearing members to gain access to the relevant market for purposes of creating and liquidating positions'' be modified to reflect these additional actions.

The Commission agrees with LCH that a DCO must have the ability to ''transfer,'' ''auction,'' or ''allocate'' cleared swaps and it is revising § 39.12(b)(1)(v) to incorporate LCH's suggestion.[67] The Commission is otherwise adopting Section 39.12(b)(1) as proposed. The Commission believes that setting forth the minimum factors that all DCOs must consider when determining contract eligibility is necessary to prevent a DCO from seeking to clear transactions that present an unacceptable level of risk. The Commission also believes that OCC's and LCH's concerns are unfounded. The rule provides factors to be considered and does not prohibit a DCO from accepting a product for clearing if it does not satisfy one of the factors. Finally, the Commission is declining to limit the rule to swaps because it believes the eligibility factors are applicable to all products cleared by a DCO. The Commission is also declining to issue suggested guidelines or core principles, or to request that a DCO file with the Commission the rationale for why a contract qualifies for clearing. The Commission believes that § 39.12(b)(1) is not burdensome because, as MGEX and OCC commented, these factors are already considered by DCOs. In contrast, filing rationales on an as-needed basis could be burdensome to the DCO and the Commission, and would not serve to mitigate risk more effectively.

c. Economic Equivalence—§ 39.12(b)(2)

Proposed § 39.12(b)(2) would require a DCO to adopt rules providing that all swaps with the same terms and conditions (as defined by templates established under DCO rules) submitted to the DCO for clearing are economically equivalent within the DCO and may be offset with each other within the DCO.

ISDA, CME, and FIA commented that the term ''template'' is inappropriate. According to ISDA, ''template'' has no clear meaning, and it assumes that the term refers to the contract specifications currently used by a variety of futures facilities. ISDA noted that the development of specific templates for swap transactions is a mixed business/technological project that requires significant discussion involving each DCO and its market participants. It suggested that the Commission's regulations guide the meaning of ''template'' to achieve as much individual transactional variability as possible within the transaction or range of transactions that a template may cover.

CME commented that references to ''templates'' are confusing because swap dealers generally maintain standard templates for documenting their trading relationships, and their counterparties frequently negotiate changes to those templates. According to CME, a DCO does not define the templates used by OTC participants, and DCO rules do not function as templates from which counterparties may negotiate. Rather, a DCO sets forth in its rulebook the product specifications of each contract it accepts for clearing, including swaps. CME suggested that the Commission revise § 39.12(b)(2) to state as follows (change in italics): ''A [DCO] shall adopt rules providing that all swaps with the same terms and conditions, as defined by product specifications established under [DCO] rules, submitted to the [DCO] for clearing are economically equivalent within the [DCO] and may be offset with each other within the [DCO].''

FIA requested that Commission confirm that economically equivalent swaps must have the same cash flows, values, and liquidation dates. FIA also suggested that terms and conditions of such templates—for example, events of default—should also be consistent with market practice.

Finally, KCC commented that the proposed rule is redundant because Chapter 21 of the KCC rulebook already defines the terms and conditions for swaps that KCC will clear.

The Commission is revising § 39.12(b)(2) as suggested by CME to substitute the phrase ''product specifications'' for the word ''templates.'' As noted above, some commenters found the use of the word ''templates'' confusing. The Commission's intent was to ensure that a DCO sets the specifications for cleared products. The Commission is otherwise adopting the rule as proposed.

In response to FIA, the Commission confirms that it regards cash flows, values, and liquidation dates as terms and conditions encompassed by this rule. The Commission, however, declines to require that terms and conditions be consistent with market practice. The Commission believes that a DCO should have the flexibility to determine whether to conform terms and conditions to market practice.

d. Non-Discriminatory Treatment of Swaps—§ 39.12(b)(3)

Proposed § 39.12(b)(3) would require a DCO to provide for non-discriminatory clearing of a swap executed bilaterally or on or subject to the rules of an unaffiliated SEF or DCM. FIA and MFA commented in support of the proposed rule.

OCC suggested that it should not be deemed a violation of § 39.12(b)(3) for a DCO to require a SEF or DCM desiring to transmit swaps to the DCO for clearing to enter into a non-exclusive clearing agreement on non-discriminatory terms similar to those offered by the DCO to other SEFs or DCMs for clearing of similar products. OCC believes that such agreements are

[67] This is also consistent with § 39.16(c)(2)(ii), adopted herein and discussed in section IV.G.4, below, which requires a DCO to adopt rules that set forth the actions that a DCO may take in the event of a default, which must include the prompt transfer, liquidation, or hedging of the defaulting clearing member's positions, and which may include the auctioning or allocation of such positions to other clearing members.

necessary and appropriate for purposes of addressing matters between the parties such as information sharing and furnishing price data by the exchange to the DCO.

LCH suggested that the Commission clarify that ''non-discriminatory'' includes costs, technology, and other related considerations. LCH also suggested that the Commission impose the reverse requirements on execution venues such as DCMs and SEFs, so that those venues are also required to provide trade feeds to DCOs on a non-discriminatory basis.

The Commission is adopting § 39.12(b)(3) as proposed. In response to OCC, the Commission notes that the rule does not prohibit a DCO from requiring a SEF or DCM desiring to transmit swaps to the DCO for clearing to enter into a non-exclusive clearing agreement on non-discriminatory terms similar to those offered by the DCO to other SEFs or DCMs for clearing of similar products. The Commission agrees that such agreements are necessary and appropriate for purposes of addressing matters between the parties such as information sharing and furnishing price data by the exchange to the DCO. The Commission notes that it expects DCOs to review clearing agreements for compliance with § 39.12(b)(3), the open access requirements of Core Principle C, and any relevant requirements of other core principles.

In response to LCH's comment, the Commission notes that the requirement applies to the factors LCH enumerated. The Commission also notes that LCH's suggestion regarding trading venues is outside the scope of this rulemaking

e. Prohibition on Requirement That Executing Party Is a Clearing Member—§ 39.12(b)(4)

Proposed § 39.12(b)(4) would prohibit a DCO from requiring one of the original executing parties to be a clearing member in order for a contract, agreement, or transaction to be eligible for clearing.

CME concurred with the Commission's analysis and fully supported the proposed regulation. FIA, Citadel, and MFA also supported the proposed regulation.

MFA suggested strengthening the proposed rule. According to MFA, when a non-clearing member trades with another non-clearing member, the clearing process should be identical and as prompt as when one of the parties is a clearing member, so long as the transaction satisfies the relevant DCO's rules, requirements, and standards otherwise applicable to such trades. MFA believes that providing this parity would allow new liquidity providers to efficiently and effectively enter into and compete within the market.

MFA also suggested that the Commission revise the proposed rule to prohibit a DCO from adopting rules or engaging in conduct that is prejudicial to non-clearing members as compared to clearing members with respect to eligibility or the timing of clearing or processing of trades generally. The Commission has addressed this issue in the recently proposed rules on clearing documentation.[68]

ISDA commented that rules barring trades that don't involve a clearing member as a party are inappropriate in established DCOs, but new DCOs may need to roll out products and procedures in a contained way. According to ISDA, ''initial decisions on which market constituencies should have access to clearing must be the subject of legitimate, reasoned decision-making by each DCO with regard to its ability to properly serve each constituency and each constituency's readiness to participate in a cleared market.''

Finally, NGX commented that if the proposed rule were applied to a non-intermediated DCO such as NGX, the rule would require a fundamental restructuring of the manner in which the DCO admits members, guarantees trades, and provides risk management. DCOs like NGX require all participants to become clearing participants at the DCO, and they do not clear contracts that involve non-clearing participants.

The Commission is adopting § 39.12(b)(4) as proposed. In response to the comments of ISDA and NGX, the Commission notes that some DCOs currently have only direct participants, *i.e.,* participants that do not offer client clearing. NGX, for example, provides direct access to commercial end users who clear for themselves. The Commission notes that, consistent with principles of open access, a DCO must have rules in place to offer client clearing promptly if an FCM or a customer requests access. However, from a cost-benefit perspective, the Commission would expect that any DCO investment in building systems would be proportionate to evidence of demand for the service.

Finally, in a separate rulemaking, the Commission has proposed rules that address MFA's suggestion that trades between indirect clearing members should have parity with trades between clearing members.[69]

f. Product Standardization—§ 39.12(b)(5)

Proposed § 39.12(b)(5) would require a DCO to select contract unit sizes and other product terms and conditions that maximize liquidity, facilitate transparency in pricing, promote open access, and allow for effective risk management.[70] To the extent appropriate to further these objectives, a DCO would be required to select contract units for clearing purposes that were smaller than the contract units in which trades submitted for clearing were executed. [71]

ISDA supported the goals identified by the Commission; however, it commented that ''unit size'' is not a meaningful concept in swap transactions because contract size is not standardized. According to ISDA, the only meaningful size limit is the smallest unit of relevant currency or relevant underlying. ISDA suggested that the Commission avoid focusing on ''unit size'' and instead articulate its ultimate objectives, as it has, leaving DCOs with the discretion to set suitable terms and conditions to further those objectives.

FIA did not support the requirement that a DCO select contract unit sizes because FIA does not believe that the swap market has evolved to the point where DCOs can do this. FIA also does not believe the market is at a point where it would be appropriate for a DCO to establish templates regarding the terms and conditions of standardized swaps eligible for clearing. FIA believes that requiring swaps to fit within artificial, prescribed templates would be disruptive to the market and would not benefit customers. FIA, however, would support a requirement that DCOs study this matter and submit a report to the Commission on the feasibility of establishing templates regarding the terms and conditions of standardized swaps as soon as practicable.

Finally, LCH commented that it is not appropriate to require a DCO to select contract units for clearing purposes that are smaller than the contract units in which trades submitted for clearing were executed. According to LCH, a DCO clearing swaps should be able to accept such swaps in any size, and swaps submitted for clearing should not

[68] *See* 76 FR 45730 (Aug. 1, 2011) (Customer Clearing).

[69] *See* 76 FR 45730 (Aug. 1, 2011) (Customer Clearing).

[70] *See* 76 FR 13101 (Mar. 10, 2011) (Straight-Through Processing).

[71] *Id.*

be broken down into sub-units. LCH suggested that the Commission strike § 39.12(b)(5) and that any rules addressing average size of exposure traded in the swap markets be addressed in rules pertaining to trading and execution venues.

The Commission is adopting § 39.12(b)(5) as proposed. The Commission believes that standardizing products, including swaps, by requiring a DCO to determine product terms and conditions, including product size, will increase liquidity, lower prices, and increase participation. In addition, standardized products should make it easier for members to accept a forced allocation in the event of bankruptcy.

The Commission recognizes that standardized products may create basis risk for some hedge positions. However, this circumstance has long existed in the futures markets. The Commission believes that the benefits of standardization, such as competitive pricing, liquid markets, and open access, outweigh the costs of imperfect hedging.

In response to LCH, the Commission notes that the product unit size of a particular swap executed bilaterally may reflect the immediate circumstances of the two parties to the transaction. Once submitted for clearing, it may be possible to split the trade into smaller units without compromising the interests of the two original parties. Smaller units can promote liquidity by permitting more parties to trade the product, facilitate open access by permitting more clearing members to clear the product, and aid risk management by enabling a DCO, in the event of a default, to have more potential counterparties for liquidation. The Commission notes that under the rule, DCOs retain some discretion in determining how best to promote liquidity, facilitate open access, and aid risk management.

g. Novation—§ 39.12(b)(6)

Proposed § 39.12(b)(6) would require a DCO that clears swaps to have rules providing that upon acceptance of a swap: (i) The original swap is extinguished; (ii) the original swap is replaced by equal and opposite swaps between clearing members and the DCO; (iii) the terms of the cleared swaps conform to templates established under DCO rules; and (iv) if a swap is cleared by a clearing member on behalf of a customer, all terms of the swap, as carried in the customer account on the books of the clearing member, must conform to the terms of the cleared swap established under the DCO's rules.

Newedge supported this rule, in particular, the requirement for standardization.

CME, FIA, and ICE commented that the proposed rule appears to presume the use of a ''principal'' model for all cleared swaps, even those swaps cleared on behalf of customers. CME noted that at CME, an FCM clearing customer business acts as an agent for undisclosed principals (*i.e.,* the FCM's customers) vis-a-vis CME and guarantees its customers' performance to CME. CME suggested that in order to preserve the agency model for customer-cleared swaps, the Commission should adopt a revised § 39.12(b)(6)(ii) to provide that, upon acceptance of a swap for clearing, ''the original swap is replaced by equal and opposite swaps *with* the DCO.'' As previously noted, CME also commented that the use of the term ''template'' is confusing. It suggested that the Commission revise § 39.12(b)(6)(iii) to state: ''All terms of the cleared swaps must conform to product specifications established under [DCO] rules.''

FIA commented that the proposed rule would conflict with the FCMs' position that, with respect to customer positions, FCMs are acting as agent, and not as principal, for customers in executing and clearing swaps (and futures) on behalf of customers. FIA suggested that the proposed rule be revised to confirm that, in clearing swaps on behalf of customers, a clearing member shall be deemed a guarantor and agent of a cleared swap and not a principal.

ICE noted that U.S. futures markets may clear on an open offer basis, which allows straight-through processing. ICE commented that the Commission should not preclude open offer clearing of swaps by requiring the underlying swap to be novated.

Finally, LCH suggested that the Commission revise the rule so that the obligation would fall on the clearing member rather than the DCO because the provisions relate to the clearing member's books and records, not the DCO's.

The Commission is adopting § 39.12(b)(6) with modifications to clarify its intended meaning. In response to the comments from CME, FIA, and ICE, the Commission is revising § 39.12(b)(6)(ii) to provide that a DCO that clears swaps must have rules providing that, upon acceptance of a swap by the DCO for clearing, ''[t]he original swap is replaced by an equal and opposite swap between the derivatives clearing organization and each clearing member acting as principal for a house trade or acting as agent for a customer trade.''

In response to the comment from CME, the Commission is revising § 39.12(b)(6)(iii) to substitute the phrase ''product specifications'' for the word ''templates.'' This is consistent with the change to § 39.12(b)(2), discussed above.

In response to the comment by ICE, the Commission notes that ''open offer'' systems are acceptable under the rule. Effectively, under an open offer system there is no ''original'' swap between executing parties that needs to be novated; the swap that is created upon execution is between the DCO and the clearing member, acting either as principal or agent.

Finally, with regard to LCH's comment, the Commission believes that it is proper for the requirement to fall on the DCO. The DCO is the central counterparty and is responsible for the transaction going forward.

h. Confirmation of Terms—§ 39.12(b)(8)

Proposed § 39.12(b)(8) would require a DCO to have rules that provide that all swaps submitted to the DCO for clearing must include written documentation that memorializes all of the terms of the transaction and legally supersedes any previous agreement.[72] The confirmation of all terms of the transaction would be required to take place at the same time as the swap is accepted for clearing.

CME suggested that the Commission revise the proposed regulation to require a DCO to ''provide each clearing member carrying a cleared swap with a definitive record of the terms of the agreement, which will serve as a confirmation of the swap.''

ISDA commented that it is not clear what efficiencies the proposed rule would achieve for the parties to the swap in confirming through a DCO. It suggested that the Commission be less prescriptive and recognize that the act of clearing a swap transaction through a DCO in and of itself should produce a definitive written record, tailored to the particular category of swap transaction by the DCO and its market constituency, which fulfills the Commission's objective of facilitating the timely processing and confirmation of swaps not executed on a SEF or a DCM.

FIA requested that the Commission clarify the obligations of the parties under this proposed rule. According to FIA, the rule appears to place

[72] This provision was originally designated as § 39.12(b)(7)(v) in 76 FR 13101 (Mar. 10, 2011) (Straight-Through Processing). It was later proposed to be renumbered as § 39.12(b)(8) in 76 FR 45730 (Aug. 1, 2011) (Customer Clearing). Section 39.12(b)(7), as currently proposed (76 FR at 13110), will be addressed in a separate final rulemaking.

responsibility on the parties to the swap to submit a written confirmation of the terms of the transaction to the DCO, which, upon acceptance by the DCO, will supersede any prior documents and serve as the confirmation of the trade. However, the notice of proposed rulemaking places responsibility on the DCO, explaining that the proposed rule ''would require that DCOs accepting a swap for clearing provide the counterparties with a definitive written record of the terms of their agreement, which will serve as a confirmation of the swap.'' Further, the proposed rule appears to apply to all swaps submitted for clearing, but the notice of proposed rulemaking appears to limit the requirement to swaps not executed on a SEF or DCM, noting that swaps executed on a SEF or DCM are confirmed upon execution.[73]

OCC commented that the terms and conditions applicable to a cleared swap would already be specified in the DCO rules or product specifications, and it does not think it is necessary for a DCO to provide a confirmation that is similar in form to detailed trade documentation such as an ISDA Master Agreement. OCC believes that the term ''written documentation'' should be interpreted broadly to mean any documentation that sufficiently memorialized the agreement of the counterparties with respect to the terms of a swap, which may consist of a confirmation (electronic or otherwise) that confirms the values agreed upon for terms that can be varied by the parties.

MarkitSERV noted that the proposed rule would require a confirmation of all terms of the transaction at the time the swap is accepted for clearing, and commented that the rule is unclear as to whether, when a swap is to be submitted for clearing, confirmation would ever be required of the pre-clearing initial transaction between the original counterparties. In contrast, the Commission has elsewhere stated that it expects a DCO to require pre-clearing transactions to be confirmed before clearing.[74] MarkitSERV also noted that when a transaction is not rapidly accepted for clearing the parties will still be responsible for confirming the transaction under Commission regulations. It recommended that the Commission clarify that when a transaction is not accepted for clearing within the time frame established for mandatory confirmation the parties should be permitted to satisfy their confirmation obligations by confirming the transaction prior to clearing.

The Commission is adopting § 39.12(b)(8) in modified form to read as set forth in the regulatory text of this final rule.

The change to the heading is responsive to the comment by FIA that it was unclear whether the rule applied to all cleared swaps or only to those that are executed bilaterally. Regardless of the execution venue, confirmation of a cleared swap is ultimately provided by the DCO. In the case of a trading facility with a central limit order book, execution and acceptance for clearing are simultaneous and confirmation occurs at that time. In all other cases, there is an interim time between execution and acceptance, or rejection, for clearing.

The Commission notes that applicable confirmation requirements may depend on the length of time between execution and acceptance or rejection for clearing. For example, if a trade executed on a SEF is accepted for clearing within seconds, the DCO notification would serve as the single confirmation. But, if a trade is executed bilaterally and later submitted for clearing, there may need to be an initial bilateral confirmation that is later superseded by the clearing confirmation.

The changes to the text are responsive to the comments of FIA, CME, ISDA, OCC, and MarkitSERV. As FIA pointed out, the proposed rule text seems to place the confirmation obligation on the submitting parties, while the discussion in the notice of proposed rulemaking places it on the DCO. Consistent with the language in the discussion and the recommendations of FIA, CME, and ISDA, the revised rule clarifies that DCOs provide confirmations of cleared trades. This interpretation was implicit in the proposal given that the second sentence of the rule provides that confirmation takes place when the trade ''is accepted'' for clearing.

D. Core Principle D—Risk Management—§ 39.13

Core Principle D, [75] as amended by the Dodd-Frank Act, requires each DCO to ensure that it possesses the ability to manage the risks associated with discharging the responsibilities of the DCO through the use of appropriate tools and procedures. It further requires each DCO to measure its credit exposures to each clearing member not less than once during each business day and to monitor each such exposure periodically during the business day. Core Principle D also requires each DCO to limit its exposure to potential losses from defaults by clearing members, through margin requirements and other risk control mechanisms, to ensure that its operations would not be disrupted and that non-defaulting clearing members would not be exposed to losses that non-defaulting clearing members cannot anticipate or control. Finally, Core Principle D provides that a DCO must require margin from each clearing member sufficient to cover potential exposures in normal market conditions and that each model and parameter used in setting such margin requirements must be risk-based and reviewed on a regular basis. The Commission proposed to adopt § 39.13 to establish requirements that a DCO would have to meet in order to comply with Core Principle D.

1. General—§ 39.13(a)

Proposed § 39.13(a) would require a DCO to ensure that it possesses the ability to manage the risks associated with discharging its responsibilities through the use of appropriate tools and procedures. The Commission did not receive any comments on proposed § 39.13(a) and is adopting § 39.13(a) as proposed.

2. Risk Management Framework—§ 39.13(b)

Proposed § 39.13(b) would require a DCO to establish and maintain written policies, procedures, and controls, approved by its board of directors, which establish an appropriate risk management framework that, at a minimum, clearly identifies and documents the range of risks to which the DCO is exposed, addresses the monitoring and management of the entirety of those risks, and provides a mechanism for internal audit. In addition, proposed § 39.13(b) would require a DCO to regularly review its risk management framework and update it as necessary.

Mr. Barnard recommended that the Commission comprehensively and explicitly address all elements that make up a risk management framework, including organizational structure, governance, risk functions, internal controls, compliance, internal audit,

[73] The notice of proposed rulemaking states: ''Proposed § 39.12(b)(7)(v) would require that DCOs accepting a swap for clearing provide the counterparties with a definitive written record of the terms of their agreement, which will serve as a confirmation of the swap.'' 76 FR at 13105–13106 (Mar. 10, 2011) (Straight-Through Processing).

[74] *See* 75 FR 81519, at 81521 (Dec. 28, 2010) (Confirmation, Portfolio Reconciliation, and Portfolio Compression Requirements for Swap Dealers and Major Swap Participants) (''if a swap is executed bilaterally, but subsequently submitted to a DCO for clearing, the DCO will require a definitive written record of all terms to the counterparties' agreement prior to novation by the DCO'').

[75] Section 5b(c)(2)(D) of the CEA, 7 U.S.C. 7a–1(c)(2)(D).

and legal functions.[76] In particular, with respect to organizational structure, Mr. Barnard noted that reporting lines and the allocation of responsibilities and authority within a DCO should be clear, complete, well-defined and enforced.

The Commission believes that a DCO should adopt a comprehensive and documented risk management framework that addresses all of the various types of risks to which it is exposed and the manner in which they may relate to each other. The Commission believes that a written risk policy is important because it will help to ensure the DCO has carefully considered its risk management framework, and it will provide guidance to DCO management, staff, and market participants. It will also allow the Commission to assess the DCO's risk management framework more efficiently. The risks to be addressed may include, but are not limited to, legal risk, credit risk, liquidity risk, custody and investment risk, concentration risk, default risk, operational risk, market risk, and business risk. However, the Commission does not believe that it is necessary to explicitly list such risks in the final rule.

MGEX commented that the documentary and procedural requirements of proposed § 39.13(b) would impose heavy costs and turn the goal of practical risk management into one of paperwork compliance, and that while having a framework containing all the various policies can be beneficial for DCOs, the development and implementation of such policies must be flexible and left to each DCO. The Commission notes that DCOs generally already have certain written risk management policies, procedures and controls, although the substance, level of detail, and integration of each DCO's documentation of such policies, procedures and controls may vary. The Commission believes that § 39.13(b) provides DCOs with the appropriate amount of flexibility with regard to the documentation of their risk management frameworks, without imposing significant additional costs upon DCOs.

OCC noted that its risk management policies are highly complex and are embodied in multiple separate written documents, and much of its day-to-day operations are related to risk management. OCC stated that the Commission should make it clear that the proposal would not require the board to approve every document related to risk management, as it would be burdensome and would inappropriately require the board to micro-manage the day-to-day functions of a DCO. OCC indicated that it does not believe that the function of the committee that is responsible for the oversight of its risk management activities would be enhanced by the creation of additional written policies, procedures, and controls.

The Commission recognizes that many of the day-to-day functions of a DCO are related to risk management, and § 39.13(b) is not intended to require that a DCO's board must approve every document at a DCO that addresses risk management issues nor is it intended to require that a DCO's board must approve every day-to-day decision regarding the implementation of the DCO's risk management framework.

CME and ICE took the position that a DCO's Risk Management Committee should have the authority to approve the written policies, procedures, and controls that establish a DCO's risk management framework, noting that this would be consistent with proposed § 39.13(c), which would require a DCO's Chief Risk Officer to make appropriate recommendations to the DCO's Risk Management Committee or board of directors, as applicable, regarding the DCO's risk management function.

The Commission believes that a DCO's risk management framework should be subject to the approval of its board of directors. The Commission recognizes that a DCO's Risk Management Committee may play a crucial role in the development of the risk management policies of a DCO. However, the board has the ultimate responsibility for the management of the DCO's risks. Requiring board approval of a DCO's risk management framework is also consistent with proposed international standards.[77]

In addition, a requirement that a DCO's board approve its risk management framework is consistent with § 39.13(c), which permits a DCO's Chief Risk Officer to make appropriate recommendations to the DCO's Risk Management Committee regarding the DCO's risk management functions. Although the board would approve the framework, it could delegate defined decision-making authority to the Risk Management Committee in connection with the implementation of the framework. The Commission is adopting § 39.13(b) as proposed.

3. Chief Risk Officer—§ 39.13(c)

Proposed § 39.13(c) would require a DCO to have a Chief Risk Officer (CRO) who would be responsible for the implementation of the risk management framework and for making appropriate recommendations regarding the DCO's risk management functions to the DCO's Risk Management Committee or board of directors, as applicable. In a separate rulemaking, the Commission has proposed to adopt § 39.13(d) to require DCOs to have a Risk Management Committee with defined composition requirements and specified minimum functions.[78]

Better Markets commented that the proposal should provide substantive parameters for a CRO and that the CRO rules applicable to FCMs should be applied to DCOs. Mr. Greenberger indicated that the CRO of a DCO should be subject to the same rules regarding reporting and independence as the CROs of other registered entities.

The Commission does not believe that it is necessary to further define the responsibilities of a DCO's CRO in the final rule. The Commission notes that it has not proposed any rules regarding a CRO for FCMs or any other registered entities, as suggested by Better Markets and Mr. Greenberger.[79]

As noted in the notice of proposed rulemaking, given the importance of the risk management function and the comprehensive nature of the responsibilities of a DCO's CCO, which are governed by § 39.10, as adopted in this rulemaking, the Commission expects that a DCO's CRO and its CCO would be two different individuals. The Commission is adopting § 39.13(c) as proposed.

4. Measurement of Credit Exposure—§ 39.13(e)

Proposed § 39.13(e) would require a DCO to: (1) Measure its credit exposure to each clearing member and mark to market such clearing member's open positions at least once each business

[76] Mr. Barnard also recommended that the Commission focus more on operational risk and the role of reporting and public disclosures. With respect to operational risk, the Commission notes that it is adopting § 39.18 herein, which addresses system safeguards, and which is discussed in section I, below. Reporting and public information are addressed in §§ 39.19 and 39.21, respectively, also adopted herein, which are discussed in sections J and L, respectively, below.

[77] *See* CPSS–IOSCO Consultative Report, Principle 2: Governance, Key Consideration 5, at 23.

[78] *See* 75 FR at 63750 (Oct. 18, 2010) (Conflicts of Interest). In that proposed rulemaking, the provisions relating to the Risk Management Committee were designated as § 39.13(g). In the final rulemaking with respect to that proposal, those provisions will be redesignated as § 39.13(d).

[79] However, the Commission has proposed rules regarding a CCO for futures commission merchants, swap dealers, and major swap participants, at 75 FR 70881 (Nov. 19, 2010) (Designation of a Chief Compliance Officer; Required Compliance Policies; and Annual Report of a Futures Commission Merchant, Swap Dealer, or Major Swap Participant), with respect to which Better Markets filed a comment letter.

day; and (2) monitor its credit exposure to each clearing member periodically during each business day. Proposed § 39.13(e) was a prerequisite for proposed § 39.14(b), which would address daily settlements based on a DCO's measurement of its credit exposures to its clearing members.

LCH commented that a DCO should be required to measure its credit exposures ''several times each business day'' and that a DCO should be obliged to recalculate initial and variation margin requirements more than once each business day. By contrast, OCC requested that the Commission clarify that the proposed requirement that a DCO monitor its credit exposure to each clearing member periodically during each business day would not require a DCO to update clearing member positions on an intra-day basis for purposes of monitoring risk, which would not be practical, and that intra-day monitoring of credit exposures based on periodic revaluation of beginning-of-day positions would be sufficient to comply with the proposed rule.

The Commission does not believe that a DCO should be required to mark each clearing member's open positions to market and recalculate initial and variation margin requirements more than once each business day, and notes that the requirement that a DCO monitor its credit exposure to each clearing member periodically during each business day could be satisfied through intra-day monitoring of credit exposures based on periodic revaluation of beginning-of-day positions as suggested by OCC.

However, as discussed in section IV.E.2, below, § 39.14(b) requires a DCO to effect a settlement with each clearing member at least once each business day, and to have the authority and operational capacity to effect a settlement with each clearing member, on an intraday basis, either routinely, when thresholds specified by the DCO are breached, or in times of extreme market volatility. Therefore, in order to comply with § 39.14(b), a DCO would be required to have the authority and operational capacity to mark each clearing member's open positions to market and recalculate initial and variation margin requirements, on an intraday basis, under the circumstances defined in § 39.14(b).

The Commission is adopting § 39.13(e) as proposed, except that the Commission is making a technical revision by replacing the phrase ''such clearing member's open positions'' with the phrase ''such clearing member's open house and customer positions'' to eliminate possible ambiguity and to clarify the Commission's intent to reflect current industry practice and include both house and customer positions, not just house positions. The Commission notes that § 39.13(e) is consistent with international recommendations.[80]

5. Limitation of Exposure to Potential Losses From Defaults—§ 39.13(f)

Proposed § 39.13(f) would require a DCO, through margin requirements and other risk control mechanisms, to limit its exposure to potential losses from defaults by its clearing members to ensure that: (1) Its operations would not be disrupted; and (2) non-defaulting clearing members would not be exposed to losses that nondefaulting clearing members cannot anticipate or control. The language of proposed § 39.13(f) is virtually identical to the language in Section 5b(c)(2)(D)(iii) of the CEA, as amended by the Dodd-Frank Act.

FIA supported the proposal and MGEX stated that it appeared reasonable if applied appropriately. FIA acknowledged that clearing members understand and accept that they are subject to losses in the event of a default of another clearing member but noted that these potential losses must be measurable and subject to a reasonable cap over a period of simultaneous or multiple defaults. MGEX suggested that the Commission adopt an interpretation that each clearing member, by becoming a clearing member, can reasonably anticipate that another clearing member may potentially default and that a DCO can apply its rules accordingly.

The Commission believes that every clearing member is aware that another clearing member may default. The Commission also notes that the potential losses resulting from such a default will be mitigated to the extent that a DCO is bound to comply with the CEA, Commission regulations, and its own rules, particularly with regard to financial resources and default rules and procedures.

KCC commented that there would appear to be little cost/benefit justification for duplicating the statutory language of the core principle in the form of a rule.[81] The Commission believes that codifying provisions of the CEA does not impose an additional cost on a DCO because a DCO must satisfy such requirements to comply with the law. At the same time, the Commission believes that codifying this statutory provision provides a DCO with a single location in which to identify the minimum standards necessary to fulfill the requirements of Core Principle D. The Commission is adopting § 39.13(f) as proposed.

6. Margin Requirements—§ 39.13(g)

a. General

Several commenters made general comments about margin requirements that did not address specific provisions of proposed § 39.13(g). The Commission has summarized those comments, and responded to those comments, below.

KCC expressed its belief that the Commission's detailed proposed margin requirements are not consistent with the Dodd-Frank Act's changes to the CEA, which simply require that a DCO's margin models and parameters must be ''risk-based.'' The Commission notes that Section 5b(c)(2) of the CEA, as amended by the Dodd-Frank Act, requires a DCO to comply with the statutory core principles ''and any requirement that the Commission may impose by rule or regulation pursuant to section 8a(5).'' As noted in section I.A, above, legally enforceable standards set forth in regulations serve to increase legal certainty, prevent DCOs from lowering risk management standards for competitive reasons, and increase market confidence. These goals are especially important with respect to margin, which is one of the key tools used by DCOs in managing risk. Therefore, the Commission believes it is appropriate to impose more detailed margin requirements than those contained in the statutory language of Core Principle D.

ISDA urged the Commission to adopt rules requiring DCOs to adopt risk methodologies that would reduce the impact that customer account risk has on the size of default fund contributions. ISDA noted that this would enable DCOs to better guaranty the portability of client portfolios, but would increase risk to the DCO; however, ISDA stated that this increased risk could be addressed by increasing the risk margin of the customer account. The Commission has not proposed and is not adopting such rules. The Commission believes that a DCO should have reasonable discretion to determine how it will calculate the amounts of any default fund contributions that it may require from its clearing members, and the extent to which customer risk will be a factor in such calculations.

MFA and Citadel stated that it is important that a DCO's process for setting initial margin be transparent in order to give all market participants

[80] *See* CPSS–IOSCO Consultative Report, Principle 6: Margin, Key Consideration 4, at 40.

[81] *See* Section 5b(c)(2)(D)(iii) of the CEA, 7 U.S.C. 7a–1(c)(2)(D)(iii).

certainty as to the margin they can expect the DCO to assess. Therefore, MFA and Citadel urged the Commission to adopt final rules that would require a DCO to make available to all market participants, at no cost, a margin calculation utility, so that they would be able to replicate the calculation of the margin that the DCO would assess.

The Commission notes that it is adopting §§ 39.21(c)(3) and (d) herein, which require a DCO to disclose information concerning its margin-setting methodology on its Web site. However, the Commission is not requiring a DCO to provide a margin calculation utility to market participants free of cost, although the Commission notes that some DCOs have chosen to do so.[82] The Commission believes that whether a DCO will provide a margin calculation utility to market participants, and whether and how much it might charge for such a utility, is a business decision that should be left to the discretion of a DCO.

The FHLBanks indicated that it may be appropriate, in some circumstances, for a DCO to waive its initial margin requirements with respect to certain highly creditworthy customers of a clearing member. Therefore, the FHLBanks urged the Commission to grant DCOs discretion to waive initial margin requirements when doing so would not pose risk to the DCO or its clearing members. In light of the fact that the Dodd-Frank Act requires the removal of reliance on credit ratings, the FHLBanks recommended that the Commission adopt alternative criteria by which a DCO could exercise such discretionary waivers, or alternatively grant DCOs discretion to establish their own criteria, subject to Commission approval, or to guidelines established by the Commission in the final rule.

The Commission has not proposed a rule that would permit it to grant DCOs the discretion to waive initial margin requirements and it is not adopting such a rule, as requested by the FHLBanks. Even if there were an objective way to define highly creditworthy customers, the Commission does not believe that permitting such waivers would constitute prudent risk management.

b. Amount of Initial Margin Required—§ 39.13(g)(1)

Proposed § 39.13(g)(1) would require that the initial margin[83] that a DCO requires from each clearing member must be sufficient to cover potential exposures in normal market conditions and that each model and parameter used in setting initial margin requirements must be risk-based and reviewed on a regular basis. The Commission invited comment regarding whether a definition of ''normal market conditions'' should be included in the proposed regulation and, if so, how normal market conditions should be defined.

MFA, BlackRock, and Citadel expressed their support for the proposal. CME and OCC commented that the Commission should not define normal market conditions, while ISDA stated that the Commission should define normal market conditions. The Commission noted in the notice of proposed rulemaking that the 2004 CPSS–IOSCO Recommendations defined ''normal market conditions'' as ''price movements that produce changes in exposures that are expected to breach margin requirements or other risk control mechanisms only 1 percent of the time, that is, on average on only one trading day out of 100.''[84] The CPSS–IOSCO Consultative Report was published subsequent to the issuance of proposed § 39.13(g)(1). The CPSS–IOSCO Consultative Report replaced the concept of ''normal market conditions'' with a proposed requirement that ''[i]nitial margin should meet an established single-tailed confidence level of at least 99 percent for each product that is margined on a product basis, each spread within or between products for which portfolio margining is permitted, and for each clearing member's portfolio losses.''[85] The Commission had also proposed similar requirements for a 99 percent confidence level in proposed § 39.13(g)(2)(iii), discussed below. Therefore, in adopting § 39.13(g)(1), the Commission is declining to adopt the proposed explicit requirement that initial margin must be sufficient to cover potential exposures in normal market conditions, in order to avoid any ambiguity over the meaning of ''normal market conditions.''

FIA recommended that parameters used in setting initial margin requirements should be reviewed monthly and models should be reviewed annually and on an ad hoc basis if substantive changes are made, whereas OCC took the position that the Commission should permit a DCO to use its reasonable discretion in determining what constitutes a ''regular basis'' for reviewing margin models and parameters. The Commission has determined not to specify the appropriate frequency of review, as it may differ based on the characteristics of particular products and markets, and the nature of the margin models and parameters that apply to those products and markets. However, although § 39.13(g)(1) would permit a DCO to exercise its discretion in determining how often it should review its margin models and parameters, the Commission would apply a reasonableness standard in determining whether the frequency of reviews conducted by a particular DCO was appropriate.

Moreover, as discussed in section IV.D.6.d, below, § 39.13(g)(3) requires that a DCO's systems for generating initial margin requirements, including the DCO's theoretical models, must be reviewed and validated by a qualified and independent party, on a regular basis. As the Commission noted in the notice of proposed rulemaking, the Commission would expect a DCO to obtain an independent validation prior to implementation of a new margin model and when making any significant change to a model that is in use by the DCO. This express expectation would address FIA's suggestion that a DCO should be required to review its margin models on an ad hoc basis if substantive changes are made. For the reasons discussed, the Commission is adopting § 39.13(g)(1) with the modification described above.

c. Methodology and Coverage

(1) General—§ 39.13(g)(2)(i)

Proposed § 39.13(g)(2)(i) would require a DCO to establish initial margin requirements that are commensurate with the risks of each product and portfolio, including any unique characteristics of, or risks associated with, particular products or portfolios.[86] In particular, proposed § 39.13(g)(2)(i) would require a DCO that clears credit default swaps (CDS) to appropriately address jump-to-default risk in setting initial margins.[87] The Commission

[82] *See e.g., http://www.cmegroup.com/clearing/cme-core-cme-clearing-online-risk-engine.html* and *https://www.theice.com/publicdocs/ice_trust/ICE_Margin_Simulation_Calculator_Training_Presentation.pdf.*

[83] The term ''initial margin'' is now defined in § 1.3(lll), adopted herein.

[84] *See* 2004 CPSS–IOSCO Recommendations at 21.

[85] *See* CPSS–IOSCO Consultative Report, Principle 6: Margin, Key Consideration 3, at 40.

[86] As proposed, § 39.13(g)(2)(i) referred to addressing any ''unique'' characteristics of, or risks associated with, particular products or portfolios. The Commission is revising this provision in the final rule to refer to any ''unusual'' characteristics of, or risks associated with, particular products or portfolios to clarify that such characteristics or risks are not limited to those that are one of a kind. *See* also n. 66, above.

[87] In the notice of proposed rulemaking, the Commission defined jump-to-default risk as referring to the possibility that a CDS portfolio with large net sales of protection on an underlying reference entity could experience significant losses

Continued

invited comment regarding whether there are specific risks that should be identified and addressed in the proposed regulation in addition to jump-to-default risk.

CME and Nadex, Inc. (Nadex) expressed the opinion that it would not be beneficial to attempt to identify additional specific risks that a DCO must address in determining initial margins and LCH commented that the reference to jump-to-default risk should either be removed or amended to cover all other products that are subject to jump-to-default risk. The Commission agrees with CME and Nadex that it is not necessary to identify additional specific risks in the regulation, and also agrees with LCH that the reference to jump-to-default risk should generally apply to any product that may be subject to such risk. Therefore, the Commission is adopting a revised § 39.13(g)(2)(i) that eliminates the specific reference to CDS. The Commission has also added the phrase ''or similar jump risk.'' This is intended to address the possibility of a large payment obligation in a product accumulating in a very short period of time following an extreme market event.

(2) Liquidation Time—§ 39.13(g)(2)(ii)

Proposed § 39.13(g)(2)(ii) would require a DCO to use margin models that generate initial margin requirements sufficient to cover the DCO's potential future exposures to clearing members based on price movements in the interval between the last collection of variation margin [88] and the time within which the DCO estimates that it would be able to liquidate a defaulting clearing member's positions (liquidation time). As proposed, a DCO would have to use a liquidation time that is a minimum of five business days for cleared swaps that were not executed on a DCM, and a liquidation time that is a minimum of one business day for all other products that it clears, although it would be required to use longer liquidation times, if appropriate, based on the unique characteristics of particular products or portfolios. The Commission invited comment regarding whether the minimum liquidation times specified in proposed § 39.13(g)(2)(ii) were appropriate, or whether there were minimum liquidation times that were more appropriate.

LCH suggested that ''or transfer'' should be inserted after ''liquidate'' in the proposed rule and that an appropriate liquidation period should be a period that would be sufficient to enable a DCO to adequately hedge or close out a defaulting member's risk. The Commission does not believe that it is appropriate to add ''or transfer,'' or to interpret the liquidation period to include the time that would be sufficient to hedge a defaulting clearing member's positions. In a worst-case scenario, a DCO would need to liquidate a defaulting clearing member's positions, and the time it would take to do so should be the relevant consideration in setting initial margin requirements.

ISDA commented that a DCO should continually monitor the risk associated with concentration in participants' positions, and if a DCO determines that a participant's cleared portfolio is so large that it could not be liquidated within the liquidation period assumed in the DCO's default management plan, the DCO should have the discretion to include an extra charge for concentration risk in the initial margin requirements of that participant. FIA made similar comments but suggested that prudent risk management should require the imposition of concentration margin in appropriate circumstances. FIA further noted that when a DCO imposes concentration margin on a clearing member, the additional margin should be included in the DCO's minimum margin calculations for any customers of the clearing member that generate the increased risk.

Although the regulations adopted by the Commission herein do not specifically address concentration margin as described by ISDA and FIA, they do not limit a DCO's discretion to impose extra charges on its clearing members for concentration risk. It should also be noted that § 39.13(h)(6), adopted herein,[89] requires a DCO to take additional actions with respect to particular clearing members, when appropriate, based on the application of objective and prudent risk management standards, which actions may include imposing enhanced margin requirements.

Numerous commenters objected to the proposed difference in requirements that would subject swaps that were either executed bilaterally or executed on a SEF to a minimum five-day liquidation time, while permitting equivalent swaps that were executed on a DCM to be subject to a minimum one-day liquidation time. Commenters variously argued that the proposed one-day/five-day distinction for swap transactions depending on the venue of execution would: (1) Be inconsistent with the open access provisions of Section 2(h)(1)(B) of the CEA [90] and/or proposed § 39.12(b)(2) [91] (GFI Group Inc. (GFI), VMAC, LCC (VMAC), BlackRock, Wholesale Markets Brokers' Association, Americas (WMBAA), and FX Alliance Inc. (FXall)); (2) be inconsistent with Congressional intent, expressed in Section 731 of the Dodd-Frank Act,[92] which recognizes a difference in risk between cleared and uncleared swaps that could be addressed by differential margin requirements, but does not differentiate between the risk of swaps executed on a DCM and those executed on a SEF (Asset Management Group of the Securities Industry and Financial Markets Association (AMG)); (3) discriminate against trades not executed on DCMs by requiring DCOs to impose higher margin requirements for swaps that are executed on SEFs than for swaps that are executed on DCMs (GFI, VMAC, MarketAxess Corporation (MarketAxess), WMBAA, Tradeweb Markets LLC (Tradeweb), Nodal Exchange, LLC (Nodal), and FXall); (4) raise the cost of clearing for swaps traded on a SEF (National Energy Marketers Association (NEM), NGX, and BlackRock); [93] (5) put SEFs at a competitive disadvantage to DCMs (GFI, MarketAxess, and BlackRock); (6) artificially restrict the ability of market participants, including asset managers, to select the best means of execution for their swap transactions (BlackRock); (7) penalize market participants that desire to effect swap transactions on a SEF rather than a DCM (WMBAA and Tradeweb); (8) undermine the goal of the Dodd-Frank Act to promote trading of swaps on SEFs (Tradeweb and FXall); (9) potentially create detrimental arbitrage between standardized swaps traded on a SEF and futures contracts with the same terms and conditions traded on a DCM (Nodal); (10) impose onerous and unnecessary administrative costs on DCOs, which would likely be passed on to clearing members and their customers (VMAC and BlackRock); (11) create a disincentive for DCOs to practice appropriate default management ''drills'' to reduce the

over a very short period of time following an unexpected event of default by the reference entity.

[88] The term ''variation margin'' is now defined in § 1.3(ooo), adopted herein.

[89] *See* discussion of § 39.13(h)(6)(ii) in section IV.D.7.f, below.

[90] *See* Section 2(h)(1)(B) of the CEA, 7 U.S.C. 2(h)(1)(B).

[91] *See* discussion of § 39.12(b)(2) in section IV.C.2.c, above.

[92] Section 731 of the Dodd-Frank Act amended the CEA to insert Section 4s. *See* Section 4s(e)(3)(A)(ii) of the CEA, 7 U.S.C. 6s(e)(3)(A)(ii).

[93] NGX estimated that the impact of transitioning from its current two-day requirement to a five-day requirement for all of the energy products that it clears would lead to an approximate 60 percent increase in initial margins.

liquidation time of portfolios of swaps (ISDA); (12) remove the incentive for DCOs to detail, practice and leverage clearing member expertise in default management (FIA); (13) discourage voluntary clearing (NGX); and (14) require DCOs and clearing members to manage margin calls and netting based on the execution platform for the relevant swaps (VMAC and BlackRock).

In addition, a number of commenters argued that there was no basis for concluding that swaps executed on a SEF would be less liquid than swaps executed on a DCM (GFI, WMBAA, NGX, MarketAxess, AMG, and FXall).

BlackRock recommended that the Commission require a DCO to use a consistent liquidation time for cleared swaps that are executed on SEFs and DCMs.

Commenters variously contended that a liquidation time of five business days may be excessive for some swaps (CME and Citadel [94]), a one-day liquidation period is too short (LCH), a one-day liquidation period is appropriate for swaps executed on a DCM or a SEF (AMG), and a two-day liquidation period is appropriate for cleared swaps (NGX).

Various commenters encouraged the Commission to permit a DCO to determine the appropriate liquidation time for all products that it clears based on the unique characteristics and liquidity of each relevant product or portfolio (CME, MFA, ISDA, LCH, NYPC, NGX, FIA,[95] Nadex, Citadel, and FXall) or to grant DCOs such discretion subject to a one-day minimum for all products, including cleared swaps (GFI, VMAC, MarketAxess, Nodal, WMBAA, and Tradeweb).

FIA and ISDA commented that the appropriate liquidation time should be derived from a DCO's default management plan and the results of its periodic testing of such plan. FIA further stated that a DCO should adjust its minimum margin requirements if its periodic testing of its default management plan demonstrates that a defaulting clearing member's positions could be resolved in a shorter period of time. Similarly, NGX stated that the Commission should permit a DCO to demonstrate through back testing and stress testing that a particular type of cleared transaction should be subject to a shorter liquidation time.

MFA and Citadel recommended that if the Commission were to mandate minimum liquidation times in the final rules, it should allow DCOs to apply for exemptions for specific groups of swaps if market conditions prove that such minimum liquidation times are excessive. Citadel further recommended that the Commission make it explicit that the Commission may re-evaluate and, if necessary, re-calibrate such minimum liquidation times as markets evolve.

The Commission is persuaded by the views expressed by numerous commenters that requiring different minimum liquidation times for cleared swaps that are executed on a DCM and equivalent cleared swaps that are executed on a SEF could have negative consequences. Therefore, after further consideration, the Commission has determined not to mandate different minimum liquidation times for cleared swaps based on their venue of execution, and has further determined that the same minimum liquidation time should be used with respect to cleared swaps that are executed bilaterally. This approach is consistent with the open access requirements of Section 2(h)(1)(B) of the CEA and § 39.12(b)(2), adopted herein.

The Commission also acknowledges the concerns expressed by commenters that a five-day liquidation period may be excessive for some swaps. For example, for a number of years, CME and ICE have successfully cleared swaps based on physical commodities using a one-day liquidation time.[96] By contrast, as noted in the notice of proposed rulemaking, several DCOs currently use a five-day liquidation time in determining margin requirements for certain swaps based on financial instruments.[97] These differences reflect differences in the risk characteristics of the products.

The Commission has carefully considered whether it should prescribe any liquidation time or, alternatively, permit each DCO to exercise its discretion in applying liquidation times based on the risk profile of particular products or portfolios. In this regard, the Commission notes that even without a specified minimum liquidation time, under Sections 5b(c)(2)(D) and 8a(7)(D) of the CEA, the Commission can require a DCO to adjust its margin methodology if it determines that the current margin levels for a product or portfolio are inadequate based on back testing or current market volatility.

Weighing the advantages and drawbacks of the alternatives, the Commission believes that a bright-line requirement, with a provision for making exceptions, will best serve the public interest. While a DCO will still have considerable latitude in setting risk-based margin levels, the Commission has determined that establishing a minimum liquidation time will provide legal certainty for an evolving marketplace, will offer a practical means for assuring that the thousands of different swaps that are going to be cleared subject to the Commission's oversight will have prudent minimum margin requirements, and will prevent a potential ''race to the bottom'' by competing DCOs. Moreover, given the large number of swaps already cleared, this alleviates the need for the Commission, with its limited staff resources, to evaluate immediately the liquidation time for each swap that is cleared.[98]

Taking into account these considerations, and in response to the comments, the Commission is adopting § 39.13(g)(2)(ii) with a number of modifications. First, the final rule requires a DCO to use the same liquidation time for a product whether it is executed on a DCM, a SEF, or bilaterally. This addresses the competitive concerns raised by numerous commenters and recognizes that once a swap is cleared, its risk profile is not affected by the method by which it was executed.[99]

Second, the final rule provides that the minimum liquidation time for swaps based on certain physical commodities, *i.e.,* agricultural commodities,[100] energy, and metals, is one day. For all other swaps, the minimum liquidation time is five days. This distinction is based on the differing risk characteristics of these product groups and is consistent with existing requirements that reflect the risk assessments DCOs have made over the course of their experience clearing these types of swaps. The longer liquidation time, currently five days for credit default swaps at ICE Clear Credit, LLC, and CME, and for interest rate

[94] Citadel further commented that excessive margin requirements relative to risk exposure could adversely affect market liquidity and deter clearing.

[95] FIA also commented that liquidation times should be set at times appropriate to manage the liquidation of the vast majority of the portfolios carried by a DCO's clearing members, and not necessarily that of the largest clearing member.

[96] NYMEX, now CME, has cleared OTC swaps generally with a one day liquidation time since 2002. CME currently offers more than 1,000 products for clearing through its ClearPort system.

[97] In particular, ICE Clear Credit LLC and CME use a five-day liquidation time for credit default swaps and LCH and CME use a five-day liquidation time for interest rate swaps.

[98] *E.g.,* the 950,000 trades in LCH's SwapClear have an aggregate notional principal amount of over $295 trillion. *Source: http://www.lch.com/swaps/swapclear_for_clearing_members/.*

[99] *See* Section 2(h)(1)(B) of the CEA and § 39.12(b)(2), adopted herein (swaps submitted to a DCO with the same terms and conditions are economically equivalent within the DCO and may be offset with each other within the DCO).

[100] *See* 76 FR 41048 (July 13, 2011) (Agricultural Commodity Definition; final rule).

swaps at LCH and CME, is based on their assessment of the higher risk associated with these products.[101] Contributing factors include a concentration of positions among clearing members, the number and variety of products listed, the complexity of the portfolios, the long-dated expiration time for many swaps, and the challenges of the liquidation process in the event of a default.[102]

Third, to provide further flexibility, the Commission is adding a provision specifying that, by order, the Commission may provide for a different minimum liquidation time for particular products or portfolios. As markets evolve, it may become appropriate to ease the requirement for certain swaps subject to the five-day minimum. Conversely, analysis may reveal that for other products or portfolios the five-day or one-day minimum is insufficient. The Commission believes that in light of the novelty, complexity, and potential magnitude of the risk posed by financial swaps, prudential considerations dictate that this type of fine-tuning should be used in appropriate circumstances. Such an order could be granted upon the Commission's initiative or in response to a petition from a DCO.

In this regard, the Commission emphasizes that it is retaining the proposed requirement that a DCO must use longer liquidation times, if appropriate, based on the specific characteristics of particular products or portfolios.[103] Such longer liquidation times may be based on a DCO's testing of its default management plan. If a DCO determines that a longer liquidation time is appropriate for a particular swap, the Commission would expect that the DCO would use the same longer liquidation time for the equivalent swaps that it clears, whether the swaps are executed on a DCM, a SEF, or bilaterally. Among the factors that DCOs should consider in establishing minimum liquidation times are: (i) Average daily trading volume in a product; (ii) average daily open interest in a product; (iii) concentration of open interest; (iv) availability of a predictable basis relationship with a highly liquid product; and (v) availability of multiple market participants in related markets to take on positions in the market in question. The Commission would also consider these factors in determining whether a particular liquidation time was appropriate.

The Commission is adopting § 39.13(g)(2)(ii) revised to read as set forth in the regulatory text of this final rule.[104]

(3) Confidence Level—§ 39.13(g)(2)(iii)

Proposed § 39.13(g)(2)(iii) would require that the actual coverage of the initial margin requirements produced by a DCO's margin models, along with projected measures of the models' performance, would have to meet a confidence level of at least 99 percent, based on data from an appropriate historic time period with respect to: (A) each product that is margined on a product basis; (B) each spread within or between products for which there is a defined spread margin rate, as described in proposed § 39.13(g)(3); (C) each account held by a clearing member at the DCO, by customer origin and house origin,[105] and (D) each swap portfolio, by beneficial owner. The Commission invited comment regarding whether a confidence level of 99 percent is appropriate with respect to all applicable products, spreads, accounts, and swap portfolios.

Alice Corporation supported the proposed 99 percent confidence level, especially for new swaps and swaps with non-linear characteristics. ISDA commented that the proposed 99 percent confidence level is appropriate given current levels of mutualization in a DCO default fund and mutualization in omnibus client accounts.[106] MGEX stated that it did not oppose the proposed 99 percent confidence level for each account held by a clearing member at a DCO, by customer origin and house origin.[107]

FIA opposed the proposed 99 percent requirement because it sets an artificial floor that may remove the incentive for DCOs to conduct the rigorous analysis necessary to establish an appropriate confidence level. FIA further stated that if a different regulatory scheme than loss mutualization for the protection of customer funds were to be adopted for cleared swaps, a much higher level of confidence may be required.

CME, Nadex, KCC,[108] and Citadel took the position that the Commission should not prescribe a specific confidence level, but should instead continue to give each DCO the discretion to determine the appropriate confidence levels. CME and Nadex noted that one or more of the following factors could be considered by a DCO in determining the appropriate confidence levels: the particular characteristics of the products and portfolios it clears, the depth of the underlying markets, the existence of multiple venues trading similar products on which a defaulting clearing member's portfolio could be liquidated or hedged, the duration of the products, the size of the DCO and its systemic importance, its customer base, or its other risk management tools.

The Commission does not agree such discretion is appropriate and has

[101] *See e.g., Cleared OTC Interest Rate Swaps* at 7 (Aug. 2011), available at *http://www.cmegroup.com/clearing/cme-core-cme-clearing-online-risk-engine.html; ICE Clear Credit Clearing Rules,* Schedule 401 (Jul. 16, 2011) available at *https://www.theice.com/publicdocs/clear_credit/ICE_Clear_Credit_Rules.pdf.*

[102] The liquidation of the Lehman interest rate swap portfolio in the fall of 2008 demonstrates that the actual liquidation time for a swap portfolio could be longer than 5 days. Between September 15, 2008 (the day Lehman Bros. Holdings declared bankruptcy) and October 3, 2008, LCH and ''OTCDerivnet,'' an interest rate derivatives forum of major market dealers, wound down the cleared OTC interest rate swap positions of Lehman Bros. Special Financing Inc. (LBSFI). This portfolio had a notional value of $9 trillion and consisted of 66,390 trades across 5 major currencies. LCH and OTCDerivnet competitively auctioned off LBSFI's five hedge currency portfolios to their members between September 24 and October 3, 2008. The margin held by LCH proved sufficient to cover the costs incurred. *Source:* LCH Press Release of October 8, 2008, available at: *http://www.lchclearnet.com/Images/2008-10-08%20SwapClear%20default_tcm6–46506.pdf.*

[103] As proposed, § 39.13(g)(2)(ii) referred to the ''unique'' characteristics of particular products or portfolios. The Commission is revising this phrase in the final rule to refer to the ''specific'' characteristics of a particular product or portfolio to clarify that such characteristics are not limited to those that are one of a kind.

[104] In a technical revision, the Commission has eliminated the phrase, ''whether the swaps are carried in a customer account subject to Section 4d(a) or 4d(f) of the Act, or carried in a house account,'' because it is superfluous.

[105] The terms ''customer account or customer origin'' and ''house account or house origin'' are now defined in § 39.2, adopted herein.

[106] ISDA contended that if there were a requirement to have individualized client accounts, the appropriate confidence level should be higher than 99 percent because the funds available to a DCO to manage a client account default would be reduced.

[107] MGEX requested that the Commission clarify that this proposed requirement applies to the net account of each clearing member and not the underlying accounts at each clearing member. The Commission did not intend proposed § 39.13(g)(2)(iii)(C), which would refer to ''[e]ach account held by a clearing member at the DCO, by customer origin and house origin * * *,'' to apply to individual customer accounts by beneficial owner. However, the Commission notes that § 39.13(g)(2)(iii)(D), as proposed and as adopted herein, applies the 99 percent confidence level requirement to ''[e]ach swap portfolio, by beneficial owner.''

[108] KCC also expressed its belief that ultra-high confidence level modeling does not protect against risk as well as direct margin intervention by the DCO in the case of significant market movements, such as retaining the right to review recent price movements to re-establish margins at a higher level and retaining the right to demand special margin from certain clearing members. The Commission believes that a DCO should retain the right to take such actions in addition to, rather than instead of, using a 99 percent confidence level, as required by § 39.13(g)(2)(iii). For example, § 39.13(h)(6)(ii), discussed below, requires a DCO to take additional actions with respect to particular clearing members, when appropriate, including imposing enhanced margin requirements.

determined to establish a minimum confidence level. The Commission believes that a minimum confidence level will provide legal certainty for an evolving marketplace, will offer a practical means for assuring market participants that the thousands of different products that are going to be cleared subject to the Commission's oversight will have prudent minimum margin requirements, and will prevent a potential ''race to the bottom'' by competing DCOs. Moreover, given the large number of products already cleared, this alleviates the need for the Commission, with its limited staff resources, to evaluate immediately the confidence level requirements for each product that is cleared.

The Commission is adopting the proposed minimum 99 percent confidence level. This is consistent with proposed international standards.[109] Moreover, given the potential costs of default, the Commission agrees with those commenters who stated that a 99 percent level is appropriate. An individual DCO may determine to set a higher confidence level, in its discretion.

NASDAQ OMX Commodities Clearing Company (NOCC) supported an approach that would allow DCOs to set margin requirements for new and low-volume products at a lower coverage level if the potential losses resulting from such products are minimal. According to NOCC, this would allow DCOs to include more products and market participants by attracting them at an early stage without materially increasing the risk of the DCO.

VMAC suggested that the Commission add to the requirement that initial margin levels must be based upon ''an established confidence level of at least 99 percent,'' language that states ''or, subject to specific authorization from the CFTC, a lower confidence level.'' In particular, VMAC commented that although a DCO should be required to demonstrate that the given confidence level results in an initial margin amount which is sufficient to allow the DCO to fully discharge its obligations upon a clearing member default, a DCO should not be required to collect margin substantially in excess of its obligations to clearing members in a default scenario.

The Commission is not modifying the language of § 39.13(g)(2)(iii) in a manner that would permit DCOs to set margin requirements at a lower coverage level for new and low-volume products, as recommended by NOCC, or provide for a lower confidence level subject to specific Commission authorization, as suggested by VMAC. In the notice of proposed rulemaking, the Commission noted that the 2004 CPSS–IOSCO Recommendations stated that ''[m]argin requirements for new and low-volume products might be set at a lower coverage level [than the major products cleared by a CCP] if the potential losses resulting from such products are minimal.''[110] However, the CPSS–IOSCO Consultative Report, which was issued subsequent to the Commission's proposed rules, does not contain similar language. The Commission believes that it is prudent to apply the same standard to all products.

OCC and NYPC encouraged the Commission to modify its proposal to make clear that, when swaps are commingled in either a Section 4d(a) futures account or a Section 4d(f) cleared swaps account, pursuant to § 39.15(b)(2),[111] the 99 percent test need not be separately applied to the swaps positions alone. The Commission agrees with OCC and NYPC that if swaps and futures are held in the same customer account pursuant to rules approved by the Commission or a 4d order issued by the Commission, as specified in § 39.15(b)(2), the 99 percent test would apply to the entire commingled account, and not just the swap positions, under § 39.13(g)(2)(iii)(D). Therefore, the Commission is modifying § 39.13(g)(2)(iii)(D) to add ''including any portfolio containing futures and/or options and held in a commingled account pursuant to § 39.15(b)(2) of this part,'' after ''[e]ach swap portfolio.'' The Commission is making similar modifications in § 39.13(g)(7) with respect to back testing requirements, which are discussed in section IV.D.6.g, below.

OCC also requested that the Commission clarify that, in the case of a margin system that calculates margin for all positions in an account on the basis of the net risk of those positions based upon historical price correlations rather than on a product or a pre-defined spread basis, the 99 percent confidence level would be applied only on an account-by-account basis, and not to individual products, product groups, or specified spread positions. NYPC made a similar request, stating that its historical Value at Risk (VaR)-based margin model calculates initial margin requirements at the portfolio level, rather than on a product or spread basis.

The Commission notes that, as proposed, § 39.13(g)(2)(iii)(A) would require the application of the 99 percent confidence level to ''[e]ach product (that is margined on a product basis)'' and § 39.13(g)(2)(iii)(B) would require the application of the 99 percent confidence level to ''[e]ach spread within or between products for which there is a defined spread margin rate * * *.'' The Commission's intent was that §§ 39.13(g)(2)(iii)(A) and (B) would apply to products and pre-defined spreads under margin models that calculate initial margin requirements on a product and pre-defined spread basis, respectively. Further, with respect to margin models that do not calculate margin on a product or pre-defined spread basis, the 99 percent requirement would apply with respect to each account held by a clearing member at the DCO by house origin and by each customer origin, and to each swap portfolio, by beneficial owner, pursuant to §§ 39.13(g)(2)(iii)(C) and (D), respectively.[112]

In order to clarify the Commission's intent, the Commission is adopting § 39.13(g)(2)(iii)(A) to read as follows: ''[e]ach product for which the derivatives clearing organization uses a product-based margin methodology,'' while striking ''(that is margined on a product basis).'' In addition, the Commission is adopting § 39.13(g)(2)(iii)(B) to read as follows: ''[e]ach spread within or between products for which there is a defined spread margin rate,'' while striking ''as described in paragraph (g)(4) of this section.''

LCH commented that the Commission's approach to setting margin based on products and spreads, while appropriate for futures, is not

[109] *See* CPSS–IOSCO Consultative Report, Principle 6: Margin, Key Consideration 3, at 40. In addition, on September 15, 2010, the European Commission (EC) proposed the European Market Infrastructure Regulation (EMIR), available at *http://ec.europa.eu/internal_market/financial-markets/docs/derivatives/20100915_proposal_en.pdf,* ''to ensure implementation of the G20 commitments to clear standardized derivatives [which can be accessed at *http://www.g20.org/Documents/pittsburgh_summit_leaders_statement_250909.pdf,* and that Central Counterparties (CCPs) comply with high prudential standards * * *,'' among other things, and expressed its intent to be consistent with the Dodd-Frank Act. (EMIR, at 2–3). The EMIR requires that margins ''* * * shall be sufficient to cover losses that result from at least 99 per cent of the exposures movements over an appropriate time horizon * * *.'' (EMIR, Article 39, paragraph 1, at 46).

[110] *See* 2004 CPSS–IOSCO Recommendations at 23.

[111] *See* discussion of § 39.15(b)(2), adopted herein, in section IV.F.3, below.

[112] For purposes of clarification, certain references to customer origin in §§ 39.13 and 39.19 have been replaced with references to ''each customer origin'' to clarify the distinction between customer positions in futures and options segregated pursuant to Section 4d(a) of the CEA, and customer positions in swaps segregated pursuant to Section 4d(f) of the CEA.

suitable or sufficient for swaps. LCH proposed that the key requirement for swaps should be for the DCO to ensure that it has enough margin and guarantee funds to cover its exposures, and for the DCO to prove this on an individual client and clearing member basis. The Commission did not intend to suggest that swaps should be margined pursuant to a product-based margin methodology, nor that they should be subject to defined spread margin rates. The Commission recognizes that swaps are often margined on a portfolio basis and specifically addressed swap portfolios in § 39.13(g)(2)(iii)(D). The Commission would also like to clarify that a 99 percent confidence level, as applied to swap portfolios, means that each portfolio is covered 99 percent of the time, and not that a collection of portfolios is covered 99 percent of the time on an aggregate basis.

The Commission is adopting § 39.13(g)(2)(iii) with the modifications described above.

(4) Appropriate Historic Time Period—§ 39.13(g)(2)(iv)

Proposed § 39.13(g)(2)(iv) would require each DCO to determine the appropriate historic time period of data that it would use for establishing the 99 percent confidence level based on the characteristics, including volatility patterns, as applicable, of each product, spread, account, or portfolio.

LCH recommended that the Commission define the ''historic time period'' as a minimum of one calendar year in order to provide for adequate historical observations. The Commission believes that a DCO should be permitted to exercise its discretion with respect to the appropriate time periods that should be used, based on the characteristics, including volatility patterns, as applicable, of the relevant products, spreads, accounts, or portfolios. The Commission also notes that proposed international standards do not specify a historic time period that would be appropriate in all circumstances, recognizing that either a shorter or a longer historic time period may be appropriate based on the volatility patterns of a particular product.[113] The Commission expects that DCOs would include periods of significant financial stress. Therefore, the Commission is adopting § 39.13(g)(2)(iv) as proposed.

d. Independent Validation—§ 39.13(g)(3)

Proposed § 39.13(g)(3) would require that a DCO's systems for generating initial margin requirements, including the DCO's theoretical models, must be reviewed and validated by a qualified and independent party, on a regular basis. The Commission invited comment regarding whether a qualified and independent party must be a third party or whether there may be circumstances under which an employee of a DCO could be considered to be independent.

In the notice of proposed rulemaking, the Commission explained that a validation should include a comprehensive analysis to ensure that such systems and models achieve their intended goals. The Commission also noted that, although the proposed regulation did not define the meaning of ''regular basis,'' the Commission would expect that, at a minimum, a DCO would obtain such an independent validation prior to implementation of a new margin model and when making any significant change to a model that was in use by the DCO.[114] The Commission further stated that significant changes would be those that could materially affect the nature or level of risks to which a DCO would be exposed, and that the Commission would expect a DCO to obtain an independent validation prior to any significant change that would relax risk management standards. However, the Commission noted that if a DCO needed to adopt a significant change in an expedited manner to enhance risk protections, the Commission would expect the DCO to obtain an independent validation promptly after the change was made.

CME, OCC, MGEX, and KCC all expressed the view that an employee of a DCO could be independent in appropriate circumstances. CME commented that permitting employees of a DCO to conduct the required reviews would be consistent with proposed § 39.18(j)(2), which would allow employees of a DCO to conduct the required testing of a DCO's business continuity and disaster recovery systems, provided that such employees are not the persons responsible for developing or operating the systems being tested.[115] OCC and MGEX took the position that employees of a DCO could be independent as long as they are not, or have not been, involved in designing the models, and OCC further stated that internal personnel must not otherwise be biased due to their involvement in implementation of the models.[116] However, FIA argued that margin models should be required to be validated by an independent third party with expertise in risk and the product being cleared.

The Commission recognizes that a third party could be more critical of a DCO's margin model than an employee of a DCO, even if that employee is ''qualified and independent.'' However, the Commission also believes that a third party could be less critical if, for example, it seeks to provide services to the DCO or the industry in the future.

The Commission agrees with CME, OCC, MGEX, and KCC that an employee of a DCO could be a ''qualified and independent party,'' and thus could review and validate the DCO's systems for generating initial margin requirements, under appropriate circumstances. It would probably be more costly for a DCO to use a third party for this purpose rather than an employee.

On balance, the Commission believes that it may be appropriate for a DCO to have an employee review and validate its margin systems. Therefore, the Commission is adopting § 39.13(g)(3) with the addition of a sentence stating that ''[s]uch qualified and independent parties may be independent contractors or employees of the derivatives clearing organization, but shall not be persons responsible for development or operation of the systems and models being tested.'' This is consistent with the language contained in § 39.18(j)(2), as adopted herein, as well as the

[113] *See* CPSS–IOSCO Consultative Report, Principle 6: Margin, Explanatory Note 3.6.7, at 43.

[114] The Commission also notes that the CPSS–IOSCO Consultative Report recommends that a CCP's initial margin models should be independently validated at least on a yearly basis. CPSS–IOSCO Consultative Report, Principle 6: Margin, Explanatory Note 3.6.8, at 43. The Commission is not requiring an annual validation at this time, although it may revisit this issue in the future.

[115] Section 39.18(j)(2), as proposed, and as adopted herein, states that testing shall be conducted by qualified, independent professionals. Such qualified independent professionals may be independent contractors or employees of the derivatives clearing organization, but shall not be persons responsible for development or operation of the systems or capabilities being tested.

[116] In particular, OCC noted that the Office of the Comptroller of the Currency, the Department of the Treasury, the Federal Reserve System and the Federal Deposit Insurance Corporation recently proposed revisions to their risk-based capital guidelines, which would require that, with respect to the validation of banks' internal risk models, ''[t]he review personnel [would] not necessarily have to be external to the bank in order to achieve the required independence'' but that ''[a] bank should ensure that individuals who perform the review are not biased in their assessment due to their involvement in the development, implementation, or operation of the models.'' *See* 76 FR 1890, at 1897 (Jan. 11, 2011) (Risk-Based Capital Guidelines: Market Risk).

proposed approach of other financial regulators.[117] The Commission also notes that the reference to independent contractors as well as employees in the added language will also prohibit a DCO from using a particular third party to conduct the validation if that third party was or is responsible for development or operation of the relevant systems and models.

KCC requested that the Commission clarify that the CRO or other comparable personnel with responsibility for overall risk management at the DCO would meet the requirements of a ''qualified and independent party.'' The Commission does not believe that a DCO's CRO or personnel responsible for overall risk management would categorically qualify as an ''independent party.'' This determination would need to be made on a case-by-case basis depending on whether the CRO or other similar person was or is responsible for development or operation of the systems and models being tested.

MGEX requested that the Commission clarify whether the requirement for independent validation would apply to the primary risk-based portfolio system such as SPAN,[118] or each DCO's analysis program for determining margins, noting its belief that requiring independent tests on the latter would be excessive. It is not clear what MGEX means by ''each DCO's analysis program for determining margins.'' However, § 39.13(g)(3) requires independent validation with respect to a DCO's underlying model, *e.g.,* SPAN or OCC's STANS model, as well as the methodology used to compute the inputs to any such model. On the other hand, a DCO would not be required to obtain an independent validation of a change in SPAN parameters as described by CME.[119]

OCC commented that, as described in the notice of proposed rulemaking, the ''could materially affect'' standard is deficient in two respects in that: (1) It fails to include any reference to the likelihood that a change would actually materially affect the nature or level of risk, and (2) it omits any reference to the direction of the change in level of risk. OCC contended that a more appropriate standard would be to provide that significant changes are those that ''are reasonably likely to materially change the nature or increase the level of risks to which the DCO would be exposed.''

In response to this comment, the Commission is modifying the standard to provide that significant changes are those for which there is a reasonable possibility that they would materially affect the nature or level of risks to which a DCO would be exposed. While this standard identifies the likelihood that a change would materially affect the nature or level of such risks, the Commission believes that it is more appropriate than identifying significant changes as only those that are ''reasonably likely to materially change'' the nature or level of such risks.

The Commission does not believe that significant changes should be limited to those that are likely to increase the level of risks. As described in the notice of proposed rulemaking, the Commission would expect a DCO to obtain an independent validation prior to any significant change that would relax risk management standards, but the Commission would permit a DCO to obtain an independent validation promptly after a significant change that would enhance risk protections, in appropriate circumstances. A DCO should obtain such a validation even if the change were designed to enhance risk protections, in order to ensure that the change would be effective in achieving its objective.

OCC also requested that the Commission clarify that the addition of a new product or new underlying interest would not inherently be deemed to trigger the independent evaluation requirement. The Commission believes that whether the addition of a new product or a new underlying interest would trigger the independent validation requirement would need to be determined on a case-by-case basis, depending on whether there is a reasonable possibility that such addition will materially change the nature or level of risks to which the DCO would be exposed. One example would be if the addition necessitates a significant change to the margin model as it applies to the new product or new underlying interest. Thus, the addition of a futures contract based on a new broad-based securities index where the DCO already clears futures contracts based on broad-based securities indexes might not require a significant change to the applicable margin model. However, the addition of a new category of swaps, even if the DCO already clears swaps, might require a significantly different margin model. Another example might be if a swap cleared by a DCO became subject to a clearing mandate and the risk profile changed because of changes in volume and open interest.

e. Spread and Portfolio Margins—§ 39.13(g)(4)(i)

Proposed § 39.13(g)(4)(i) would permit a DCO to allow reductions in initial margin requirements for related positions (spread margins), if the price risks with respect to such positions were significantly and reliably correlated. Under the proposed regulation, the price risks of different positions would only be considered to be reliably correlated if there were a theoretical basis for the correlation in addition to an exhibited statistical correlation. Proposed § 39.13(g)(4)(i) would include a non-exclusive list of possible theoretical bases, including the following: (A) The products on which the positions are based are complements of, or substitutes for, each other; (B) one product is a significant input into the other product(s); (C) the products share a significant common input; or (D) the prices of the products are influenced by common external factors. The Commission requested comment regarding the appropriateness of requiring a theoretical basis for the correlation between related positions before reductions in initial margin requirements would be permitted. In addition, proposed § 39.13(g)(4)(ii) would require a DCO to regularly review its spread margins and the correlations on which they are based.[120]

KCC and OCC addressed the proposed requirement that the price risks of related positions would only be considered to be reliably correlated, and thus be eligible for initial margin reductions, if there were a theoretical basis for the correlation in addition to

[117] *Id.*

[118] For a description of SPAN, see CME's Web site, at *http://www.cmegroup.com/clearing/risk-management/span-overview.html#works.*

[119] *See id.* for a description of SPAN parameters. Therefore, § 39.13(g)(1), which requires that a DCO review its margin models and parameters, on a regular basis, requires a broader review than would be met by compliance with § 39.13(g)(3).

[120] In addition to the other comments discussed herein, Alice Corporation noted that it supported the cautious approach taken by the Commission and that offsets across products with different maturities and risk profiles should be avoided where possible, and ISDA stated that spread margins should only permitted when a DCO can demonstrate a strong correlation in stressed market conditions and agrees to periodic public disclosure of its methodology and results. With respect to ISDA's comment, the Commission notes that § 39.13(g)(2)(iii), discussed in section IV.D.6.c.(3), above, requires a DCO to ensure that the actual coverage of its initial margin requirements, along with projected measures of the performance of its margin models, must meet an established confidence level of at least 99 percent, based on data from an appropriate historic time period, for, among other things, spreads within or between products for which there is a defined spread margin rate, for each account held by a clearing member at the DCO, by customer and house origin, and for each swap portfolio, by beneficial owner, and § 39.13(g)(7), discussed in section IV.D.6.g, below, imposes related back testing requirements. In addition, § 39.21(c)(3), discussed in section IV.L, below, requires a DCO to publicly disclose its margin methodology.

an exhibited statistical correlation. KCC contended that the proposed requirement would be difficult for the Commission to implement and unnecessary because DCOs have no incentive to offer margin reductions in the absence of high correlation between positions. KCC further noted that the proposal does not detail what level of observed statistical correlation is required, and the proposed requirement to articulate a theoretical basis is vague.

OCC also questioned the appropriateness of the requirement that there must be a theoretical basis for the correlation, noting that a theoretical basis for correlation is, by definition, theoretical and may not be directly observable or verifiable except through the correlation. OCC stated that it is difficult to imagine a correlation for which no theoretical basis can be constructed, and in many if not most cases, the theoretical basis for any significant correlation is obvious.

The Commission continues to believe that reductions in initial margin requirements should only be allowed if a DCO is able to articulate a reasonable theoretical explanation for an observed statistical correlation to ensure that the positions are reliably correlated. The Commission notes that it is a matter of basic statistics that correlation does not equal causation. The world is replete with examples of events or data that are highly correlated at various points in time but for which there is no theoretical relationship. If there is no theoretical relationship, a DCO has no basis to believe that a statistical relationship—no matter how strong—is stable, and a margin based on such a relationship may be insufficient to capture price variation.

Several commenters addressed the appropriateness of applying proposed § 39.13(g)(4) to portfolio-based margin systems. LCH commented that the spread margin measure which the Commission proposed is unsuited and inappropriate for swaps clearing and that the Portfolio Approach to Interest Rate Scenarios (PAIRS), the historical simulation method that LCH uses, is more suitable to non-standardized swaps. Therefore, LCH urged the Commission to amend proposed § 39.13(g)(4) to afford recognition to this technique. OCC requested that the Commission acknowledge that its STANS methodology meets the requirements of proposed § 39.13(g)(4), noting that STANS currently relies on over 20 million separate correlations. OCC stated that it would be impractical to attempt to document or even articulate the ''theoretical basis'' for all of these correlations even though it believes that they would be supportable on a theoretical level, and further believes that its systems for determining and reviewing the validity of the correlations it uses are sufficient to ensure that OCC does not allow unjustified margin offsets. NYPC requested that the Commission clarify that § 39.13(g)(4) would not be applicable to margin models that calculate initial margin requirements at the account level, including NYPC's historical VaR-based margin model.

The Commission intends § 39.13(g)(4) to apply to portfolio-based margin models as well as product-based margin models. For some products, DCOs establish defined spread margin rates, pursuant to a product-based margin methodology. Typically, this occurs where there is a bilateral correlation, *e.g.,* a March-June calendar spread or a correlation between two related products.[121] For other products, there may be multilateral correlations for which margin is calculated on a portfolio basis, pursuant to a portfolio-based margin methodology. In the latter instance, there is not a defined margin amount or margin reduction for a defined portfolio that remains the same over time. Instead, margin is recalculated each day for each individual portfolio.

Therefore, the Commission is adopting § 39.13(g)(4), with several modifications, in order to clarify that margin reductions calculated on a portfolio basis are also permissible if they meet the standards of the regulation. First, the Commission is changing the heading of the provision from ''[s]pread margins'' to ''[s]pread and portfolio margins.'' The Commission is also removing the parenthetical ''(spread margins)'' after the clause in § 39.13(g)(4)(i) that states ''[a] derivatives clearing organization may allow reductions in initial margin requirements for related positions.'' Finally, the Commission is changing the reference to ''spread margins'' in § 39.13(g)(4)(ii) to ''margin reductions.'' These changes are designed to make it clear that § 39.13(g)(4) applies to reductions in initial margin requirements for related positions, whether a DCO uses a product-based margin model or a portfolio-based margin model.

Better Markets and Mr. Greenberger commented that § 39.13(g)(4) must require that the relationship between positions be calculated using the same standards (with respect to volatility and liquidity requirements) that are applied to the calculation of initial margin for the individual positions. The Commission agrees with Better Markets and Mr. Greenberger and, as discussed above, spread and portfolio margins would also be subject to a 99 percent coverage standard.

f. Price Data—§ 39.13(g)(5)

Proposed § 39.13(g)(5) would require a DCO to have a reliable source of timely price data to measure its credit exposure accurately, and to have written procedures and sound valuation models for addressing circumstances where pricing data is not readily available or reliable.

Interactive Data Corporation expressed its belief that the concept of ''sound valuation models'' should be expanded further with additional prescriptive guidance in four key dimensions, including: (1) Leveraging greater trade transparency; (2) using multiple sources; (3) mitigating conflicts of interest; and (4) sourcing of independent price data.

The Commission does not believe that it is necessary to be more specific or prescriptive with respect to this requirement, and is adopting § 39.13(g)(5) as proposed. As the Commission noted in the notice of proposed rulemaking, the nature of the applicable valuation models would necessarily depend on the particular products and the available sources of any relevant pricing data.

g. Daily Review and Back Tests—§§ 39.13(g)(6) and (g)(7)

Proposed § 39.13(g)(6) would require a DCO to determine the adequacy of its initial margin requirements for each product, on a daily basis, with respect to those products that are margined on a product basis.

Proposed § 39.13(g)(7) would require a DCO to conduct certain back tests. The Commission has defined ''back test'' in § 39.2, adopted herein, as ''a test that compares a derivatives clearing organization's initial margin requirements with historical price changes to determine the extent of actual margin coverage.''

For purposes of proposed § 39.13(g)(7)(i) and (ii), the introductory paragraph of proposed § 39.13(g)(7) would require that, in conducting back tests, a DCO use historical price change data based on a time period that is equivalent in length to the historic time period used by the applicable margin model for establishing the minimum 99 percent confidence level or a longer time period. The applicable time period

[121] A defined spread margin rate may also apply to three related products, *e.g.,* the Chicago Board of Trade's soybean crush spread with respect to soybeans, soybean oil and soybean meal.

was separately specified for the back tests required by proposed § 39.13(g)(7)(iii), as discussed below.

Proposed § 39.13(g)(7)(i) would require a DCO, on a daily basis, to conduct back tests with respect to products that are experiencing significant market volatility. Specifically, a DCO would be required to test the adequacy of its initial margin requirements and its spread margin requirements for such products that are margined on a product basis.

Proposed § 39.13(g)(7)(ii) would require a DCO, on at least a monthly basis, to conduct back tests to test the adequacy of its initial margin requirements and spread margin requirements for each product that is margined on a product basis. The Commission requested comment regarding whether initial margin requirements for all products should be subject to back tests on a monthly basis or whether some other time period, such as quarterly, would be sufficient to meet prudent risk management standards.

Proposed § 39.13(g)(7)(iii) would require a DCO, on at least a monthly basis, to conduct back tests to test the adequacy of its initial margin requirements for each clearing member's accounts, by customer origin and house origin, and each swap portfolio, by beneficial owner, over at least the previous 30 days. In the notice of proposed rulemaking, the Commission noted that, since the composition of such accounts and swap portfolios may change on a daily basis, it was anticipated that back tests with respect to such accounts and portfolios would involve a review of the initial margin requirements for each account and portfolio as it existed on each day during the 30-day period. The Commission also requested comment regarding whether initial margin requirements for all clearing members' accounts, by origin, and swap portfolios, by beneficial owner, should be subject to back tests on a monthly basis or whether some other time period, such as quarterly (based on the previous quarter's historical data), would be sufficient to meet prudent risk management standards.

Several commenters addressed the appropriate frequency of back tests and/or the appropriate historic time period for the analysis of price change data. FIA commented that initial margin requirements should be back tested monthly. MGEX stated that it was not opposed to a monthly back testing requirement with respect to proposed § 39.13(g)(7)(iii) based on its understanding that the Commission intended that the DCO must look at its clearing member's net account and not each underlying customer account with the exception of swaps.[122]

LCH took the position that back tests should be conducted at least on a daily basis for all products cleared by a DCO. However, LCH argued that such back tests should be conducted at the portfolio level because margining techniques appropriate for swaps, such as LCH's PAIRS methodology, do not allow for the disaggregation of initial margin and spread margin requirements at a product level. LCH also commented that, for back tests to be statistically meaningful, the applicable historic time period should be a minimum of one calendar year.

KCC stated that it may be appropriate for the Commission to further define ''significant market volatility,'' for purposes of proposed § 39.13(g)(7)(i),[123] but that, more generally, any back-testing requirements should be based on a discretionary, risk-based determination by the DCO. In addition, KCC expressed its belief that the back testing period should be subject to the discretion of the DCO in light of then-current market conditions, *i.e.,* imposing a specific back-testing period may inappropriately reflect an exaggerated or understated level of market volatility.

NOCC took the position that products, customers or spread credits should reach a specified volume or risk exposure level before being required to be back tested with the proposed frequencies so long as the DCO can demonstrate that it is meeting the core principle objectives underlying proposed § 39.13(f).

NYPC requested that the Commission clarify that proposed §§ 39.13(g)(6) and (g)(7)(i)–(ii) would not be applicable to margin models that calculate initial margin requirements at the account level, including NYPC's historical VaR-based margin model. OCC also stated its belief that it would not be subject to the requirement for daily review in proposed § 39.13(g)(7)(i), as it does not margin on a product basis, but noted that it does conduct daily back testing on all accounts, *i.e.,* on a portfolio basis.

The Commission is adopting § 39.13(g)(6), eliminating the language stating ''for each product (that is margined on a product basis),'' in order to correct a potential inconsistency between the text of the rule and the notice of proposed rulemaking. In the notice of proposed rulemaking, the Commission stated that ''[d]aily review and periodic back testing are essential to enable a DCO to provide adequate coverage of the DCO's risk exposures to its clearing members.'' As proposed, § 39.13(g)(6) would only require a DCO to determine the adequacy of its initial margin requirements, on a daily basis, for products that were margined on a product basis. The adequacy of a DCO's initial margin requirements for futures and options on futures products margined on a portfolio basis, and for swap portfolios, would not have been subject to such daily review. The Commission believes that such a result is untenable, as one of the most rudimentary steps in risk management is to conduct daily review of margin coverage, *i.e.,* to determine whether any margin breaches have occurred. Moreover, the Commission believes that the change will not impose any burden because it believes that all DCOs currently conduct some form of daily review of the adequacy of their initial margin requirements, whether they use a product-based or a portfolio-based margin methodology.

The Commission is adopting § 39.13(g)(7)(i) with modifications that require a DCO to conduct back tests, on a daily basis, to test the adequacy of its initial margin requirements with respect to products or swap portfolios that are experiencing significant market volatility: (a) For that product if the DCO uses a product-based margin methodology; (b) for each spread involving that product if there is a defined spread margin rate; (c) for each account held by a clearing member at the DCO that contains a significant position[124] in that product, by house origin and by each customer origin; and (d) for each such swap portfolio, including any portfolio containing futures and/or options and held in a commingled account pursuant to § 39.15(b)(2),[125] by beneficial owner.

Similarly, the Commission is adopting § 39.13(g)(7)(ii) with modifications that

[122] MGEX correctly understands that the Commission's reference to ''each account held by a clearing member at the DCO, by origin, house and customer'' in proposed § 39.13(g)(7)(iii) was not intended to apply to individual accounts by beneficial owner, although proposed § 39.13(g)(7)(iii) would require monthly back tests with respect to initial margin requirements for each swap portfolio, by beneficial owner.

[123] The Commission believes that each DCO should determine what ''significant volatility'' means based upon the volatility patterns of each individual product or swap portfolio that it clears.

[124] The Commission has not defined a ''significant position,'' leaving that determination to the discretion of each DCO, as the size of a position that would be a ''significant position'' may vary depending on the nature of the particular product or the composition of the particular account.

[125] *See* discussion of the addition of the same language to § 39.13(g)(2)(iii)(D), in section IV.D.6.c.(3), above.

require a DCO to conduct back tests, on at least a monthly basis: (a) For each product for which the DCO uses a product-based margin methodology; (b) for each spread for which there is a defined spread margin rate; (c) for each account held by a clearing member at the DCO, by house origin and by each customer origin; and (d) for each swap portfolio, including any portfolio containing futures and/or options and held in a commingled account pursuant to § 39.15(b)(2),[126] by beneficial owner. As adopted, § 39.13(g)(7) no longer contains a paragraph (iii) as paragraph (ii) now describes all monthly back testing requirements.

As originally proposed, § 39.13(g)(7) would only require daily back testing for products that were experiencing significant market volatility if the DCO used a product-based margin methodology, and for spreads involving that product if there was a defined spread margin rate. It would not require daily back testing for each account, by customer origin and house origin, that contained a significant position in that product, whether the DCO used a product-based or a portfolio-based margin methodology, or for each swap portfolio that was experiencing significant market volatility. As with respect to § 39.13(g)(6), there was a potential inconsistency in the treatment of different positions. There is no reasonable basis to require daily back tests solely with respect to products that are experiencing significant market volatility for which the DCO uses a product-based margin methodology and spreads involving such products if there is a defined spread margin rate, and not to require daily back tests with respect to accounts, by customer origin and house origin, which contain significant positions in those products simply because the DCO uses a portfolio-based margin methodology. Similarly, there is no justification for requiring daily back tests with respect to products that are experiencing significant market volatility and not requiring daily back tests with respect to swap portfolios that are experiencing significant market volatility. A DCO should be required to conduct daily back tests when the instruments that it clears are subject to significant market volatility, whether the DCO bases its initial margin requirements on a product-based or a portfolio-based margin methodology, and whether those instruments are futures, options on futures, or swaps.

Although OCC stated that it currently conducts daily back tests on all accounts on a portfolio basis, and LCH expressed its view that back tests should be conducted on a daily basis for all products and swap portfolios cleared by a DCO, the Commission has determined to permit a DCO to conduct back tests on at least a monthly basis when significant market volatility is not present. FIA and MGEX supported monthly back testing. Apart from KCC's contention that back testing should be subject to the discretion of the DCO, and NOCC's suggestion that DCOs should be able to obtain an exemption from the proposed frequencies for products, customers and spread credits that have not reached a specified volume or risk exposure level,[127] none of the commenters indicated that back tests should be conducted less frequently than monthly. Moreover, a particular DCO would be able to exercise its discretion to conduct back tests on a more frequent basis than that required by the Commission's regulation.

The Commission has not proposed and is not adopting LCH's suggestion that the applicable historic time period for the price change data used for back testing should be a minimum of one calendar year. However, the Commission is removing the proposed language from the introductory paragraph of § 39.13(g)(7) regarding the time periods for historical price changes that must be used in the required back tests and is revising the introductory paragraph to require a DCO to use an appropriate time period but not less than the previous 30 days for all of the back tests required by §§ 39.13(g)(7)(i) and (ii).

h. Customer Margin

(1) Gross Margin for Customer Accounts —§ 39.13(g)(8)(i)

Proposed § 39.13(g)(8)(i) would require a DCO to collect initial margin on a gross basis for each clearing member's customer account equal to the sum of the initial margin amounts that would be required by the DCO for each individual customer within that account if each individual customer were a clearing member and would prohibit a DCO from netting positions of different customers against one another. The proposed regulation would permit a DCO to collect initial margin for its clearing members' house accounts on a net basis.

Better Markets and LCH (with a suggested exception described below) supported proposed § 39.13(g)(8)(i).[128] CME, KCC, OCC, ICE, NYPC, FIA, and the Commodity Markets Council (CMC) argued against the adoption of proposed § 39.13(g)(8)(i).

KCC and ICE pointed out that DCOs that perform net margining have not had any clearing member defaults or customer losses, including during the 2008 financial crisis.

Various commenters opposed the proposal based on the potential extent and costs of operational and technology changes that would need to be made by clearing members and DCOs: (1) To convert net margining systems to gross margining systems, and (2) to permit clearing members to provide individual customer position information to DCOs, and DCOs to receive individual customer position information and calculate the margin required for each individual customer account (CME, KCC, ICE, NYPC, and CMC).

OCC stated that the only means by which it could calculate margin requirements on a customer-by-customer basis within a clearing member's omnibus futures customers' account would be to create subaccounts for each customer. CME, NYPC, KCC, and FIA commented that DCOs do not currently receive position-level information for each individual customer of their clearing members. CME and FIA expressed concern about the costs associated with clearing members having to provide individual customer position information, and CME indicated that DCOs would incur costs in processing the information received from clearing members in order to calculate margin requirements on individual customer accounts on a daily basis. NYPC also stated that the adoption of proposed § 39.13(g)(8)(i) would require it to make significant changes to its systems.[129]

KCC stated that managing gross customer margin at the DCO level

[126] *Id.*

[127] The Commission does not believe that it is appropriate to adopt a regulation establishing an exemption process with respect to back testing requirements based on volume or risk exposure or otherwise.

[128] LCH also expressed its belief that a DCO should also collect margin from all affiliated legal entities within a house account on a gross basis unless there is legal certainty of the DCO's right to offset risks across the affiliates in the event of the default of the group or one or more of its affiliated legal entities. The Commission has not proposed and is not adopting such a requirement. However, although § 39.13(g)(8)(i) permits a DCO to collect initial margin for its clearing members' house accounts on a net basis, it does not require it to do so, and a DCO could determine to collect house margin in the manner suggested by LCH.

[129] *See* further discussion of these costs in section VII, below. NYPC also commented that given the necessary technology builds, it would need more than three years to come into compliance with proposed §§ 39.13(g)(8)(i) and 39.13(h)(2). The Commission believes that the modifications to § 39.13(g)(8)(i), discussed in this section, would minimize any technology changes that would be necessary in order to comply with § 39.13(g)(8)(i).

would require a DCO to assume the role of a back-office account management service, requiring continuous updates from each clearing member regarding customer positions. KCC further noted that DCOs would be required to adjust the timing deadlines for margin payments, DCOs' ability to track margin requirements closely with market movements would be decreased, and DCOs may face difficulty in relaying variation margin payment information to their settlement banks quickly.

ICE noted that converting to a gross margining system would be a major operational change for clearing firms and DCOs that use net margining. However, ICE also stated that most DCOs currently use gross margining, including ICE Trust (now ICE Clear Credit LLC) and ICE Clear U.S., although ICE Clear Europe uses net margining. In particular, ICE stated that gross margining would require reengineering of firms' end-of-day processing. According to ICE, changes would need to be made to such DCOs' margining technology, data submission/input mechanism and margin reporting specifications, and clearing firms or their service providers would need to implement software updates. ICE noted that changes to position reporting, reconciliation and margining methodology are challenging technology changes for clearing members and their third-party software vendors and typically take at least six to nine months to complete. However, ICE indicated that an implementation period of at least 12 months would allow DCOs that currently use net margining, and their clearing members, to adequately test and implement the systems necessary for gross margining.

CME, KCC, and CMC all argued that requiring clearing members to report gross customer positions by beneficial owner to DCOs is not necessary in order to accomplish reasonable and adequate ''modified'' gross margining. Specifically, CME and KCC urged the Commission to permit a version of gross margining of customer accounts that would only require clearing members to report gross customer positions to DCOs (not by beneficial owner) and that would allow clearing firms to submit positions as spreadable for those accounts that have recognized calendar spreads or spreads between correlated products. However, CME further represented that ''[t]his version of gross margining will sometimes lead to less than aggregate gross margins as a result of optimal spreading that occasionally occurs between accounts. Nevertheless, it approximates aggregate gross margins without imposing significant costs on the industry.''

In light of the various concerns raised by CME, KCC, ICE, NYPC, and CMC regarding the operational and technology changes that would be needed and related costs of requiring a DCO to obtain individual customer position information from its clearing members and to use such information to calculate the margin requirements for each individual customer, the Commission is modifying § 39.13(g)(8)(i). In particular, the Commission is adding a provision, which states that ''[f]or purposes of calculating the gross initial margin requirement for each clearing member's customer account(s), to the extent not inconsistent with other Commission regulations, a derivatives clearing organization may require its clearing members to report the gross positions of each individual customer to the derivatives clearing organization, or it may permit each clearing member to report the sum of the gross positions of its customers to the derivatives clearing organization.'' [130]

Thus, the Commission is providing a DCO with the discretion to either calculate customer gross margin requirements based on individual customer position information that it obtains from its clearing members or based on the sum of the gross positions of all of a clearing member's customers that the clearing member provides to the DCO, without forwarding individual customer position information to the DCO. In either case, the customer gross margin requirement determined by a DCO must equal ''the sum of the initial margin amounts that would be required by the derivatives clearing organization for each individual customer within that account if each individual customer were a clearing member.'' The customer gross margin collected by a DCO may not be subject to ''spreading that occasionally occurs between accounts'' that may lead to ''less than aggregate gross margins,'' as described by CME.

CME commented that proposed § 39.13(g)(8)(i) was unclear regarding how DCOs would be expected to treat customer omnibus accounts of non-clearing FCMs and foreign brokers for which the clearing firm carrying the account generally does not know the identities of individual customers within the omnibus accounts. Under current industry practice, omnibus accounts report gross positions to their clearing members and clearing members collect margins on a gross basis for positions held in omnibus accounts.[131] The Commission does not intend to alter this current practice by adopting § 39.13(g)(8)(i). Therefore, the Commission is adding a provision, which states that ''[f]or purposes of this paragraph, a derivatives clearing organization may rely, and may permit its clearing members to rely, upon the sum of the gross positions reported to the clearing members by each domestic or foreign omnibus account that they carry, without obtaining information identifying the positions of each individual customer underlying such omnibus accounts.''

The Commission believes that giving a DCO the option of permitting its clearing members to provide the sum of their customers' gross positions to a DCO, without the need to provide individual customer position information to the DCO, allows DCOs to provide their clearing members with a much less costly alternative to requiring clearing members to provide individual customer position information to the DCO, and requiring the DCO to calculate the gross margin requirement for each customer of each clearing member.

The Commission recognizes that § 39.13(g)(8)(i), even as modified, will require DCOs and their clearing members to incur certain costs. However, the Commission continues to believe, as stated in the notice of proposed rulemaking, that gross margining of customer accounts will: (a) More appropriately address the risks posed to a DCO by its clearing members' customers than net margining; (b) will increase the financial resources available to a DCO in the event of a

[130] The Commission is including the phrase ''to the extent not inconsistent with other Commission regulations'' because, in a separate rulemaking, the Commission has proposed regulations that would require FCM clearing members to provide daily information identifying the positions of individual cleared swaps customers to the relevant DCO and that would require such DCOs to calculate the amount of collateral required for each cleared swaps customer of such clearing members on a daily basis. If these regulations are adopted, they will supersede the provisions of § 39.13(g)(8)(i) to the extent that they are inconsistent with such provisions, with respect to cleared swaps. *See* 76 FR 33818 (June 9, 2011) (Protection of Cleared Swaps Customer Contracts and Collateral; Conforming Amendments to the Commodity Broker Bankruptcy Provisions).

The Commission is also making a conforming amendment by inserting ''and may not permit its clearing members to'' in the sentence that now reads as follows (added text in italics): ''A derivatives clearing organization may not, *and may not permit its clearing members to,* net positions of different customers against one another.''.

[131] *See, e.g.,* Margins Handbook, *http://www.nfa.futures.org/NFA-compliance/publication-library/margins-handbook.pdf,* at 34; CME Rule 930.J.; ICE Futures U.S. Inc. Rule 5.04; and CBOE Futures Exchange, LLC Rule 516.

customer default;[132] and (c) with respect to cleared swaps, will support the requirement in § 39.13(g)(2)(iii) that a DCO must margin each swap portfolio at a minimum 99 percent confidence level.

The Commission believes that the clearing of swaps will increase the risk that DCOs face. Gross margining will maximize the amount of money DCOs hold. Because a DCO may not have access to customer initial margin collected by and held at an FCM if the DCO collects initial margin on a net basis, if the FCM defaults, the Commission believes that holding gross initial margin at a DCO is the safest mechanism by which DCOs can protect themselves from increased risk. If a DCO is unable to obtain customer margin in the event of default, there is significant risk of contagion. Consequently, if more margin is held at the DCO, the potential risk that the failure of one clearing member will propagate throughout the financial system to other clearing members and other entities is decreased.[133]

CME and KCC commented that proposed § 39.13(g)(8)(i) would require clearing members to ''pass-through'' the margin deposits that they receive from their customers to the DCO, thus requiring clearing members to apply to their customers the DCO's standards for acceptable collateral as well as the DCO's concentration limits with respect to collateral types. CME indicated that this would add pressure with respect to the available collateral pool, and argued that the Commission should not impose such additional and costly constraints on market participants in the absence of significant and demonstrable benefits. The Commission notes that, although as a business matter clearing members may determine to ''pass-through'' the margin deposits that they receive from their customers to the relevant DCO, proposed § 39.13(g)(8)(i) does not require that a clearing member only accept from its customers those types of margin assets that are acceptable for the clearing member to deposit with the DCO.

KCC requested that the Commission clarify whether the requirement to collect gross customer margin imposes an obligation on the DCO to determine the defaulting customer accounts in a customer default situation (which would be costly and burdensome) and stated that having the total customer gross margin available to the DCO in the event of a customer default is a prudent risk management technique. The Commission notes that Commission rules currently permit a DCO to commingle the initial margin with respect to all of a clearing member's customers in a single customer origin account at the DCO and to apply the entire customer origin account to cover losses with respect to a customer default, whether the DCO collects initial margin on a net basis or on a gross basis. The Commission does not intend § 39.13(g)(8)(i), by its terms, to alter this approach.

In a separate rulemaking, however, the Commission has proposed to require DCOs to legally segregate customer funds and assets margining swap positions that are held by a clearing member at the DCO in a commingled cleared swaps customer account.[134] In addition, European Union legislation, although not yet finalized, would require central counterparties to provide individual customer segregation in certain circumstances.[135] As previously noted, gross margining will be instrumental if individual customer segregation is adopted. OCC requested that the Commission restrict the applicability of proposed § 39.13(g)(8)(i) to futures customer accounts at both the clearing level and the FCM level, to make it clear that it does not intend to impose these margin requirements on accounts that are restricted to securities products (with respect to an entity that is both a DCO and an SEC-regulated clearing agency). OCC is correct that § 39.13(g)(8)(i) applies only to customer and house accounts, cleared by a DCO, which contain futures, options on futures, and/or swap positions that are subject to the jurisdiction of the Commission. It does not apply to accounts that only contain securities products that are subject to the jurisdiction of the SEC.

LCH requested that the Commission allow DCOs operating from non-U.S. jurisdictions to offer ''net omnibus'' account structures for associated entities operating under the same group or umbrella structure to customers outside the U.S. The treatment of customers is outside the scope of this rulemaking. However, to the extent a DCO is clearing products subject to the Commission's jurisdiction, this rule would apply at the clearing level regardless of the location of the DCO or the customer.

The Commission is adopting § 39.13(g)(8)(i) with the modifications described above. The Commission recognizes that DCOs that currently use net margining, or that use a ''modified'' version of gross margining, as well as their clearing members and their service providers, will need time to make the necessary operational and technology enhancements that will facilitate gross margining, as described herein. Therefore, the Commission is adopting an effective date that is 12 months after the publication of final § 39.13(g)(8)(i) in the **Federal Register**.

(2) End-of-Day Position Reporting—§ 39.19(c)(1)(iv)

Proposed § 39.19(c)(1)(iv) would require each DCO to report to the Commission, on a daily basis, the end-of-day positions for each clearing member, by customer origin and house origin; and for customer origin, separately, the gross positions of each beneficial owner.[136]

As noted by KCC and CMC, the Commission currently receives certain information about the ownership and control of reportable positions through its large trader reporting program, under Parts 15 through 21 of the Commission's

[132] ICE commented that the Commission's rationale for gross margining, *i.e.,* that it would increase the financial resources available to a DCO in the event of a customer default, is based upon the mutualization of customer risk to protect the DCO. ICE stated its belief that this rationale conflicts with the reasoning behind the proposal that DCOs individually segregate cleared swaps customer funds to protect such customers from fellow customer risk. The Commission notes, however, that gross margining is not only consistent with, but will be instrumental in achieving, complete legal segregation for cleared swaps accounts. *See* 76 FR 33818 (June 9, 2011) (Protection of Cleared Swaps Customer Contracts and Collateral; Conforming Amendments to the Commodity Broker Bankruptcy Provisions).

[133] As pointed out in the CPSS–IOSCO Consultative Report, under certain circumstances gross margining may also increase the portability of customer positions in an FCM insolvency. That is, a gross margining requirement would increase the likelihood that there will be sufficient collateral on deposit in support of a customer position to enable the DCO to transfer it to a solvent FCM. *See* CPSS–IOSCO Consultative Report, Principle 14: Segregation and Portability, Explanatory Notes 3.14.6 and 3.14.8, at 67–68.

[134] *See* 76 FR 33818 (June 9, 2011) (Protection of Cleared Swaps Customer Contracts and Collateral; Conforming Amendments to the Commodity Broker Bankruptcy Provisions).

[135] *See Financial markets: OTC derivatives, central counterparties and trade repositories (amend. Directive 98/26/EC),* COD/2010/0250 (June 7, 2011), available at *http://www.europarl.europa.eu/oeil/FindByProcnum.do?lang=en&procnum=COD/2010/0250.*

[136] As originally proposed, § 39.19(c)(1)(iv) would require each DCO to report to the Commission, on a daily basis, the end-of-day positions for each clearing member, by customer origin and house origin. *See* 75 FR 78185 (Dec. 15, 2010) (Information Management). The preamble in the notice of proposed rulemaking (76 FR 3698 (Jan. 20, 2011) (Risk Management)), described a proposed amendment to proposed § 39.19(c)(1)(iv) to add ''and for customer origin, separately, the gross positions of each beneficial owner.'' However, this clause was inadvertently omitted from the language of the regulation in the notice of proposed rulemaking. Therefore, the Commission subsequently issued a correction at 76 FR 16588 (Mar. 24, 2011) (Risk Management Requirements for Derivatives Clearing Organizations; Correction).

regulations. Commission staff reviews the effectiveness of this program on a regular basis, and will continue to adopt enhancements where appropriate.[137] The large trader reporting system, however, does not currently apply to many swaps that are, or may be, cleared. The Commission may need information about large swap positions to assess the risk profile of a DCO or a clearing FCM.

CME, KCC, MGEX, FIA, and CMC commented that clearing members do not generally have information identifying the underlying customers in customer omnibus accounts carried on behalf of non-clearing member FCMs, foreign brokers, hedge funds or commodity pools, and therefore clearing members cannot reasonably be expected to report such information to DCOs, and DCOs cannot reasonably be expected to report such information to the Commission. The Commission notes that a DCO may be able to obtain such information under its own rules. For example, CME Rule 960 requires a clearing member to immediately disclose the identities and positions of the beneficial owners of any omnibus account to CME upon its request.

MGEX expressed its concern that the significant costs resulting from compliance with a requirement for the routine daily reporting of all gross customer positions by beneficial owner could lead to further consolidation in the industry at the FCM, clearing member, and DCO levels.

The Commission is not adopting the proposed requirement in § 39.19(c)(1)(iv) that a DCO provide daily reports to the Commission of the gross positions of each beneficial owner within each clearing member's customer origin account. However, the Commission is adopting § 39.19(c)(5)(iii),[138] which requires a DCO to provide this information to the Commission upon the Commission's request, in the format and manner, and within the time, specified by the Commission.

For example, the Commission could request that a DCO provide information about customer positions by beneficial owner, on a case-by-case basis, with respect to a particular clearing member, customer, or product. Moreover, the Commission could request that such information be provided for a particular day, month, or until further notice by the Commission. In recent years, the Commission has worked cooperatively with several DCOs to obtain information about cleared swap positions. The Commission notes that any potential costs should be substantially reduced by the modified requirement that a DCO provide information to the Commission identifying the positions of beneficial owners of customer accounts only upon Commission request and not on a daily basis.

(3) Customer Initial Margin Requirements—§ 39.13(g)(8)(ii)

Proposed § 39.13(g)(8)(ii) would require a DCO to require its clearing members to collect customer initial margin [139] from their customers for non-hedge positions at a level that is greater than 100 percent of the DCO's initial margin requirements [140] with respect to each product and swap portfolio. Proposed § 39.13(g)(8)(ii) would permit a DCO to have reasonable discretion in determining the percentage by which customer initial margins would have to exceed the DCO's initial margin requirements with respect to particular products or swap portfolios. However, under the proposed regulation, the Commission could review such percentage levels and require different percentage levels if the Commission deemed the levels insufficient to protect the financial integrity of the clearing members or the DCO in accordance with Core Principle D.[141]

OCC stated its view that exchanges, which have historically set customer level margin requirements, should continue to do so, rather than DCOs, noting that clearing organizations would ordinarily have no means to enforce customer level margin requirements.

KCC stated that it generally supports the concept that clearing members should collect customer initial margin at a level above that of DCO initial margin, but requested that the Commission clarify the circumstances in which it may deem the ratio of customer initial margin to DCO initial margin insufficient to protect the DCO. Although the FHLBanks opposed the proposal, they recommended that if the Commission were to adopt it, the Commission should provide additional guidance and/or establish criteria for DCOs with respect to setting the required amount of excess margin. MGEX noted that although it currently maintains a 130 percent requirement, this is a decision that should be left to each DCO and its clearing members to determine. Because the circumstances for each DCO or the nature of its clearing members vary, it would be difficult to provide the general clarification or criteria that KCC and the FHLBanks are seeking, because such a determination would need to be made on a case-by-case basis.

MFA argued that a requirement that a DCO must require its clearing members to collect customer initial margin at a level that is greater than the DCO's initial margin requirements would be inappropriate because DCOs do not have information about individual customers' creditworthiness and such a requirement would impair market liquidity by limiting the trading activity of certain market participants, resulting in greater market concentration. Citadel and the FHLBanks made similar comments.

ICE stated that FCMs are best able to determine how much to charge above the initial margin requirement because they have complete visibility into their customers' positions, and the Commission should not place this requirement on a DCO, but should address this with FCMs through another set of rules. FIA opposed the proposed rule stating that the amount of excess margin, if any, that an FCM may require from its customers is a credit decision that should be made by each FCM based on its analysis of the creditworthiness of the particular customer, including the nature of the customer's trading activity and its record of meeting margin calls.

Currently DCMs require their FCM members to impose customer initial margin requirements that are a specified percentage higher than the DCO's initial margin requirements, generally in the neighborhood of 125 percent to 140 percent, as determined by the DCM. DCMs generally permit FCM members to impose customer initial margin requirements for hedge positions that are equal to the applicable maintenance margin requirements (which are generally the same as the applicable clearing initial margin requirements). This rule simply shifts the responsibility for establishing customer initial margin requirements from DCMs to DCOs.

DCOs have greater expertise in risk management and a direct financial stake in whether their clearing members' customers, and consequently their clearing members, are able to meet their margin obligations. Moreover, it is anticipated that some DCOs will clear fungible swaps that may be listed on multiple SEFs. SEFs may or may not

[137] For example, the Commission recently adopted final rules on Large Trader Reporting for Physical Commodity Swaps at 76 FR 43851 (July 22, 2011).

[138] *See* further discussion of § 39.19, adopted herein, in section IV.J, below.

[139] The term ''customer initial margin'' is now defined in § 1.3(kkk), adopted herein.

[140] A DCO's initial margin requirements are also referred to herein as ''clearing initial margin'' requirements. ''Clearing initial margin'' is defined as ''initial margin posted by a clearing member with a [DCO]'' in § 1.3(jjj), adopted herein.

[141] Section 5b(c)(2)(D)(iii) of the CEA, 7 U.S.C. 7a–1(c)(2)(D)(iii).

impose customer initial margin requirements on their members for cleared swaps. Requirements set by DCOs may be less susceptible to pressure to being lowered for competitive reasons. Finally, DCOs will be the only self-regulatory organizations that will be in a position to set customer initial margin requirements for swaps that are executed bilaterally, and voluntarily cleared. Moreover, DCOs will have the opportunity to review whether their clearing members are collecting customer initial margin, as required by the DCO, during their reviews of the risk management policies, procedures, and practices of their clearing members, pursuant to § 39.13(h)(5).[142]

Section 39.13(g)(8)(ii) permits a DCO to exercise its discretion in determining the appropriate percentage by which the customer initial margin for a particular product or swap portfolio should exceed the clearing initial margin,[143] as DCMs do today with respect to futures and options. This percentage should be based on the nature and volatility patterns of the particular product or swap portfolio, and the DCO's related evaluation of the potential risks posed by customers in general to their clearing members and, in turn, the potential risks posed by such clearing members in general to the DCO, rather than the creditworthiness of particular customers. Consequently, a DCO will retain the flexibility to establish an appropriate percentage for customer initial margin that applies to each product that it clears, which will apply to all of its clearing FCMs and all of their customers. However, as is also the case today, such clearing FCMs would remain free to exercise their discretion to determine whether they will collect additional margin over and above that amount either from all of their customers, or from particular customers based on such customers' risk profiles.[144]

The Commission continues to believe that requiring a DCO to require its clearing members to collect customer initial margin in a percentage higher than 100 percent of the clearing initial margin, for non-hedge positions, provides a valuable cushion of readily available customer margin. Citadel stated that the market's extensive experience in a range of cleared markets demonstrates preparedness for the regular exchange of margin between clearing members and their customers for cleared OTC derivatives, even where margin calls occur more frequently than once daily, and that frequent exchange of margin is also current market practice for uncleared trades. However, the maintenance of such a cushion would enable clearing members to deposit additional margin with a DCO on behalf of their customers, as necessitated by adverse market movements, without the need for the clearing members to make such frequent margin calls to their customers. In addition, many clearing members choose to deposit excess margin with their DCOs to provide their own cushion, which may in some instances obviate the need to transfer funds to the DCO on a daily basis in order to meet variation margin requirements.

ISDA, FIA, and the FHLBanks commented that if the Commission were to adopt proposed § 39.13(g)(8)(ii), it should clarify the meaning of ''non-hedge positions.'' The FHLBanks also stated that the Commission should provide guidance regarding how the determination as to whether a position is a hedge or a non-hedge position would be made, whether by the DCO, the clearing member, or the customer, and expressed the belief that a clearing member's customers should be responsible for determining and certifying, to their clearing members or DCOs, whether their swap positions are ''hedge'' or ''non-hedge'' positions.

Several commenters have argued that there is no basis for distinguishing between hedge positions and non-hedge positions in determining whether such positions should be subject to customer initial margin requirements in excess of clearing initial margin requirements.[145] LCH stated that it does not believe that a DCO or a clearing member should distinguish in any way between a customer's hedge and non-hedge positions because: (1) if the two parts of the hedge are carried by the same clearing member within the same DCO, such hedges would in any event implicitly be recognized by the DCO's risk calculations and the provision would be unnecessary; and (2) if one or the other leg of the hedge is uncleared, or is carried by a different clearing member, or by the same or another clearing member at another DCO, no recognition of the offsetting hedge should be allowed either by the DCO(s) or by the clearing member(s), as neither party would have the economic benefit of the hedged transaction. The Commission notes that the categorization of a position as a hedge for purposes of this regulation does not affect the margin collected by the DCO; it only affects the additional increment that the clearing member collects from its customer.

Freddie Mac indicated that the Commission should consider eliminating the proposed requirement for increased customer initial margin for ''non-hedge positions,'' noting that customers with non-hedge positions are not inherently riskier or more likely to miss margin calls than customers with ''hedge positions.''

As previously noted, DCMs have historically drawn a distinction between hedge positions and non-hedge positions in setting customer initial margin requirements, and the Commission believes that it is reasonable to assume that hedgers may present less risk than speculators, in that losses on their derivatives positions should be offset by gains on the positions whose risks they are hedging. The relevant consideration is the relative risks posed by hedgers versus non-hedgers, rather than the

[142] *See* discussion of § 39.13(h)(5), adopted herein, in section IV.D.7.e, below.

[143] OCC commented that its STANS margin system calculates margin based on all positions in an account and not on a position-by-position basis; therefore it would not be able to furnish clearing members with a number representing the initial margin on a particular position without conducting subaccounting for each customer. OCC also noted that since STANS requirements are data-driven on a month-to-month, and even a day-to-day, basis they can vary in ways that cannot be readily predicted. The Commission is adopting § 39.13(g)(8)(i) herein, which requires a DCO to collect initial margin on a gross basis for its clearing members' customer accounts. Therefore, a clearing member (or the DCO) will be required to determine the initial margin that must be posted with the DCO with respect to each customer's positions. Even if that amount changes from day to day as a result of the application of a portfolio-based margin system, a DCO could require that its clearing members collect customer initial margin in an amount that is a given percentage in excess of 100 percent of the daily clearing initial margin requirement with respect to each customer.

[144] *See, e.g.,* CME Rule 8G930.E (''IRS Clearing members may call for additional performance bond at their discretion.'') (available at *http://www.cmegroup.com/rulebook/CME/I/8G/*) and International Derivatives Clearinghouse, LLC Rule 614(g) (''A Clearing Member may call, at any time, for [margin] above and beyond the minimums required by the Clearinghouse.'') (available at *http://www.idch.com/pdfs/idch/20100901rulebook.pdf*).

[145] MFA stated that it would be highly burdensome to distinguish between hedge and non-hedge positions for purposes of the application of differentiated margining, especially in a portfolio margining context. As noted in n. 143, above, a DCO that uses a portfolio-based margin model could require that its clearing members collect customer initial margin in an amount that is a given percentage in excess of 100 percent of the daily clearing initial margin requirement with respect to each customer. If all of a particular customer's positions were hedge positions, the DCO could permit the clearing member to collect customer initial margin in an amount that equals the amount of clearing initial margin with respect to that customer's positions. It is only in those circumstances where a hedger may also engage in speculative trading that it may be difficult to distinguish between positions for purposes of the application of differentiated margining in a portfolio margining context.

creditworthiness of particular customers.

Freddie Mac recommended that, if the Commission does not eliminate the distinction between hedge and non-hedge positions, the Commission should clarify that, for purposes of § 39.13(g)(8)(ii): (1) ''hedge positions'' would include all swaps that hedge or mitigate any form of a customer's business risks; (2) such swaps may qualify as ''hedge positions'' regardless of whether they qualify as ''bona fide hedging transactions'' under the CEA and § 1.3(z) or qualify as hedges under applicable accounting standards; and (3) such swaps may qualify as ''hedge positions'' regardless of the nature of the entity that holds such positions (*e.g.,* whether it is a financial entity or a non-financial entity). Freddie Mac indicated that such treatment would be consistent with Commission proposals for defining hedging for purposes of other Dodd-Frank Act rules, including the definition of a ''major-swap participant'' [146] and rules relating to the availability of the end-user exception to mandatory clearing.[147]

The Commission intends to interpret ''hedge positions,'' for purposes of § 39.13(g)(8)(ii), as referring to those that meet either the definition set forth in § 1.3(z), or the definition set forth in § 1.3(ttt), when, and in the form in which, it is ultimately adopted.[148] The Commission also believes that, as is currently the practice, it would be the customer's responsibility to identify its positions as hedge positions to its clearing FCM.

The Commission is adopting § 39.13(g)(8)(ii) as proposed.

(4) Withdrawal of Customer Initial Margin—§ 39.13(g)(8)(iii)

Proposed § 39.13(g)(8)(iii) would require a DCO to require its clearing members to prohibit their customers from withdrawing funds from their accounts with such clearing members unless the net liquidating value plus the margin deposits remaining in the customer's account after the withdrawal would be sufficient to meet the customer initial margin requirements with respect to the products or swap portfolios in the customer's account, which were cleared by the DCO.

LCH agreed with the underlying requirement, but stated that it should be imposed in rules that directly apply to clearing members rather than in rules applicable to DCOs. KCC also supported the concept but noted that DCM rules already require customers to maintain minimum margin levels and that these restrictions are generally tested by a clearing member's risk department and the clearing member's self-regulatory organization during examinations. KCC further noted that DCOs do not have full access to information regarding each customer's financial condition. MGEX took the position that the Commission [149] or a clearing member's designated self-regulatory organization (DSRO) should monitor compliance with such a requirement rather than the DCO, indicating that it would not be economically feasible for the DCO to do so.

As noted in the notice of proposed rulemaking, the requirement stated in § 39.13(g)(8)(iii) is consistent with the definition of ''Margin Funds Available for Disbursement'' in the Margins Handbook prepared by the JAC.[150] Therefore, DSROs currently review FCMs to determine whether they are appropriately prohibiting their customers from withdrawing funds from their futures accounts unless the net liquidating value plus the margin deposits remaining in such customers' accounts after the withdrawal would be sufficient to meet the customer initial margin requirements with respect to such accounts. However, it is unclear to what extent this requirement would apply to cleared swaps accounts when such swaps are executed on a DCM which participates in the JAC. Moreover, clearing members which only clear swaps that are executed on a SEF will not be subject to the requirements set forth in the Margins Handbook or subject to review by a DSRO.

The Commission anticipates that, at a minimum, DCOs will be able to review whether their clearing members are ensuring that customers do not make withdrawals from their accounts unless the specified conditions are met, when they conduct reviews of their clearing members' risk management policies, procedures, and practices pursuant to § 39.13(h)(5).[151]

The Commission is adopting § 39.13(g)(8)(iii) as proposed.

i. Time Deadlines—§ 39.13(g)(9)

Proposed § 39.13(g)(9) would require a DCO to establish and enforce time deadlines for initial and variation margin payments.

LCH submitted a comment letter indicating that it agrees with the proposal, but stated that it should apply only to a DCO's clearing members since a DCO has no direct relationship with clients of its clearing members. Consistent with its original intent, the Commission is adopting § 39.13(g)(9) with a modification to make it clear that it only applies to time deadlines for initial and variation margin payments to a DCO by its clearing members.

7. Other Risk Control Mechanisms

a. Risk Limits—§ 39.13(h)(1)(i)

Proposed § 39.13(h)(1)(i) would require a DCO to impose risk limits on each clearing member, by customer origin and house origin, in order to prevent a clearing member from carrying positions where the risk exposure of those positions exceeds a threshold set by the DCO relative to the clearing member's financial resources, the DCO's financial resources, or both. The Commission believes that an FCM engages in excess risk-taking if it, or its customers, take on positions that require financial resources that exceed this threshold. The DCO would have reasonable discretion in determining: (1) the method of computing risk exposure; (2) the applicable threshold(s); and (3) the applicable financial resources, provided however, that the ratio of exposure to capital would have to remain the same across all capital levels. For example, if a DCO set limits under which margin could not exceed 200 percent of capital, the limit for a $100 million clearing member would be $200 million and the limit for a $200 million clearing member would be $400 million. The Commission could review any of these determinations and require different methods, thresholds, or financial resources, as appropriate.

Proposed § 39.13(h)(1)(ii) would allow a DCO to permit a clearing member to exceed the threshold(s) applied pursuant to paragraph (h)(1)(i) provided that the DCO required the clearing member to post additional initial margin that the DCO deemed sufficient to appropriately eliminate excessive risk

[146] *See* 75 FR 80174 (Dec. 21, 2010) (Further Definition of ''Swap Dealer,'' ''Security-Based Swap Dealer,'' ''Major Swap Participant,'' ''Major Security-Based Swap Participant'' and ''Eligible Contract Participant'').

[147] *See* 75 FR 80747 (Dec. 23, 2010) (End-User Exception to Mandatory Clearing).

[148] The Commission has proposed a definition of ''hedging or mitigating commercial risk,'' to be codified at § 1.3(ttt), for the purposes of the definition of ''Major Swap Participant,'' 75 FR at 80214–80215 (Further Definition of ''Swap Dealer,'' ''Security-Based Swap Dealer,'' ''Major Swap Participant,'' ''Major Security-Based Swap Participant'' and ''Eligible Contract Participant'').

[149] The Commission does not believe that it would be practical for the Commission to review each clearing member of each DCO to determine whether the clearing member is prohibiting its customers from making impermissible withdrawals from their accounts.

[150] *See http://www.nfa.futures.org/NFA-compliance/publication-library/margins-handbook.pdf,* at 45.

[151] *See* discussion of § 39.13(h)(5), adopted herein, in section IV.D.7.e, below.

exposure at the clearing member. The Commission could review the amount of additional initial margin and require a different amount, as appropriate.

J.P. Morgan and Alice Corporation supported the proposal to require DCOs to establish risk-based position limits for their clearing members. J.P. Morgan indicated that in setting such position limits applicable to any one clearing member, a DCO should consider its overall exposure to clearing members in the aggregate. The Commission agrees that this would be prudent and expects that DCOs would take into consideration the aggregate exposure in establishing individual levels. J.P. Morgan further took the position that DCOs should monitor exposures against these limits on a real time basis. As discussed in section IV.D.4, above, § 39.13(e)(2) requires a DCO to monitor its credit exposure to each clearing member periodically during each business day.

FIA stated that it generally agrees with the proposed requirement that ''the ratio of exposure to capital must remain the same across all capital levels'' but indicated that the rule should make clear that, in computing the ratio of exposure to capital, a clearing member's capital should be calculated net of all risk exposures and potential assessment obligations at other clearing organizations of which it is a clearing member. The Commission agrees that it would be appropriate for a DCO to consider a clearing member's exposures to other clearing organizations, to the extent that it is able to obtain such information, in determining a clearing member's applicable financial resources for the purpose of setting appropriate risk limits.

CME argued that a requirement that DCOs impose risk limits for every clearing member would be overly prescriptive and unnecessary, provided that a DCO collects adequate margin, its stress-test results regarding the clearing member's exposures are acceptable, and it employs concentration margining (whereby the DCO would set a level of risk at which it would begin to charge higher margins based on indicative stress-test levels). In other words, CME suggested that risk limits may be unnecessary if a DCO sets a level of risk at which it would begin to charge higher margins based on stress test results with respect to a clearing member. However, § 39.13(h)(1)(ii) would allow a DCO to permit a clearing member to exceed an established risk limit provided that the DCO required the clearing member to post additional margin. Although CME's proposed approach is worded slightly differently, the effect would be the same as that of § 39.13(h)(1)(ii), *i.e.,* a clearing member could only exceed a defined risk level if it posted additional margin.

MGEX indicated that the proposed rule requiring DCOs to impose risk limits on each clearing member might not be practical, adding additional cost with little benefit, noting that DCOs currently address credit and default risk via margins and security deposits on a daily basis and conduct risk reviews. Rather, according to MGEX, a DCO should be looking for risk signs and focusing on those that are most relevant. The Commission believes that the establishment of risk limits for clearing members would impose little additional cost on DCOs since DCOs are already required to monitor their clearing members' capital levels and their own financial resources, as well as the trading activity of their clearing members. On the other hand, the Commission believes that the establishment of such risk limits would add significant risk management benefits to the benefits already conferred by margins, security deposits, and reviews of clearing members' risk management policies and procedures.

The Commission is adopting § 39.13(h)(i) as proposed, except for a technical revision that replaces the phrase ''by customer orgin and house origin'' with ''by house origin and by each customer origin,'' which conforms the language with other provisions of part 39. OCC requested that the Commission clarify that proposed § 39.13(h)(i) would not apply to securities accounts of broker-dealers that are not FCMs and do no futures business. The Commission does not intend for § 39.13(h)(i) to apply to such accounts. The Commission is also adopting § 39.13(h)(ii) as proposed.

b. Large Trader Reports—§ 39.13(h)(2)

Proposed § 39.13(h)(2) would require a DCO to obtain from its clearing members, copies of all reports that such clearing members are required to file with the Commission pursuant to part 17 of the Commission's regulations, *i.e.,* large trader reports. Large trader reports are necessary for stress testing to ensure that FCMs and their customers have not taken on too much risk. A DCO would be required to obtain such reports directly from the relevant reporting market if the reporting market exclusively listed self-cleared contracts, and would therefore be required to file such reports on behalf of clearing members pursuant to § 17.00(i).

Proposed § 39.13(h)(2) would further require a DCO to review the large trader reports that it receives from its clearing members, or reporting markets, as applicable, on a daily basis to ascertain the risk of the overall portfolio of each large trader. A DCO would be required to review positions for each large trader, across all clearing members carrying an account for the large trader. A DCO would also be required to take additional actions with respect to such clearing members in order to address any risks posed by a large trader, when appropriate. Such actions would include those actions specified in proposed § 39.13(h)(6).[152]

FIA supported the proposal to require DCOs to obtain copies of all large trader reports that are filed with the Commission. MGEX commented that the Commission should provide large trader reports to each DCO rather than imposing a requirement that would require clearing members to make redundant filings. KCC argued that the proposed requirement that DCOs obtain large trader reports from clearing members is duplicative because a DCO receives large trader information from the exchange.[153]

MGEX recommended that the Commission perform the review of large trader reports itself or permit a clearing member's DSRO to perform such review instead of DCOs.

NYPC recommended that the Commission not adopt proposed § 39.13(h)(2) because the Commission has expended considerable resources to modify its own internal programs and processes in order to glean potentially relevant financial and risk management information from the large trader data that it receives from clearing members and DCMs, and even if DCOs had comparable financial and human resources that they could deploy for such a purpose, the information that they would obtain would frequently be fragmented and inconclusive, given that—unlike the Commission—no single DCO will ever have access to information relating to the futures, option and swap positions that are cleared by other DCOs or to uncleared swaps. NYPC further argued that given the necessary technology builds, it would need more than three years to come into compliance with proposed §§ 39.13(g)(8)(i) and 39.13(h)(2).

OCC indicated that it should be the role of a clearing member's DSRO to require that an FCM submit sufficient information to permit the DSRO to identify customer accounts that could potentially cause a clearing member to

[152] See discussion of § 39.13(h)(6), adopted herein, in section IV.D.7.f, below.

[153] KCC further noted that, in its case, the exchange in turn receives the relevant large trader reports from the Commission.

default, and that if DCOs were required to perform all tasks required by the proposed rules alone, they would be required to build new surveillance systems and significantly increase their surveillance staff.

In response to suggestions that the Commission should conduct the required review of large trader reports, the Commission notes that it does review large trader reports for financial, market, and risk surveillance purposes. However, the Commission believes that DCOs should also have an obligation to review large trader reports for those large traders whose trades they clear, for their own risk surveillance purposes, even though as noted by NYPC, they may not have access to information relating to positions cleared by other DCOs or to uncleared swaps. Moreover, § 39.13(h)(2) requires a DCO to review such large trader reports with a view toward taking any necessary additional actions with respect to such large traders' clearing members in order to address risks posed by such large traders to the DCO.

In addition, it would not be feasible for a clearing member's DSRO to review large trader reports. DSRO designations apply to FCMs that are members of multiple DCMs. Therefore, clearing members that only trade for their own accounts do not have a DSRO. Clearing members that solely clear SEF-executed trades also will not have DSROs. Moreover, risk management ultimately is the responsibility of each DCO. A DSRO would not be in a position to analyze the daily risk of the overall portfolio of each large trader at a particular DCO, nor to take any additional actions to address such risks at a particular DCO.

KCC stated that it is the clearing member's obligation to determine the financial fitness of large trader customers, in that clearing members have better, more direct information regarding the credit quality of the customer and the exposures of the customer under positions the customer may hold outside the DCO. KCC stated its belief that imposing a duplicative requirement on DCOs would achieve little risk management benefit at a high cost. The Commission agrees that clearing members must determine the financial capacity of their customers and they may have information which a particular DCO may not have regarding positions that they may clear for their customers on other DCOs.[154] However, this does not obviate the need for each relevant DCO to ascertain the risks that the large trader poses to that DCO based on the information which the DCO is able to obtain through large trader reports.

ISDA noted that while the expansion of oversight required by proposed §§ 39.13(h)(2) and § 39.13(h)(3)[155] may provide benefits, many DCOs do not currently have the systems or infrastructure to monitor or assess non-clearing member risk.[156]

In response to ISDA's comment, as well as other comments that in order to comply with § 39.13(h)(2), DCOs would need technology builds (NYPC), new surveillance systems and additional surveillance staff (OCC), and that there would be a high cost (KCC), the Commission notes that some DCOs already receive and review large trader reports for risk surveillance purposes on a daily basis. In fact, KCC stated in its comment letter that ''KCC would also remind the Commission that DCO compliance staff review the reportable position files that they receive on a daily basis to ascertain large trader risks that [clearing members] face.'' In addition, at least five years ago, Commission staff began recommending that DCOs do so, if they had not already been doing so, in DCO reviews that Commission staff has conducted to determine whether such DCOs were in compliance with relevant core principles under the CEA.

The Commission is modifying § 39.13(h)(2) to require a DCO to obtain large trader reports either from its clearing members or from a DCM or a SEF for which it clears, which are required to be filed with the Commission by, or on behalf of, such clearing members. However, the Commission does not believe that it is practical or appropriate for a DCO to rely on the Commission to provide large trader reports to the DCO.

The Commission is adopting § 39.13(h)(2) with the modifications described above.

c. Stress Tests—§ 39.13(h)(3)

Proposed § 39.13(h)(3) would require a DCO to conduct certain daily and weekly stress tests. The Commission has defined a ''stress test'' in § 39.2, adopted herein, as ''a test that compares the impact of potential extreme price moves, changes in option volatility, and/or changes in other inputs that affect the value of a position, to the financial resources of a derivatives clearing organization, clearing member, or large trader, to determine the adequacy of such financial resources.''[157]

Proposed § 39.13(h)(3)(i) would require a DCO to conduct daily stress tests with respect to each large trader who poses significant risk to a clearing member or the DCO in the event of default, including positions at all clearing members carrying accounts for the large trader. The DCO would have reasonable discretion in determining which traders to test and the methodology used to conduct the stress tests. However, the Commission could review the selection of accounts and the methodology and require changes, as appropriate.

Proposed § 39.13(h)(3)(ii) would require a DCO to conduct stress tests at least once a week with respect to each account held by a clearing member at the DCO, by customer origin and house origin, and each swap portfolio, by beneficial owner, under extreme but plausible market conditions. The DCO would have reasonable discretion in determining the methodology used to conduct the stress tests. However, the Commission could review the methodology and require any appropriate changes. The Commission requested comment regarding whether all clearing member accounts, by origin, and all swap portfolios should be subject to such stress tests on a weekly basis or whether some other time period, such as monthly, would be sufficient to meet prudent risk management standards.

Several commenters addressed daily stress testing. FIA recommended that all of the proposed stress tests should be conducted on a daily basis. LCH stated its belief that stress testing requirements should not be extended to cover large traders that are clients of clearing

[154] The Commission is modifying the language in proposed § 39.13(h)(2), which would have referred to ''positions at all clearing members carrying accounts for each such large trader'' by revising it to read as follows: ''futures, options, and swaps cleared by the [DCO] which are held by all clearing members carrying accounts for each such large trader.'' This will make it clear that the Commission is not attempting to require a DCO to review a large trader's positions that were cleared by another DCO, as it would not typically have access to information about such positions. The technical change from ''positions'' to ''futures, options, and swaps'' conforms the language with other provisions of part 39.

[155] See discussion of § 39.13(h)(3), adopted herein, in section IV.D.7.c, below.

[156] ISDA also stated that further clarity regarding how the Commission intends to apply the large trader definition to swaps is needed. The Commission notes that it has begun this process by adopting final rules for Large Trader Reporting for Physical Commodity Swaps, in a new part 20, at 76 FR 43851 (July 22, 2011). Since these large trader reporting rules were adopted subsequent to the Commission's proposal of § 39.13(h)(2), the Commission is modifying § 39.13(h)(2) to refer to reports required to be filed with the Commission by, or on behalf of, clearing members pursuant to parts 17 and 20 of this chapter.

[157] *See* further discussion of § 39.2 in section III.B, above.

members but that the proposed weekly stress tests should be conducted daily. OCC stated that it did not see a sufficient benefit to justify the increased DCO resources that would be required to undertake daily stress tests on each large trader,[158] noting that the costs would be passed on to clearing members and their customers. MGEX indicated that a requirement for daily stress testing of large traders seems excessive since the data may be dated even after one day and may not be more relevant than doing an average stress test over a weekly or monthly period. MGEX also expressed the view that the value of stress testing large traders is diminished if they have accounts with different clearing members.

As stated above, proposed § 39.13(h)(3)(i) would require a DCO to include positions at all clearing members carrying accounts for the large trader in the required stress tests. The Commission is making the same change to § 39.13(h)(3)(i) that it is making to § 39.13(h)(2) by replacing the reference to ''positions at all clearing members carrying accounts for each such large trader'' with ''futures, options, and swaps cleared by the derivatives clearing organization, which are held by all clearing members carrying accounts for each such large trader.''

KCC stated its belief that the frequency of stress testing should be left to the discretion of the DCO and should be risk-based in light of prevailing market conditions. NOCC indicated that products, customers or spread credits should reach a specified volume or risk exposure level before being required to be stress tested with the proposed frequencies so long as the DCO can demonstrate that it is meeting the core principle objectives underlying proposed § 39.13(f).[159]

The Commission believes that it is appropriate to specify the minimum frequency of stress tests as set forth in § 39.13(h)(3). As noted above, several commenters supported certain daily stress testing requirements. With the exception of KCC's and NOCC's comments, no commenters suggested that stress tests should be conducted less frequently than weekly.

LCH recommended that the Commission prescribe that the stress scenarios used by the DCO in its testing should be adapted for current market conditions such that price or market shifts should not be translated literally, but rather proportionally. The Commission believes that § 39.13(h)(3) should explicitly permit DCOs to exercise reasonable discretion in determining the methodology to be used in conducting the required stress tests. The Commission would recognize the approach suggested by LCH to be an appropriate element of a DCO's stress testing methodology, but does not believe that it is necessary to adopt such a prescriptive requirement.

OCC indicated that for regulatory reasons associated with OCC's status as a dual SEC/Commission registrant, OCC's system does not consolidate all positions into a single ''customer origin'' and ''house origin'' for each clearing member, but rather permits multiple account types, including a firm (proprietary) account that incorporates both securities and futures positions, a securities customers' account, a regular futures customer segregated funds account subject to Section 4d of the CEA, separate segregated funds accounts for cross-margining arrangements as provided in various Commission orders approving such arrangements, and others. OCC further stated that because of the mathematical properties of the risk measures that it uses, its unconsolidated account level stress testing is more rigorous than if such stress testing were conducted at the level of each origin as a whole and argued that it makes sense to aggregate positions for stress testing in the same manner as they would be aggregated or netted for liquidation purposes. Therefore, OCC requested that the Commission clarify that this method of stress testing at the unconsolidated account level based on appropriate historical data would meet the requirements of proposed § 39.13(h)(3)(ii). The Commission agrees with OCC that it would be appropriate for a DCO to conduct the stress tests required by § 39.13(h)(3)(ii) with respect to separate house origin and customer origin accounts such as the house account that incorporates both securities and futures positions identified by OCC,[160] separate customer accounts subject to Sections 4d(a) and 4d(f) of the CEA, respectively, or cross-margining accounts.

OCC also argued that while the requirement of conducting stress tests under ''extreme but plausible'' market conditions may be appropriate for determining the adequacy of a clearing organization's resources for withstanding the default of its largest participant, it would be inappropriate for measuring the adequacy of an individual clearing member's margin deposits. In particular, OCC expressed its belief that stress testing the positions, including margin assets, in clearing member accounts on a daily basis to ensure a positive liquidating value at more than a 99 percent confidence level is adequate and appropriate and that DCOs should have the ability to cover for more extreme market conditions through the use of additional financial resources, including clearing fund deposits.

A stress test, as defined by the Commission, is not designed to measure the adequacy of a clearing member's margin deposits or to ensure that margin assets in clearing members' accounts meet a 99 percent confidence level. Rather, these are the functions of the daily review and back testing required by §§ 39.13(g)(6) and (g)(7), adopted herein.[161] Stress tests address the adequacy of the applicable financial resources to cover losses resulting from potential extreme price moves, changes in option volatility, and/or changes in other inputs that affect the value of a position. In other words, if margin deposits would be sufficient to cover losses 99 percent of the time, stress tests would determine whether other financial resources would be available and sufficient to cover losses the remaining 1 percent of the time. Such other financial resources could include the capital of the clearing member or the DCO, or a DCO's guaranty fund.

The Commission is adopting § 39.13(h)(3) with the modifications described above.

d. Portfolio Compression—§ 39.13(h)(4)

Proposed § 39.13(h)(4)(i) would require a DCO to offer multilateral portfolio compression exercises, on a regular basis, for its clearing members that clear swaps, to the extent that such

[158] As noted above, proposed § 39.13(h)(3)(i) would not require daily stress tests on each large trader, but only with respect to those large traders who pose significant risk to a clearing member or the DCO in the event of default.

[159] NOCC made a similar comment with respect to the frequency of back testing, which is discussed in section IV.D.6.g,, above. The Commission does not believe that it is appropriate to adopt a regulation establishing an exemption process with respect to stress testing requirements based on volume or risk exposure or otherwise.

[160] A DCO that is dually-registered as a securities clearing agency would not be subject to the stress testing requirements of § 39.13(h)(3)(ii) with respect to an account that only contains securities positions. However, such a DCO would be subject to the requirements of § 39.13(h)(3)(ii) with respect to any relevant account that contains positions in instruments regulated by the Commission, even if that account also contains securities positions. In this regard, the Commission is revising § 39.13(h)(3)(ii) to refer to ''each clearing member account, by house origin and by each customer origin, and each swap portfolio, including any portfolio containing futures and/or options and held in a commingled account pursuant to § 39.15(b)(2) of this part, * * *''

[161] See discussion of §§ 39.13(g)(6) and (g)(7) in section IV.D.6.g, above.

exercises are appropriate for those swaps that it clears. The Commission requested comment regarding whether such exercises should be offered monthly, quarterly, or on another frequency. In addition, the Commission requested comment regarding whether the frequency of such exercises should vary for different categories of swaps.

Proposed § 39.13(h)(4)(ii) would mandate that a DCO require its clearing members to participate in all multilateral portfolio compression exercises offered by the DCO, to the extent that any swap in the applicable portfolio was eligible for inclusion in the exercise, unless including the swap would be reasonably likely to significantly increase the risk exposure of the clearing member.

Proposed § 39.13(h)(4)(iii) would permit a DCO to allow clearing members participating in such exercises to set risk tolerance limits for their portfolios, provided that the clearing members could not set such risk tolerances at an unreasonable level or use such risk tolerances to evade the requirements of proposed § 39.13(h)(4).

CME commended the Commission for recognizing the importance of portfolio compression exercises as an important risk management tool. CME further suggested that the Commission refrain from prescribing the frequency of such exercises, stating its belief that each DCO is best positioned to determine the optimal frequency of portfolio compression exercises for the swaps that it clears, based on the unique characteristics of the particular products and markets. On the other hand, the FHLBanks stated that the Commission should specify how often portfolio compression exercises are to take place. The Commission agrees with CME and is retaining the language that simply refers to ''a regular basis.''

ISDA requested that the Commission clarify the meaning of ''multilateral portfolio compression'' in these proposals. ISDA stated that if the Commission is referring to position netting, then it agrees that a DCO must offer such exercises. However, ISDA indicated that if it refers to the provision of multilateral portfolio compression services such as those currently provided by entities such as TriOptima, DCOs should not be required to build such duplicative services, which would be likely to delay their roll-out of comprehensive clearing services. The Commission agrees that a DCO should not be required to incur the expense of building its own multilateral compression services. Therefore, the Commission is modifying the requirement to make it clear that although a DCO may develop its own portfolio compression services if it chooses, it is only required to make such exercises available to its clearing members if applicable portfolio compression services have been developed by a third party for those swaps that it clears.[162]

The FHLBanks urged the Commission to further define ''reasonably likely to increase risk exposure to a clearing member'' to include the risk exposures of a clearing member's customers, and also stated their view that a clearing member's customers must have the ability to ''opt-out'' of portfolio compression requirements to the extent that those customers' swap positions need to be retained for hedge accounting and other business purposes. In particular, the FHLBanks expressed their concern that the proposal's ambiguities would cause the internal risk management strategies of entities that are not swap dealers or major swap participants to be adversely affected, noting that portfolio compression could potentially jeopardize hedge accounting treatment for customers' swap transactions and disrupt anticipated cash flows.

LCH stated that it strongly supports the use of compression services and believes that they should be encouraged by the Commission to the greatest extent possible, but it would not necessarily always be appropriate for a DCO to require its clearing members to participate in all such exercises. First, LCH noted that a DCO's clearing members may not always be subject to the Commission's supervision and may not be required to engage in such compression activities; therefore imposing such a requirement on the DCO may discourage such firms from becoming clearing members of that DCO and thereby have the perverse effect of discouraging such firms from clearing. Second, LCH stated that a clearing member may have legitimate reasons for not participating in such compression exercises at all times, or for not submitting all eligible swaps to such exercises. Therefore, LCH took the position that the use of compression services should be encouraged but should not be compulsory, and suggested that the Commission eliminate § 39.13 (h)(4)(ii) in its entirety. For the reasons stated by LCH and the FHLBanks, the Commission is modifying § 39.13(h)(4) to provide that participation in compression exercises by clearing members and their customers would be voluntary.

e. Clearing Members' Risk Management Policies and Procedures—§ 39.13(h)(5)

Proposed § 39.13(h)(5) would impose several requirements upon DCOs relating to their clearing members' risk management policies and procedures. Specifically, a DCO would be required to adopt rules that: (a) require its clearing members to maintain current written risk management policies and procedures (proposed § 39.13(h)(5)(i)(A)); (b) ensure that the DCO has the authority to request and obtain information and documents from its clearing members regarding their risk management policies, procedures, and practices, including, but not limited to, information and documents relating to the liquidity of their financial resources and their settlement procedures (proposed § 39.13(h)(5)(i)(B)); and (c) require its clearing members to make information and documents regarding their risk management policies, procedures, and practices available to the Commission upon the Commission's request (proposed § 39.13(h)(5)(i)(C)).

In addition, proposed § 39.13(h)(5)(ii) would require a DCO to review the risk management policies, procedures, and practices of each of its clearing members on a periodic basis and document such reviews. The Commission invited comment regarding whether it should require that a DCO must conduct risk reviews of its clearing members on an annual basis or within some other time frame. The Commission also requested comment regarding whether it should require that such reviews be conducted in a particular manner, *e.g.,* whether there must be an on-site visit or whether any particular testing should be required. In addition, the Commission invited comment regarding whether, and to what extent, a DCO should be permitted to vary the method and depth of such reviews based upon the nature, risk profiles, or other regulatory supervision of particular clearing members.

ISDA and FIA supported the proposed requirement in § 39.13(h)(5)(i)(A) that clearing members must have written risk management policies and procedures. FIA also recommended that clearing members should be required to have adequate staff and systems to monitor customer risk on a real-time or near-real time basis and to routinely test their risk management procedures under theoretical stress scenarios.

NGX stated that the requirement that clearing members have and follow risk management policies is a sensible requirement in the context of the

[162] This also addresses the FHLBanks' comment that the Commission should specify what types of swaps are to be included in portfolio compression exercises.

typical, intermediated clearinghouse.However, NGX argued that such requirements should not apply to a non-intermediated DCO such as NGX, where clearing participants are commercial end users, trading and clearing for their own accounts, and none of the clearing participants are exposed to the default risk of any other clearing participant or to that of fellow customers of a clearing participant.

The Commission believes that it is appropriate for a DCO to require all of its clearing members to maintain written risk management policies and procedures, regardless of whether such clearing members have customer business or are exclusively self-clearing. As noted above, the Commission believes that written policies are a crucial component of any risk management framework. Moreover, § 39.13(h)(5)(i)(A) does not specify the nature or extent of the required written risk management policies and procedures, which could vary as appropriate to a particular type of clearing member, subject to the requirements of any other applicable Commission regulations.[163]

The Commission has not proposed and is not adopting the additional requirements suggested by FIA, described above, as part of this rulemaking. However, the Commission has proposed additional requirements with respect to clearing members' risk management policies and procedures in a separate rulemaking applicable directly to clearing members.[164]

With respect to the proposed requirement in § 39.13(h)(5)(i)(C) that a DCO must have rules requiring its clearing members to make information regarding their risk management policies, procedures, and practices available to the Commission, MGEX stated that the Commission should seek access to a clearing member's risk management policies and processes directly and a DCO should not act as an unnecessary conduit between the Commission and clearing members. The Commission notes that even if it were to propose a regulation to impose such a requirement directly on clearing members in the future, it does not preclude the Commission from requiring DCOs to impose this requirement on their clearing members at this time.[165]

LCH stated that it concurs with the provisions of proposed § 39.13(h)(5) but suggested that the Commission limit the requirements under proposed paragraph (h)(5)(C) so that they would be applicable only to those clearing members that are subject to the Commission's oversight and not to all clearing members of a DCO regardless of the jurisdiction in which they operate. The Commission notes that risk management practices of clearing members of registered DCOs, to the extent that such clearing members are clearing products subject to the Commission's oversight, are of importance to the Commission in its capacity as the regulator of the DCO. For purposes of risk management oversight, there is no basis for differentiating among clearing members because of their registration status or domicile. Although the Commission does not directly supervise non-registrants, the Commission has previously adopted rules that apply to clearing members, whether or not they are Commission registrants, *e.g.,* §§ 1.35(b) and (c) (recordkeeping requirements), and Part 17 of the Commission's regulations (reporting requirements). Section 39.13(h)(5)(C) is consistent with the Commission's approach with respect to such other rules, and is an appropriate component of the regulatory framework for DCO risk management.

With regard to the proposed requirement in § 39.13(h)(5)(ii) that a DCO must review the risk management policies, procedures, and practices of each of its clearing members on a periodic basis, FIA stated that all clearing members should be subject to on-site audits at least annually. NGX suggested that if the Commission requires non-intermediated DCOs to require their members to have written risk management policies, the Commission should provide guidance that a non-intermediated DCO would not be required to conduct on-site audits of clearing participants and that the DCO would meet its obligations to review the policies of such clearing participants if it does so only on a for-cause basis.

The Commission is adopting § 39.13(h)(5)(ii) as proposed, without prescribing the specific frequency, depth, or methodology of such reviews, and without specifying when an on-site audit may or may not be appropriate. The Commission believes that such a review is important to ensure that each clearing member's risk management framework is sufficient and properly implemented. The Commission also believes that a DCO should be permitted to exercise reasonable discretion with respect to each of these matters, based upon the nature, risk profiles, or other regulatory supervision of particular clearing members. The requirement that such reviews must be conducted on a ''periodic basis'' means that reviews must be conducted routinely and, therefore, the requirement would not permit a DCO to only conduct such reviews on a for-cause basis.

A number of commenters noted that many clearing members are clearing members of multiple DCOs and thus could be subject to multiple duplicative risk reviews. CME, OCC, MGEX, ICE, and NYPC indicated that this would be burdensome for such clearing members. For example, MGEX noted ''the burden a clearing member may be faced with due to duplication of efforts and associated costs.'' KCC indicated that such duplicative reviews would achieve little with great expenditure of resources.

OCC and NYPC also expressed their concerns about the costs to DCOs. In particular, OCC noted that requiring DCOs to conduct such reviews would impose a very high cost on a DCO that is not integrated with a DCM. NYPC noted its concern that the Commission may be underestimating the immensity of conducting such reviews in that a clearing member's risk management plan will not address solely the risks associated with clearing membership, but will be integrated and cover the broad spectrum of risks, including market, credit, liquidity, capital, and operational risk, that are associated with the entirety of the clearing member's securities, banking and futures business, much of which may have nothing to do with business through the DCO.

In order to address NYPC's specific concern, the Commission is modifying § 39.13(h)(5)(i)(A) to add the qualifier ''which address the risks that such clearing members may pose to the derivatives clearing organization'' after ''risk management policies and procedures'' and is adding the same qualifier in § 39.13(h)(5)(ii) after ''risk

[163] For example, in a separate rulemaking, proposed § 23.600 would set forth detailed requirements for the risk management programs of swap dealers and major swap participants, and would require such entities to maintain written procedures and policies describing their Risk Management Programs. *See* 75 FR 71397 (Nov. 23, 2010) (Regulations Establishing and Governing the Duties of Swap Dealers and Major Swap Participants). Such swap dealers and major swap participants may or may not be clearing members.

[164] *See* 76 FR 45724 (Aug. 1, 2011) (Clearing Member Risk Management). In that rulemaking, the Commission has proposed to require FCMs, swap dealers, and major swap participants, each of which are clearing members, to adopt certain specified risk management procedures, including written procedures to comply with the proposed requirements.

[165] In another context, *e.g.,* a DCM has adopted a rule that requires the operator of a DCM-approved delivery facility to '' * * * make such reports, keep such records and permit such facility visitation as the Exchange, the Commodity Futures Trading Commission or any other applicable government agency may require * * * .'' *See* CBOT Rule 703.A.

management policies, procedures, and practices of each of its clearing members.''

To reduce the potential burden of duplicative risk reviews of clearing members that are clearing members of multiple DCOs, CME and NYPC urged the Commission to give each DCO reasonable discretion regarding the frequency, scope, or manner in which it conducts risk reviews of its clearing members, taking into account various factors including other regulatory supervision, or review by a governmental entity or self-regulatory organization, of particular firms. Other commenters variously suggested that risk reviews should be conducted by the Commission (OCC and MGEX), by the clearing member's DSRO or a similar DCO industry group (KCC, OCC, ICE, and MGEX), or by NFA (OCC).

The Commission notes that the current DSRO system is not a viable option for reviewing clearing members' risk management policies, procedures and practices. Because DSROs are only responsible for conducting examinations of DCM-member FCMs' compliance with financial requirements, clearing members that only engage in house trading do not have a DSRO, nor will clearing members that solely clear SEF-executed trades. Moreover, such examinations do not address all of the risk issues which would concern a particular DCO. Furthermore, even if the current DSRO system were expanded to include DCOs, or a similar industry group composed of DCOs were formed, it would be impractical to allocate the responsibility to one DCO to analyze the risk management policies, procedures and practices of a common clearing member, on behalf of all relevant DCOs, when each DCO may impose different risk management requirements on its clearing members and each DCO may have differing margin methodologies that call for different risk management responses from clearing members.

The Commission does not believe that it should assume the sole oversight of the risk management policies, procedures, and practices of clearing members of DCOs. The Commission conducts risk surveillance with respect to both DCOs and clearing members; however, this cannot replace a DCO's obligation to ensure that its clearing members are appropriately managing the risks that such clearing members pose to that particular DCO. Similarly, it does not appear that NFA would be an efficient alternative. The Commission recognizes that certain DCMs have entered into regulatory services agreements with NFA, and that NFA has thereby assumed certain audit responsibilities with respect to FCMs that are members of those DCMs. However, a DCO remains in the best position to review the risk management policies, procedures, and practices of its clearing members in the context of their obligations to that particular DCO.

The Commission is adopting § 39.13(h)(5) with the modifications described above.

f. Additional Authority—§ 39.13(h)(6)

Proposed § 39.13(h)(6) would require a DCO to take additional actions with respect to particular clearing members, when appropriate, based on the application of objective and prudent risk management standards. Such actions could include, but would not be limited to: (i) Imposing enhanced capital requirements; (ii) imposing enhanced margin requirements; (iii) imposing position limits; (iv) prohibiting an increase in positions; (v) requiring a reduction of positions; (vi) liquidating or transferring positions; and (vii) suspending or revoking clearing membership.

KCC stated that it generally supports the concept that DCOs should impose heightened risk management requirements on clearing members as their risk profiles change and requested that the Commission clarify whether each of the potential heightened risk management requirements enumerated in proposed § 39.13(h)(6)(i)–(vii) must be explicitly delineated in DCO rules or in the DCO's clearing membership agreement. The Commission believes that a DCO must have the authority and ability to take appropriate additional actions with respect to particular clearing members, as described in § 39.13(h)(6), but how the DCO asserts such authority, whether by rule or contractual agreement, should be left to the discretion of the DCO.

J.P. Morgan expressed the view that higher margin multipliers should be adopted for members who present a higher risk profile as a result of excessive concentration of risk cleared, reduced creditworthiness, or other factors affecting a particular member, and that such margin multipliers should be documented in risk management policies applicable to all members.

J.P. Morgan's concern that margin multipliers should be applied to clearing members with a higher risk profile, is addressed in § 39.13(h)(1), adopted herein and discussed in section IV.D.7.a, above, which requires a DCO to impose risk limits on each clearing member.

The Commission is adopting § 39.13(h)(6) as proposed.

E. Core Principle E—Settlement Procedures—§ 39.14

Core Principle E,[166] as amended by the Dodd-Frank Act, requires a DCO to: (1) Complete money settlements on a timely basis, but not less frequently than once each business day; (2) employ money settlement arrangements to eliminate or strictly limit its exposure to settlement bank risks (including credit and liquidity risks from the use of banks to effect money settlements); (3) ensure that money settlements are final when effected; (4) maintain an accurate record of the flow of funds associated with money settlements; (5) possess the ability to comply with the terms and conditions of any permitted netting or offset arrangement with another clearing organization; (6) establish rules that clearly state each obligation of the DCO with respect to physical deliveries; and (7) ensure that it identifies and manages each risk arising from any of its obligations with respect to physical deliveries. The Commission proposed § 39.14 to establish requirements that a DCO would have to meet in order to comply with Core Principle E.[167]

1. Definitions—§ 39.14(a)

''Settlement'' was defined in proposed § 39.14(a)(1) to include: (i) Payment and receipt of variation margin for futures, options, and swap positions; (ii) payment and receipt of option premiums; (iii) deposit and withdrawal of initial margin for futures, options, and swap positions; (iv) all payments due in final settlement of futures, options, and swap positions on the final settlement date with respect to such positions; and (v) all other cash flows collected from or paid to each clearing member, including but not limited to, payments related to swaps such as coupon amounts. ''Settlement bank'' was defined in proposed § 39.14(a)(2) as ''a bank that maintains an account either for the [DCO] or for any of its clearing members, which is used for the purpose of transferring funds and receiving transfers of funds in connection with settlements with the [DCO].''

ISDA and FIA commented that posting of variation margin on swaps should not be viewed as ''settling'' the present value of the trade and noted that price alignment interest would still be paid on variation margin. ISDA stated that, similarly, initial margin is not ''paid'' by a clearing member to a DCO

[166] Section 5b(c)(2)(E) of the CEA, 7 U.S.C. 7a–1(c)(2)(E) (Core Principle E).

[167] Without addressing any specific aspect of proposed § 39.14, LCH commented that it agrees with the Commission's proposals for settlement procedures.

but is often posted with a security interest granted by the clearing member. FIA also commented that the deposit and withdrawal of initial margin is not properly defined as a settlement.

NGX stated that, with the exception of a relatively small power contract, its clearing model does not require daily variation margin payments and collections from its clearing participants; rather, it holds collateral (initial margin) in an account at a depository bank rather than in a settlement account, and additional collateral may be called for as required. Therefore, NGX stated that it would be clearer when applied to the NGX model, to use the term ''payment and receipt'' rather than the term ''deposit'' when referring to initial margin.

The Commission proposed a broad definition of ''settlement'' in § 39.14(a)(1) to encompass all cash flows between clearing members and a DCO. The Commission recognizes that accounts that are used for the payment and receipt of variation margin are frequently called settlement accounts, while accounts that are used for the deposit and withdrawal of initial margin may be called deposit accounts, or custody accounts, if the initial margin deposited therein is in the form of securities. The definition of ''settlement bank'' in § 39.14(a)(2) was intended to encompass any bank that a DCO uses for settlements, as defined in § 39.14(a)(1), whether the relevant accounts are called settlement accounts, deposit accounts, or custody accounts. In order to avoid confusion, the Commission is modifying § 39.14(a)(2) to define a settlement bank simply as ''a bank that maintains an account either for the [DCO] or for any of its clearing members, which is used for the purpose of any settlement described in paragraph (a)(1) above.'' The Commission is adopting § 39.14(a)(1) as proposed, except for a non-substantive change, which replaces each reference to ''futures, options, and swap positions'' with ''futures, options, and swaps.''

2. Daily Settlements—§ 39.14(b)

Proposed § 39.14(b) would require a DCO to effect a settlement with each clearing member at least once each business day, and to have the authority and operational capacity to effect a settlement with each clearing member, on an intraday basis, either routinely, when thresholds specified by the DCO were breached, or in times of extreme market volatility.

CME expressed its support for intra-day settlements. LCH suggested that a DCO must measure its credit exposures ''several times each business day,'' and should be obliged to recalculate initial and variation margin requirements more than once each business day. J.P. Morgan stated that intraday margin calls should be made with greater frequency for clearing members who have a higher risk profile.

The Commission does not believe that it is necessary to adopt a requirement that all DCOs recalculate initial and variation margin requirements more than once each business day or an explicit requirement for intraday margin calls for clearing members with a higher risk profile. The Commission believes that it has struck the appropriate balance in § 39.14(b), by requiring a DCO to conduct daily settlements, while permitting a DCO to exercise its discretion regarding whether it will conduct routine intraday settlements, or whether it will settle positions on an intraday basis only when certain thresholds are breached [168] or in times of extreme market volatility. This approach is also generally consistent with proposed international standards.[169] A particular DCO could determine to conduct routine intraday settlements, as some have done, or to conduct intraday settlements for particular clearing members based on their risk profiles.

NEM, NGX, and NOCC all requested that the Commission afford recognition to a clearing model that does not require daily variation margin payments and collections but permits accrual accounting with respect to certain energy products.

NEM noted that most Retail Energy Marketers (REMs) [170] use an accrual accounting practice that recognizes revenues and costs after energy delivery to their retail customers and that clearing solutions that require daily cash settlements would either complicate their accounting practices or significantly impact REM cash flows.

NGX stated that its clearing model generally does not require daily variation margin payments and collections, and that settlement on its energy contracts [171] occurs only on a monthly basis, after clearing participant obligations have been netted, consistent with practices in the cash market and with the end-user nature of the vast majority of NGX clearing participants. NGX noted that, therefore, the type of daily settlement risk that proposed § 39.14 addresses is not present in the NGX model and the degree of risk in the monthly settlement process is reduced.

Although NOCC supported adoption of proposed § 39.14(b) for traditional futures and cleared swaps, it indicated that it intends to develop a clearinghouse that will seek registration as a DCO to clear energy products, including commercial forward contracts that it believes will be outside the scope of regulation as futures contracts or as swaps under the CEA, as well as financial forwards that it believes will fall within the definition of swaps under the CEA. NOCC stated that while gains and losses on the commercial forward contracts and financial forwards that it intends to clear are calculated daily, they are accrued throughout the delivery period and following the delivery period, and are not cash settled until final payment occurs approximately three weeks after the month in which the commodity is delivered. NOCC proposed that the Commission adopt a rule that would permit exemptions for alternative risk management frameworks, which would provide NOCC with the ability to demonstrate to the Commission that daily accrual settlement of variation margin is a sound practice appropriately tailored to the unique characteristics of the cash energy markets and market participants for which NOCC is seeking to provide the benefits of clearing.

The Commission has not proposed and is not adopting a rule permitting exemptions for alternative risk management frameworks. However, a particular DCO may petition the Commission for an exemption if it believes that it can demonstrate that the daily accrual of gains and losses provides the same protection to the DCO as would daily variation margin payments and collections. Therefore, the Commission is adding a clause to § 39.14(b) that states ''[e]xcept as otherwise provided by Commission order'' prior to the requirement that a DCO ''shall effect a settlement with each clearing member at least once each business day.''

[168] *E.g.,* a DCO could establish thresholds that relate to the extent of market volatility, or with respect to a particular clearing member, the extent of losses that it has suffered on a particular day or whether it has reached a risk limit established by the DCO pursuant to § 39.13(h)(1)(i), which is discussed in section IV.D.7.a, above.

[169] *See* CPSS–IOSCO Consultative Report, Principle 6: Margin, Key Consideration 4, at 40; EMIR, Article 39, paragraph 3, at 46.

[170] NEM stated that REMs ''sell electricity and natural gas to consumers as a competitive alternative to the local utility'' and ''often purchase wholesale physical natural gas and electricity on a spot (delivery) month (day) basis and also purchase swaps to lock in prices for any consumers who want a long-term fixed price contract.''

[171] NGX stated that it ''operates a trading and clearing system for energy products that provides electronic trading, central counterparty clearing and data services to the North American natural gas, electricity and oil markets.''

3. Settlement Banks—§ 39.14(c)

The introductory paragraph of proposed § 39.14(c) would require a DCO to employ settlement arrangements that eliminate or strictly limit its exposure to settlement bank risks, including the credit and liquidity risks arising from the use of such banks to effect settlements with its clearing members.

OCC commented that it would not be possible for a DCO to ''eliminate'' all exposure to settlement bank risks and that the Commission had not provided any guidance as to what it means to ''strictly limit'' such exposure. The Commission notes that the language in the introductory paragraph of proposed § 39.14(c), which would require a DCO to ''employ settlement arrangements that eliminate or strictly limit its exposure to settlement bank risks, including the credit and liquidity risks arising from the use of such banks to effect settlements * * *,'' is virtually identical to the statutory language in Core Principle E.[172] The Commission is adopting the introductory paragraph of § 39.14(c) with two modifications. First, in response to OCC's comment, the Commission is adding the words ''as follows:'' at the end of the sentence, in order to clarify that a DCO that complies with § 39.14(c)(1), (2), and (3), discussed below, will be deemed to have ''employ[ed] settlement arrangements that eliminate or strictly limit its exposure to settlement bank risks'' within the meaning of § 39.14(c). The Commission is also inserting parentheses around the letter ''s'' in the word ''banks'' in order to clarify that the Commission is not intending to require that a DCO must have more than one settlement bank in all circumstances. However, a DCO will need to have more than one settlement bank to the extent that it is reasonably necessary in order to eliminate or strictly limit the DCO's exposures to settlement bank risks, pursuant to § 39.14(c)(3), as further discussed below.

4. Criteria for Acceptable Settlement Banks—§§ 39.14(c)(1) and (c)(2)

Proposed § 39.14(c)(1) would require a DCO to have documented criteria with respect to those banks that are acceptable settlement banks for the DCO and its clearing members, including criteria addressing the capitalization, creditworthiness, access to liquidity, operational reliability, and regulation or supervision of such banks. Proposed § 39.14(c)(2) would require a DCO to monitor each approved settlement bank on an ongoing basis to ensure that such bank continues to meet the criteria established pursuant to § 39.14(c)(1). Proposed §§ 39.14(c)(1) and (c)(2) are consistent with international recommendations.[173]

NYPC agreed with the proposed requirement that DCOs must articulate the standards that they apply to the selection of settlement banks.

OCC indicated that a DCO may have to deviate from its written policies on the selection of clearing banks during a major market disruption, as those settlement banks that are the best options available at the time may not meet the technical criteria set forth in a DCO's written policies. The Commission agrees with OCC that a DCO may have to deviate from its written policies during a major market disruption. However, whether the Commission would permit a DCO to do so would need to be addressed in the context of the particular major market disruption, *e.g.,* based on an analysis of whether all available settlement banks no longer meet such written criteria.

MGEX commented that the Federal Reserve and other banking authorities are in the best position to review a bank's financial condition. NYPC recommended that the Commission modify the proposed rule to reflect the fact that the only criteria that are likely to be susceptible to observation by a DCO are a bank's operational reliability, regulatory capital, and the rating of its parent bank holding company. The Commission agrees that the Federal Reserve and other banking authorities may be in the best position to review a bank's financial condition and that there is certain information about settlement banks to which a DCO will not have regular access. Nonetheless, a DCO has a responsibility to undertake reasonable efforts to ensure that its settlement bank(s) continue to meet the criteria established by the DCO. A DCO may be able to obtain pertinent information from public sources, and it should be able to request and obtain information from an approved settlement bank, which demonstrates whether the bank continues to meet the criteria established by the DCO.

The Commission is adopting § 39.14(c)(1) with a modification that replaces the language that states: ''with respect to those banks that are acceptable settlement banks for the derivatives clearing organization and its clearing members'' with ''that must be met by any settlement bank used by the derivatives clearing organization or its clearing members.'' In addition, the Commission is inserting parentheses around the letter ''s'' in the word ''banks.'' Consistent with the modification to the introductory paragraph of § 39.14(c) described above, these modifications also clarify that there may be circumstances in which it may be appropriate for a DCO to use a single settlement bank. The Commission is adopting § 39.14(c)(2) as proposed.

5. Monitoring and Addressing Exposure to Settlement Banks—§ 39.14(c)(3)

Proposed § 39.14(c)(3) would require a DCO to monitor the full range and concentration of its exposures to its own and its clearing members' settlement banks and assess its own and its clearing members' potential losses and liquidity pressures in the event that the settlement bank with the largest share of settlement activity were to fail.[174] A DCO would be required to: (i) maintain settlement accounts at additional settlement banks; (ii) approve additional settlement banks for use by its clearing members; (iii) impose concentration limits with respect to its own or its clearing members' settlement banks; and/or (iv) take any other appropriate actions if any such actions are reasonably necessary in order to eliminate or strictly limit such exposures.

OCC commented that the requirement that a DCO monitor its clearing members' exposure to the settlement banks used by such clearing members could result in a massive duplication of effort and would be very burdensome for the DCO. Therefore, OCC suggested that clearing members or their primary regulators should be responsible for monitoring clearing members' exposure to their settlement banks.

The Commission does not agree with OCC that proposed § 39.14(c)(3) could result in a massive duplication of effort. The focus of the monitoring required by § 39.14(c)(3) is on a DCO's exposures and its clearing members' potential losses insofar as they may create exposures for the DCO. Therefore, each

[172] *See* Section 5b(c)(2)(E)(ii) of the CEA, 7 U.S.C. 7a–1(c)(2)(E)(ii).

[173] *See* CPSS–IOSCO Consultative Report, Principle 9: Money Settlements, Key Consideration 3, at 54.

[174] Some DCOs have their own settlement accounts at each settlement bank used by their clearing members, in which case a clearing member's settlement bank is also the DCO's settlement bank, and transfers between a clearing member's settlement account and a DCO's settlement account are made internally. Other DCOs permit their clearing members to use settlement banks at which such DCOs do not have their own settlement accounts, and settlement transfers are made between a clearing member's settlement bank and the DCO's settlement bank. In either event, the settlement bank with the largest share of settlement activity will always be a bank at which the DCO maintains a settlement account, as all settlement activity will involve the DCO.

DCO must conduct the required monitoring as each DCO's exposures are unique to that DCO. In addition, this provision of § 39.14(c)(3) is consistent with proposed international standards.[175]

NYPC commented that since initial and variation margin requirements fluctuate daily, proposed § 39.14(c)(3) would require DCOs to monitor their exposures to all settlement banks and not merely the largest. The Commission agrees with NYPC. Proposed § 39.14(c)(3) would require a DCO to ''monitor the full range and concentration of its exposures to its own and its clearing members' settlement banks,'' which means that a DCO must conduct such monitoring with respect to all such settlement banks. The reference to ''the settlement bank with the largest share of settlement activity'' was made in the context of requiring a DCO to assess the potential impact of the failure of such bank.

CME and OCC requested that the Commission clarify that a DCO would only be required to take any of the actions specified in proposed § 39.14(c)(3)(i)–(iv), if the specific action were reasonably necessary in order to eliminate or strictly limit exposures to settlement banks, and that a DCO would not be required to take all of the specified actions in all cases. CME supported this interpretation and OCC stated its belief that these requirements would be reasonable if the final rule were expressly limited in this manner. The Commission is modifying § 39.14(c)(3)(i)–(iv) to clarify the Commission's intent to obligate a DCO to employ any one or more of the actions specified in (i) through (iv), only if any one or more of such actions is reasonably necessary in order to eliminate or strictly limit such exposures.

CME, ICE, MGEX, and KCC variously commented that prescribing concentration limits and requiring that a DCO and its clearing members maintain multiple settlement banks would impose significant expenses on the DCO, its clearing members, and their customers. CME, MGEX, and NYPC stated their belief that it would be difficult to comply with this regulation given the limited number of banks that are qualified and willing to serve as settlement banks.[176] CME also commented that the meaning of ''concentration limits'' is unclear, and stated its belief that it would be unwise to impose artificial limits on the number of clearing members or the size of clearing member accounts at a particular settlement bank.

ICE took the position that hard concentration limits could increase systemic risk because a DCO would need to distribute funds across multiple banks. ICE indicated that as settlement funds increased, highly rated banks would eventually be consumed by the concentration limits and DCOs may have to open accounts with lower rated banks. ICE further commented that concentration limits could act as a constraint on customer choice, in that if one bank had a large number of settlement customers, there would be natural concentration of settlement flows, and the DCO could have to direct customers not to use their chosen bank.

NYPC also questioned whether current settlement banks would be willing to continue to act in that role if the Commission required a DCO and some of its clearing members to transfer their business to other banks. NYPC stated that this would leave the existing settlement banks with an expensive infrastructure supported by fewer client accounts.

MGEX stated its belief that requiring a DCO to oversee clearing members' banks and establishing credit or concentration limits would be intrusive and suggested that the final rule should provide DCOs with flexibility.

The Commission notes that proposed § 39.14(c)(3)(iii) would require a DCO to impose concentration limits with respect to its own or its clearing members' settlement banks if such action were reasonably necessary in order to eliminate or strictly limit its exposures to such settlement banks. Section 39.14(c)(3) would provide a DCO with other possible options for addressing such exposures. For example, a DCO could open an account at an additional settlement bank pursuant to § 39.14(c)(3)(i), or approve an additional settlement bank for use by its clearing members pursuant to § 39.14(c)(3)(ii), without imposing concentration limits, if doing so would mean that such limits would not be reasonably necessary. In addition, proposed § 39.14(c)(3)(iv) would allow a DCO to take other appropriate actions, which could obviate the potential need for concentration limits.

KCC commented that identifying multiple settlement banks for use by clearing members could increase a DCO's operational risk by fragmenting the DCO's margin pool. KCC suggested that there is no need for multiple settlement banks because there would be little effect on the operations of a DCO if a non-systemically significant settlement bank failed. KCC noted that the Federal Deposit Insurance Corporation generally facilitates the transfer of the accounts and operations of a failed bank to a successor institution or a bridge bank with little or no disruption to depositors at the failed bank. KCC further stated that a DCO's settlement account is essentially a pass-through account and DCOs generally do not maintain large, long-term balances in the account. According to KCC, even if a DCO held significant guaranty funds or security deposits at a settlement bank, such assets would likely be held in a trust or custody account, which would be unavailable to creditors of the failed institution and would generally be available to the DCO within a short period of time following the insolvency of the settlement bank. KCC also noted that a requirement that DCOs identify additional settlement banks for use by clearing members would cause a significant rise in bank service fees for DCOs and clearing members.

NGX noted that proposed § 39.14(c) generally refers to settlement banks, in the plural, assuming that all DCOs will maintain accounts with at least two settlement banks. NGX questioned the benefit of requiring all DCOs, regardless of size, to use multiple settlement banks. According to NGX, settlement risk varies across DCOs, and the type of daily settlement risk the proposed rule addresses is not present at a DCO like NGX, which does not engage in daily variation margin payments and collections from its clearing participants. NGX stated that the rule should take account of the level of settlement activity because requiring a DCO with a relatively small need for settlement services to divide the flow of funds may cause the DCO to be less attractive, bear higher costs, and be less competitive with larger DCOs, while having a negligible impact on systemic risk.[177] NGX also commented that the rule could result in increased operational risk at a DCO like NGX with complex contract settlement and delivery that requires a settlement bank to have specialized expertise and to maintain specialized processes and operational capabilities. NGX requested that the Commission provide the flexibility to permit a DCO to

[175] *See* CPSS–IOSCO Consultative Report, Principle 9: Money Settlements, Explanatory Note, 3.9.5, at 56.

[176] CME also expressed concern that, as drafted, the proposed regulation appears to require a DCO to approve at least two more settlement banks, because of the reference to ''settlement banks'' in the plural.

[177] However, NGX stated that where a DCO has daily settlements or monthly settlements in a greater amount, requiring more than one settlement bank may materially reduce systemic risk without adverse effects.

demonstrate that the use of a single settlement bank is appropriate from both a policy and a financial perspective.

As noted above, the Commission does not intend to require a DCO to use more than one settlement bank if the particular DCO otherwise employs settlement arrangements that eliminate or strictly limit its exposure to settlement bank risks. The Commission understands that the number of banks that are willing to serve settlement functions might be limited, particularly for smaller DCOs. The Commission further understands that it might be costly for some DCOs that currently only have one settlement bank to use an additional settlement bank. However, pursuant to § 39.14(c)(3), a DCO would be required to have a second settlement bank, if it were reasonably necessary in order to eliminate or strictly limit the DCO's exposures to settlement bank risks.

The Commission is modifying §§ 39.14(c)(3)(i) and (ii) to refer to ''one or more'' additional settlement banks, so that it will be clear that a DCO would not necessarily be required to maintain settlement accounts with more than one additional settlement bank or to approve more than one additional settlement bank that its clearing members could choose to use, under the specified circumstances. In addition, the Commission is modifying § 39.14(c)(3)(iii) to similarly clarify that a DCO may only be required to impose concentration limits with respect to ''one or more'' of its own or its clearing members' settlement banks, under the specified circumstances. The Commission is also modifying § 39.14(c)(3)(ii) by replacing ''for use by its clearing members'' with ''that its clearing members could choose to use'' to make it clear that the Commission is not suggesting that a single clearing member might be required to use more than one settlement bank.[178]

The Commission is adopting § 39.14(c)(3) with the modifications described above.

6. Settlement Finality—§ 39.14(d)

Proposed § 39.14(d) would require a DCO to ensure that settlement fund transfers are irrevocable and unconditional when the DCO's accounts are debited or credited. In addition, the proposed regulation would require that a DCO's legal agreements with its settlement banks must state clearly when settlement fund transfers would occur and a DCO was required to routinely confirm that its settlement banks were effecting fund transfers as and when required by those legal agreements.

ISDA and FIA requested that the rule allow for the correction of errors.[179] The Commission agrees with ISDA and FIA that settlement finality should not preclude the correction of errors, and is adding a clause to § 39.14(d) that explicitly provides that a DCO's legal agreements with its settlement banks may provide for the correction of errors.

In addition, the Commission is adding the modifier ''no later than'' before ''when the derivatives clearing organization's accounts are debited or credited'' in recognition of the fact that a DCO's legal agreements with its settlement banks may provide for settlement finality prior to the time when the DCO's accounts are debited or credited, *e.g.,* upon the bank's acceptance of a settlement instruction.

KCC commented that a DCO can never effectively ensure that settlement payments are irrevocable, given the existence of a legal risk that a settlement payment may be deemed to be an inappropriate transfer pursuant to applicable bankruptcy law. Therefore, KCC urged the Commission to eliminate the requirement or to restate the rule as a requirement to monitor operational risks related to settlement finality. The Commission does not believe that it is appropriate to do so. Core Principle E requires a DCO to ''ensure that money settlements are final when effected.''[180] In addition, Section 546(e) of the U.S. Bankruptcy Code[181] provides that a bankruptcy trustee may not avoid a transfer that is a margin payment or a settlement payment made to a DCO by a clearing member, or made to a clearing member by a DCO (with the exception of fraudulent transfers). However, the Commission is modifying § 39.14(d) to state that ''[a DCO] shall ensure that settlements are final when effected by ensuring that *it has entered into legal agreements that state that* settlement fund transfers are irrevocable and unconditional * * *'' (added text in italics).

The Commission is adopting § 39.14(d) with the modifications described above.

7. Recordkeeping—§ 39.14(e)

Proposed § 39.14(e) would require a DCO to maintain an accurate record of the flow of funds associated with each settlement.

KCC expressed its general support of the concept of maintaining accurate records of settlement fund flows, but stated that it may be prudent for the Commission to further clarify the extent to which the additional recordkeeping applies to cross-margining and netting arrangements that a DCO may have in place with certain clearing members and their customers. The language in § 39.14(e) is virtually identical to the Core Principle E language, which the Dodd-Frank Act added to the CEA.[182] Moreover, this language is similar to the language that had been contained in Core Principle E prior to its amendment by the Dodd-Frank Act.[183]

Therefore, proposed § 39.14(e) would not impose any additional recordkeeping requirements. The Commission believes that the requirement that a DCO must maintain an accurate record of the flow of funds associated with each settlement would necessarily require the maintenance of an accurate record with respect to any cross-margining or netting arrangements, without the need to separately address such arrangements. The Commission is adopting § 39.14(e) as proposed.

8. Netting Arrangements—§ 39.14(f)

Proposed § 39.14(f) would incorporate Core Principle E's requirement that a DCO must possess the ability to comply with each term and condition of any permitted netting or offset arrangement with any other clearing organization.[184]

[178] For example, it appears that CME may have interpreted proposed § 39.14(c)(3)(ii) in this unintended manner, since it stated that ''we do not believe the CFTC should *require* clearing members to have accounts at multiple settlement banks, which may prove to be an impossible (and/or extremely costly) requirement to satisfy.'' It appears that KCC may also have interpreted proposed § 39.14(c)(3)(ii) in this manner, in light of its comment that a requirement that DCOs identify additional settlement banks for use by clearing members would cause a significant rise in bank service fees for DCOs and clearing members. There is no reason that providing greater choice to clearing members regarding which single settlement bank they could elect to use would cause a rise in bank service fees for clearing members.

[179] ISDA also requested that the Commission clarify how the proposed requirement would be compatible with the fact that title transfer of initial margin may not occur when it is posted to a DCO. Title transfer is not a necessary element of settlement finality. Although in some jurisdictions a clearing member may need to transfer title to margin collateral to a DCO in order for the DCO to effectively exert control over such collateral, in other jurisdictions a clearing member may transfer margin collateral to a DCO and grant a security interest to the DCO without transfer of title.

[180] *See* Section 5b(c)(2)(E)(iii) of the CEA, 7 U.S.C. 7a–1(c)(2)(E)(iii).

[181] 11 U.S.C. 546(e).

[182] *See* Section 5b(c)(2)(E)(iv) of the CEA, 7 U.S.C. 7a–1(c)(2)(E)(iv).

[183] Prior to amendment by the Dodd Frank Act, Core Principle E provided, in part, that a [DCO] applicant shall have the ability to ''* * * [m]aintain an adequate record of the flow of funds associated with each transaction that the applicant clears. * * *''

[184] *See* Section 5b(c)(2)(E)(v) of the CEA, 7 U.S.C. 7a–1(c)(2)(E)(v).

The Commission did not receive any comment letters discussing § 39.14(f) and is adopting § 39.14(f) as proposed.

9. Physical Delivery—§ 39.14(g)

Proposed § 39.14(g) would require a DCO to establish rules clearly stating each obligation that the DCO has assumed with respect to physical deliveries, including whether it has an obligation to make or receive delivery of a physical instrument or commodity, or whether it indemnifies clearing members for losses incurred in the delivery process, and to ensure that the risks of each such obligation are identified and managed.

KCC commented that it generally supports the concept of proposed § 39.14(g), but requested that the Commission clarify that a DCO may be deemed to have satisfied its obligation to establish rules relating to physical deliveries if the rules of the exchange that lists the cleared contracts clearly delineates such physical delivery obligations. The Commission notes that the rules referenced in § 39.14(g) must be enforceable by and against the DCO. If a DCO were integrated with a DCM and the DCM's rules were enforceable by and against the DCO, then it may be that the DCM's rules would satisfy the requirements of § 39.14(g). However, such compliance would need to be determined on a case-by-case basis. The Commission is adopting § 39.14(g) as proposed, except for a technical revision that replaces ''contracts, agreements and transactions'' with ''products'' to ensure consistency with other provisions in part 39.

F. Core Principle F—Treatment of Funds—§ 39.15

Core Principle F, [185] as amended by the Dodd-Frank Act, requires a DCO to: (i) Establish standards and procedures that are designed to protect and ensure the safety of its clearing members' funds and assets; (ii) hold such funds and assets in a manner by which to minimize the risk of loss or of delay in the DCO's access to the assets and funds; and (iii) only invest such funds and assets in instruments with minimal credit, market, and liquidity risks. The Commission proposed § 39.15 to establish requirements that a DCO would have to meet in order to comply with Core Principle F.

1. Required Standards and Procedures—§ 39.15(a)

Proposed § 39.15(a) would require a DCO to establish standards and procedures that are designed to protect and ensure the safety of funds and assets belonging to clearing members and their customers.[186] The Commission did not receive any comments on proposed § 39.15(a) and is adopting the provision as proposed.

2. Segregation—§ 39.15(b)(1)

Proposed § 39.15(b)(1) would require a DCO to comply with the segregation requirements of Section 4d of the CEA and Commission regulations thereunder, or any other applicable Commission regulation or order requiring that customer funds and assets be segregated, set aside, or held in a separate account.

LCH suggested that the Commission clarify the meaning of ''segregated'' and limit the segregation requirement to the funds of clearing members' clients. LCH also urged the Commission to limit these requirements to client business cleared by the DCO under the FCM clearing structure, noting that a DCO based outside the United States may offer client clearing services through alternative structures and that it did not believe it would be appropriate for clients clearing under these non-U.S. structures to be subject to the segregation requirements of Section 4d of the CEA, but rather to the requirements set out by the DCO's home or other regulators.

FIA recommended that the proposed rule be revised to make clear that a DCO should keep margin posted by clearing members to support proprietary positions separate from the DCO's own assets, noting that although proprietary funds held at a DCO are not subject to the segregation provisions of the CEA, it is essential that these funds are protected in the event of the default of the DCO. The Commission has not proposed and is not adopting FIA's suggestion that the Commission expand the applicability of § 39.15(b)(1) in this manner.

BlackRock and FHLBanks expressed their views on specific segregation models. The Commission has proposed rules in a separate rulemaking regarding the segregation of cleared swaps customer contracts and collateral, and the Commission will address BlackRock's and FHLBanks' comments in connection with the final rulemaking for that proposal.[187]

The comments submitted by LCH, FIA, BlackRock, and FHLBanks all address the substance or applicability of segregation requirements. Proposed § 39.15(b)(1) would not have imposed any additional substantive segregation requirements upon a DCO. It would simply require a DCO to comply with the substantive segregation requirements of the CEA and other Commission regulations or orders, which are currently applicable or which may become applicable in the future. In particular, § 39.15(b)(1) is not intended to extend the extraterritorial reach of existing segregation requirements beyond that which may already exist in such requirements. However, in order to clarify the Commission's intent in this regard, the Commission has added ''applicable'' before ''segregation requirements'' in § 39.15(b)(1). In addition, the Commission wishes to clarify that its current segregation requirements apply to a non-U.S. based DCO with respect to clearing members that are registered as FCMs, whether they are clearing business for U.S. based customers or non-U.S. based customers. Such requirements do not apply with respect to clearing members that are non-U.S. based and that are not registered as FCMs, nor required to be registered as FCMs.

The Commission is adopting § 39.15(b)(1) with the modification described above.

3. Commingling of Futures, Options on Futures, and Swap Positions—§ 39.15(b)(2)

Proposed § 39.15(b)(2)(i) would permit a DCO to commingle, and a DCO to permit clearing member FCMs to commingle, customer positions in futures, options on futures, and swaps, and any money, securities, or property received to margin, guarantee, or secure such positions, in an account subject to the requirements of Section 4d(f) of the CEA (cleared swaps account), pursuant to DCO rules that have been approved by the Commission under § 40.5 of the Commission's regulations. The DCO's rule filing [188] would have to include, at a minimum, the following: (A) an identification of the futures, options on futures, and swaps that would be commingled, including contract specifications or the criteria that would

[185] Section 5b(c)(2)(F) of the CEA, 7 U.S.C. 7a–1(c)(2)(F) (Core Principle F).

[186] Such ''assets'' would include any securities or property that clearing members deposit with a DCO in order to satisfy initial margin obligations, which are also sometimes referred to as ''collateral.'' Proposed § 39.15 uses the term ''assets'' rather than ''securities or property'' or ''collateral'' in order to be consistent with the statutory language.

[187] *See* 76 FR 33818 (June 9, 2011) (Protection of Cleared Swaps Customer Contracts and Collateral; Conforming Amendments to the Commodity Broker Bankruptcy Provisions).

[188] The DCO's rule filing would also need to comply with the procedural requirements of § 40.5(a).

be used to define eligible futures, options on futures, and swaps; (B) an analysis of the risk characteristics of the eligible products; (C) a description of whether the swaps would be executed bilaterally and/or executed on a DCM and/or a SEF; (D) an analysis of the liquidity of the respective markets for the futures, options on futures, and swaps that would be commingled, the ability of clearing members and the DCO to offset or mitigate the risks of such products in a timely manner, without compromising the financial integrity of the account, and, as appropriate, proposed means for addressing insufficient liquidity; (E) an analysis of the availability of reliable prices for each of the eligible products; (F) a description of the financial, operational, and managerial standards or requirements for clearing members that would be permitted to commingle the eligible products; (G) a description of the systems and procedures that would be used by the DCO to oversee such clearing members' risk management of the commingled positions; (H) a description of the financial resources of the DCO, including the composition and availability of a guaranty fund with respect to the commingled products; (I) a description and analysis of the margin methodology that would be applied to the commingled products, including any margin reduction applied to correlated positions, and any applicable margin rules with respect to both clearing members and customers; (J) an analysis of the ability of the DCO to manage a potential default with respect to any of the commingled products; (K) a discussion of the procedures that the DCO would follow if a clearing member defaulted, and the procedures that a clearing member would follow if a customer defaulted, with respect to any of the commingled products; and (L) a description of the arrangements for obtaining daily position data from each beneficial owner of the commingled products.[189]

Proposed § 39.15(b)(2)(ii) would address situations where customer positions in futures, options on futures, and cleared swaps could be carried in a futures account subject to Section 4d(a) of the CEA. Proposed § 39.15(b)(2)(ii) would incorporate the informational requirements of proposed § 39.15(b)(2)(i), but would require a DCO to file a petition with the Commission for an order pursuant to Section 4d(a) of the CEA, permitting the DCO and its clearing members to commingle customer positions in futures, options on futures, and swaps in a futures account (4d order).

Proposed § 39.15(b)(2)(iii)(A) would provide that the Commission may request additional information in support of a rule submission and that it may approve the rules in accordance with § 40.5.[190] Proposed § 39.15(b)(2)(iii)(B) would provide that the Commission could request additional information in support of a petition and that it could issue a 4d order in its discretion.

As noted in the notice of proposed rulemaking, in the case of a rule approval under § 39.15(b)(2)(i), as well as the issuance of an order under § 39.15(b)(2)(ii), the Commission would take action pursuant to Section 4d of the CEA (permitting commingling) and Section 4(c) of the CEA (exempting the DCO and clearing members from the requirement to hold customer positions in a 4d(a) or 4d(f) account, as applicable).

The Commission requested comment on whether it should take the same approach (rule submission or petition for an order) with respect to the futures account and the cleared swap account and, if so, what that approach should be. In addition, the Commission requested comment on whether the enumerated informational requirements fully capture the relevant considerations for making a determination on either rule approval or the granting of an order, and whether the Commission's analysis should take into consideration the type of account in which the positions would be carried, the particular type of products that would be involved, or the financial resources of the clearing members that would hold such accounts. The Commission further requested comment on what, if any, additional or heightened requirements should be imposed to manage the increased risks introduced to a futures account that also holds cleared swaps.

In some instances, commenters addressed topics that are more properly considered by the Commission in connection with a separate rulemaking,[191] that relate to substantive requirements that the Commission might impose as a condition of approving a rule or granting an order under § 39.15(b)(2),[192] or that relate to other provisions adopted herein.[193] The Commission is not addressing those comments in its discussion of § 39.15(b)(2) because they are not within the scope of the proposal.

CME, FIA, and MFA expressed their general support for the adoption of rules that would allow commingling of customer positions in futures, options on futures, and cleared swaps. In particular, CME indicated that such commingling could achieve important benefits with respect to greater capital efficiency which would result from margin reductions for correlated positions, and that adoption of a regulation permitting such commingling would be consistent with the public interest, in accordance with Section 4(c) of the CEA. CME further stated that ''[h]aving positions in a single account can also enhance risk management practices and systemic risk containment by allowing the customer's portfolio to

[189] As noted in the Commission's notice of proposed rulemaking regarding the protection of cleared swaps customer contracts and collateral, 76 FR at 33818 (June 9, 2011) (Protection of Cleared Swaps Customer Contracts and Collateral; Conforming Amendments to the Commodity Broker Bankruptcy Provisions), if the complete legal segregation model is adopted for cleared swaps, a DCO could more easily justify the approval of rules or the issuance of a 4d order allowing the commingling of futures, options, and swaps, since the impact of any different risk from the product being brought into the portfolio would be limited to the customer who chooses to trade that product. In such case, the Commission may still wish to obtain and review all of the information specified in proposed § 39.15(b)(2)(i), although its specific concerns may be minimized. However, if the complete legal segregation model is adopted for cleared swaps, and after the Commission obtains experience with respect to considering requests to commingle futures, options, and swaps under § 39.15(b)(2) in an environment where that margin model applies, the Commission may revisit its ongoing need for all of the information listed in § 39.15(b)(2)(i).

[190] A rule submitted for prior approval would be approved unless the rule is inconsistent with the CEA or the Commission's regulations. *See* Section 5c(c)(5) of the CEA, 7 U.S.C. 7a–2(c)(5); and 75 FR at 44793–44794 (Provisions Common to Registered Entities; final rule).

[191] *E.g.,* CME and FIA raised operational concerns in the event the Commission adopts a different segregation regime for each type of customer account. Those comments will be considered in connection with the Commission's proposal regarding the appropriate segregation regime for cleared swaps accounts. *See* 76 FR 33818 (June 9, 2011) (Protection of Cleared Swaps Customer Contracts and Collateral; Conforming Amendments to the Commodity Broker Bankruptcy Provisions).

[192] *E.g.,* LCH suggested additional factors that the Commission should consider before a DCO or its clearing members should be able to commingle, and offer offsets between, futures, options on futures, and swaps, including: (a) clients must hold their futures, options, and swaps under the same account structure and within the same legal entity, and (b) the DCO must margin the futures, options, and swaps using the same margin model; and ELX expressed the view that in order for a customer to gain the portfolio margining benefits of commingling futures, options, and swaps executed on a SEF, it would be necessary for a customer to clear its futures, options, and swaps through the same DCO.

[193] LCH stated that all offset assumptions in the DCO's margin calculations must, at a minimum, be replicated in the DCO's stress testing and must be recalibrated frequently. The Commission notes that permitted spread and portfolio margins are addressed in § 39.13(g)(4), discussed in section IV.D.6.e, above, and back testing of such spread and portfolio margins is addressed in § 39.13(g)(7), discussed in section IV.D.6.g, above.

be handled in a coordinated fashion in a transfer or liquidation scenario.''

CME stated its belief that it would be logical to apply the same methodology (rule submission or petition for an order) with respect to the futures account and the cleared swaps account, and that a rule submission would be the most efficient and optimal approach. The Commission is retaining the proposed distinction whereby the Commission may permit futures to be commingled in a Section 4d(f) cleared swaps account subject to a rule approval process, and may permit cleared swaps to be commingled in a Section 4d(a) futures account subject to a 4d order. In the latter instance, the 4d petition process would provide additional procedural protections in that: (1) Review of a 4d petition by the Commission is not subject to the time limits that apply to a request for rule approval under § 40.5; and (2) the Commission may impose conditions in a 4d order, as appropriate. The Commission has determined that, at this time, it is appropriate to provide these additional procedural protections before exposing futures customers to the risks of swaps that may be commingled in a futures account. As also noted in other contexts in this notice of final rulemaking, DCOs have greater experience in clearing futures. Swaps will expose DCOs to risks that can differ in their nature and magnitude. However, as the Commission and the industry gain more experience with cleared swaps, the Commission may revisit this issue in the future.

The Commission is adopting CME's suggestion that it revise § 39.15(b)(2)(i)(L) to remove the reference to obtaining daily position data ''from each beneficial owner.'' Therefore, § 39.15(b)(2)(i)(L), as modified, requires a DCO to submit ''[a] description of the arrangements for obtaining daily position data with respect to futures, options on futures, and swaps in the account,'' without specifying the level of detail or the source of the daily position data that the DCO must obtain. As noted by CME, the Commission could request additional information from the DCO, in support of its request for rule approval or petition for a 4d order, pursuant to § 39.15(b)(2)(iii).

The Commission is also making conforming changes to § 39.15(b)(2), to replace a reference to ''cleared swap account'' with ''cleared swaps account'' to achieve consistency with the terminology in another Commission rulemaking;[194] is revising the references to ''futures, options on futures, and swap positions'' and ''futures, options on futures, and swaps'' to read ''futures, options, and swaps;''[195] is replacing a reference to ''contract'' with ''product;'' and is correcting the references to § 39.15(b)(2)(i) and (ii) in § 39.15(b)(iii)(A) and (B), respectively.

The Commission is adopting § 39.15(b)(2) with the modifications described above.

4. Holding of Funds and Assets—§ 39.15(c)

The introductory paragraph of proposed § 39.15(c) would require that a DCO hold funds and assets belonging to clearing members and their customers in a manner that minimizes the risk of loss or of delay in the DCO's access to those funds and assets. The Commission did not receive any comment letters discussing the introductory paragraph of proposed § 39.15(c) and is adopting the provision as proposed.

5. Types of Assets—§ 39.15(c)(1)

Proposed § 39.15(c)(1) would require a DCO to limit the assets it accepts as initial margin to those that have minimal credit, market, and liquidity risks, and prohibit a DCO from accepting letters of credit as initial margin.

LCH agreed with the provisions of proposed § 39.15(c), but added that the rules might more properly require that a DCO must be able to convert any funds and assets held promptly into cash, and should prove that it is able to do so on an ongoing basis. J.P. Morgan stated that it is necessary for DCOs to maintain sufficient liquidity, and that this could be achieved by requiring that clearing members post a minimum amount of liquid (cash and qualifying government securities) margin, among other things.[196]

The Commission believes that the standard of ''minimal credit, market, and liquidity risks'' is sufficient and that it is not necessary to modify the language of the regulation to include an explicit requirement that a DCO must be able to convert funds and assets promptly into cash or to require that clearing members must post a minimum amount of cash and qualifying government securities. Moreover, the requirement that a DCO shall limit the assets that it accepts as initial margin to those that have ''minimal credit, market, and liquidity risks'' is consistent with international recommendations.[197]

OCC expressed its belief that the proposal places an excessive focus on the types of assets that may be used as margin and that the Commission's central focus should be on whether a DCO's procedures and risk management systems are sufficient to provide a high degree of assurance that a portfolio, including margin assets, can be liquidated with a positive liquidation value. OCC further noted its concern that some of the collateral that it currently accepts as initial margin, including less-liquid stocks and long-dated Treasury securities, would no longer be permitted under the proposed rule. OCC explained that its ''collateral in margins'' or ''CIM'' program looks at each type of collateral as an asset with specific risk characteristics rather than as a fixed value, and it recognizes both positive and negative correlations with other assets and liabilities in a particular account.

As an example, OCC stated that even though XYZ stock may be less liquid than other stocks, it may have a greater value than a more liquid stock when it is used as margin for a short position in XYZ call options. Therefore, OCC urged the Commission not to impose a standard of ''minimal credit, market, and liquidity risk,'' or not to adopt an interpretation of such a standard in a manner that would reduce the opportunities for diversification of collateral and use of assets that may have specific risk-reducing properties in a particular portfolio. In particular, OCC stated that ''[w]here a DCO is capable of reflecting the risk of certain assets in its margin model, we see no reason why less liquid instruments or instruments with higher than average credit or market risks should not be acceptable for initial margin.''

The Commission agrees that a DCO should be permitted to accept assets as initial margin if such assets have specific risk-reducing properties in a particular portfolio and the DCO's margin model is capable of appropriately reflecting the risk of those

[194] *See* 76 FR 33818 (June 9, 2011) (Protection of Cleared Swaps Customer Contracts and Collateral; Conforming Amendments to the Commodity Broker Bankruptcy Provisions).

[195] This conforming terminology, which appears elsewhere in part 39, streamlines the rule text without changing the meaning of the provision. The scope of part 39 covers only those products subject to the Commission's oversight and would not include, for example, options on securities. Refinements in the definitions of products subject to Commission oversight will be addressed in the future.

[196] J.P. Morgan also suggested that DCOs could maintain liquidity by requiring clearing members to make guarantee fund contributions or by requiring clearing members to participate in a liquidity facility. The Commission has not proposed and is not adopting such requirements.

[197] *See* CPSS–IOSCO Consultative Report, Principle 5: Collateral, at 37.

assets. Accordingly, although the Commission is retaining the standard of minimal credit, market, and liquidity risk, it is revising the provision to add the following: ''A [DCO] may take into account the specific risk-reducing properties that particular assets have in a particular portfolio.'' As illustrated by OCC, an asset that would not generally be acceptable could be acceptable for use in connection with a particular portfolio.

Freddie Mac requested that the Commission clarify that DCOs may accept collateral types beyond those specified as permitted investments under § 1.25. Section 39.15(c) does not prohibit a DCO from accepting collateral types that are not specified as permitted investments under § 1.25. The Commission believes that it is appropriate to permit DCOs to retain the flexibility to accept a broader range of assets that meet the general requirement of ''minimal credit, market, and liquidity risks'' than those which are appropriate investments for funds received from clearing members.

Several comment letters specifically discussed the proposal to prohibit the use of letters of credit as initial margin. The commenters disagreed with the Commission's proposed requirement that a DCO may not accept letters of credit for this purpose. CME stated that letters of credit provide an absolute assurance of payment and, therefore, the issuing bank must honor the demand even in circumstances where the DCO (the beneficiary) breached its duty to the clearing member and even if the clearing member is unable to reimburse the bank for its payment. CME also stated that it was not aware of any instances in the cleared derivatives industry in which a beneficiary of a letter of credit posted as collateral had sought to draw upon the letter of credit and had not been promptly paid by the issuer. CME noted that letters of credit have been especially useful for clearing members to post as collateral for late-day margin calls. ICE and NOCC similarly commented that letters of credit should be permitted to serve as non-cash collateral. NGX indicated that letters of credit are consistent with Section 4s(e)(3)(D) of the CEA, which provides that the financial regulators shall establish comparable capital requirements and minimum initial and variation margin requirements, including the use of non-cash collateral, for swap dealers.[198]

Many commenters suggested that letters of credit should be acceptable if they are subject to appropriate conditions. OCC recommended that the Commission should allow letters of credit as long as a DCO sets criteria with respect to issuers, diversifies concentration of risk among issuers, and limits the proportion of a clearing member's margin requirement that can be represented by letters of credit. In addition, OCC stated that it would be appropriate for the Commission to prohibit a DCO from accepting a letter of credit from a clearing member if the letter of credit is issued by an institution affiliated with the clearing member.

Similarly, FIA suggested that a DCO should be permitted to accept letters of credit on a case-by-case basis subject to the credit quality of the bank and appropriate limits on the percentage of a clearing member's margin requirements that can be met by letters of credit. FIA also indicated that DCOs should limit the aggregate value of letters of credit that may be issued by any one bank.

FHLBanks wrote that ''a hard and fast prohibition against letters of credit is inappropriate because it fails to take into account that a letter of credit issued by a highly creditworthy entity could contain terms that would make the letter of credit just as liquid as a funded asset.'' [199]

CME stated that it only accepts letters of credit that comply with its specified terms and conditions, including payment within one hour of notification of a draw, from issuers that it has reviewed and approved and that meet its criteria for issuing banks. CME further noted that it conducts periodic reviews of approved banks and uses caps and concentration limits in connection with letters of credit.

NGX stated that it has accepted letters of credit that comply with its requirements regarding timing and acceptable institutions, for many years, and has successfully drawn on such letters of credit.

Several commenters warned of the potential risks associated with prohibiting letters of credit, including higher costs for clearing members and their customers (OCC), the placement of U.S. DCOs at a disadvantage to foreign clearing houses (ICE),[200] and increased systemic risk as a result of decreased voluntary clearing (NOCC).

The Commission acknowledges that DCOs have historically been permitted to exercise their discretion regarding whether and to what extent they would accept letters of credit for initial margin for futures and options. Certain DCOs have accepted such letters of credit without incident and continue to do so. On the other hand, as stated in the notice of proposed rulemaking, letters of credit are unfunded financial resources with respect to which funds might be not be available when they are most needed by the DCO. Moreover, the initial margin of a defaulting clearing member would typically be the first asset tapped to cure the clearing member's default. Taking into account both the strong track record of letters of credit in connection with cleared futures and options on futures and the potentially greater risks of cleared swaps, the Commission is modifying the provision to permit DCOs to accept letters of credit as initial margin for futures and options on futures. However, the Commission has determined to maintain an additional safeguard for swaps at this time by prohibiting a DCO from accepting letters of credit as initial margin for swaps. In cases where futures and swaps are margined together, the Commission has determined that letters of credit may not be accepted. The Commission will monitor developments in this area and may revisit this issue in the future.

The Commission is adopting § 39.15(c)(1), redesignated as § 39.13(g)(10),[201] with the modification described above.

6. Valuation and Haircuts—§§ 39.15(c)(2) and 39.15(c)(3)

Proposed § 39.15(c)(2) would require a DCO to use prudent valuation practices to value assets posted as initial margin on a daily basis. Proposed § 39.15(c)(3) would require a DCO to apply appropriate reductions in value to reflect the market and credit risk of the assets that it accepts in satisfaction of

[198] The Commission notes that the minimum initial and variation margin requirements referenced in Section 4s(e)(3)(D) of the CEA, 7 U.S.C. 6s(e)(3)(D), apply to uncleared swaps.

NGX also stated its view that in a non-intermediated model, such as that operated by NGX, the DCO is familiar with its clearing participants, and can exercise a degree of discretion in accepting letters of credit without the same risk management challenges that may be faced by an intermediated DCO.

[199] The FHLBanks further noted that the prohibition on letters of credit may unnecessarily constrain certain end-users from clearing swaps because they may be precluded from pledging other assets, *e.g.,* by loan covenants.

[200] ICE noted that the CPSS–IOSCO Consultative Report did not prohibit any type of collateral.

[201] Redesignation of this provision and several other provisions proposed as part of § 39.15 is a non-substantive change that moves the provisions to the risk management rules for margin requirements. As a risk management rule, the provision implements Core Principle D, Section 5b(c)(2)(D)(iii) of the CEA, which provides that ''Each [DCO], through margin requirements and other risk control mechanisms, shall limit the exposure of the [DCO] to potential losses from defaults by members and participants of the [DCO].''

initial margin obligations and to evaluate the appropriateness of its haircuts on at least a quarterly basis.

OCC commented that if a DCO can only accept instruments with minimal risk, then haircuts should either not be required at all or should be very small. The Commission notes that, as defined in § 39.15(c)(3), haircuts are ''appropriate reductions in value to reflect market and credit risk.'' This is a flexible standard that would allow a DCO to determine the extent of the haircut based on the extent of the risk posed by the instrument deposited as initial margin.

OCC further stated that proposed § 39.15(c)(3) is ambiguous regarding what OCC would be required to test on a quarterly basis. OCC explained that its STANS margin methodology does not apply fixed haircuts to securities deposited as collateral, but rather treats collateral as part of a clearing member's overall portfolio, revisiting each ''haircut'' or valuation on a security-by-security, account-by-account, and day-by-day basis. Thus, OCC stated that it checks the adequacy of its haircuts through back testing and not through a periodic review.

The general language of § 39.15(c)(3), requiring a DCO to ''apply appropriate reductions in value to reflect market and credit risk * * * to the assets that it accepts in satisfaction of initial margin obligations'' and to ''evaluate the appropriateness of such haircuts on at least a quarterly basis,'' is broad enough to encompass the method of daily valuation and back testing described by OCC.

The Commission is adopting § 39.15(c)(2), redesignated as § 39.13(g)(11), as proposed. The Commission is adopting a technical revision to § 39.15(c)(3), redesignated as § 39.13(g)(12), by adding a reference to ''liquidity'' risk to conform the terminology used to describe haircuts (proposed as ''appropriate reductions in value to reflect market and credit risk'') with the terminology used in § 39.13(g)(10), which refers to assets that have ''minimal credit, market, and liquidity risks.'' [202] The Commission is also making a non-substantive revision to replace the phrase ''including in stressed market conditions'' with ''taking into consideration stressed market conditions.''

7. Concentration Limits—§ 39.15(c)(4)

Proposed § 39.15(c)(4) would require a DCO to apply appropriate limitations on the concentration of assets posted as initial margin, as necessary, in order to ensure the DCO's ability to liquidate those assets quickly with minimal adverse price effects. The proposed regulation also would require a DCO to evaluate the appropriateness of its concentration limits, on at least a monthly basis.

OCC indicated that the proposed rule was not clear regarding whether it would be sufficient to impose concentration charges rather than imposing concentration limits, but argued that if the margin system adequately penalizes concentration of risk, it does not believe that fixed concentration limits are required. The Commission agrees that concentration charges, rather than concentration limits, may be appropriate in certain circumstances, and is modifying the provision to permit a DCO to apply ''appropriate limitations or charges on the concentration of assets posted as initial margin'' and to ''evaluate the appropriateness of any such concentration limits or charges, on at least a monthly basis.'' The inclusion of concentration charges as an acceptable alternative to concentration limits is consistent with international recommendations.[203]

CME stated its view that the Commission should not prescribe the frequency of a DCO's reviews of its concentration limits and it urged the Commission to revise § 39.15(c)(4) to replace ''on at least a monthly basis'' with ''on a regular basis.'' The Commission believes that it is appropriate to require a DCO to evaluate the appropriateness of its concentration limits (or charges) on at least a monthly basis and notes that § 39.15(c)(4) provides a DCO with the discretion to determine the nature of such evaluation.

The Commission is adopting § 39.15(c)(4), redesignated as § 39.13(g)(13), with the modifications described above.

8. Pledged Assets—§ 39.15(c)(5)

Under proposed § 39.15(c)(5), if a DCO were to permit its clearing members to pledge assets for initial margin while retaining such assets in accounts in the names of such clearing members, the DCO would have to ensure that the assets are unencumbered and that the pledge has been validly created and validly perfected in the relevant jurisdiction. The Commission did not receive any comments discussing proposed § 39.15(c)(5) and is adopting the provision, redesignated as § 39.13(g)(14), as proposed.

9. Permitted Investments—§ 39.15(d)

Proposed § 39.15(d) would require that clearing members' funds and assets that are invested by a DCO must be held in instruments with minimal credit, market, and liquidity risks and that any investment of customer funds or assets by a DCO must comply with § 1.25 of the Commission's regulations. Moreover, the proposed regulation would apply the limitations contained in § 1.25 to all customer funds and assets, whether they are the funds and assets of futures and options customers subject to the segregation requirements of Section 4d(a) of the CEA, or the funds and assets of cleared swaps customers subject to the segregation requirements of Section 4d(f) of the CEA.

The Commission did not receive any comment letters discussing proposed § 39.15(d). The Commission is adopting the provision, redesignated as § 39.15(e), as proposed.

10. Transfer of Customer Positions—§ 39.15(d)

The Commission proposed regulations addressing the processing, clearing, and transfer of customer positions by swap dealers (SDs), major swap participants (MSPs), FCMs, SEFs, DCMs, and DCOs.[204] Proposed § 39.15(d) would require a DCO to have rules providing that, upon the request of a customer and subject to the consent of the receiving clearing member, the DCO would promptly transfer all or a portion of such customer's portfolio of positions and related funds from the carrying clearing member of the DCO to another clearing member of the DCO, without requiring the close-out and rebooking of the positions prior to the requested transfer.

MFA, Citadel, and FHLBanks supported the proposal. MFA and Citadel suggested that the Commission clarify that associated margin should transfer simultaneously with the transferred positions.

LCH also suggested that the section should be revised to require that the transfer of positions and related funds be effected simultaneously. LCH believes that absent such a provision, a

[202] Credit, market, and liquidity risks are concepts that are not mutually exclusive, and this articulation of the types of risks to be evaluated by a DCO appears in the CEA (Core Principle F, Treatment of Funds (requiring that ''[f]unds and assets invested by a [DCO] shall be held in instruments with minimal credit, market, and liquidity risks''), and ''minimal credit, market, and liquidity risks'' is set forth as the standard for assets acceptable for a guaranty fund (§ 39.11(e)(3)(i)), and as the standard for assets acceptable as initial margin (§ 39.13(g)(10)).

[203] *See* CPSS–IOSCO Consultative Report, Principle 5: Collateral, Explanatory Note 3.5.4, at 38.

[204] 76 FR 13101 (March 10, 2011) (Straight-Through Processing).

DCO could be understood to be required to transfer either the positions or the funds, but not both, and such an obligation would expose the DCO to risk during the customer transfer.

FIA agreed with the Commission that a customer should not be required to close-out and re-book positions as a condition of transferring such positions, and that a clearing member should not unnecessarily interfere with a customer's request to transfer positions. However, FIA noted that a DCO will not have the immediate ability to determine which positions carried in a clearing member's omnibus account belong to a particular customer. FIA suggested that a DCO's rules provide that the customer submit its request to transfer its positions to the clearing member carrying the positions, not to the DCO. FIA also suggested that the Commission revise the proposed rule to confirm that a clearing member is required to transfer a customer's positions only after that customer has met all contractual obligations, including outstanding margin calls and any additional margin required to support any remaining positions.

OCC also noted that a customer will not ask a DCO directly to transfer a customer position. Like FIA, OCC believes that any such transfer must be subject to all legitimate conditions or restrictions established by the DCO in connection with its clearing of swaps.

CME stated that it fully supports the concept of applying the same standards to transfer of customer cleared swaps as have historically been applied to transfer of customer futures. It noted that a customer request to transfer its account is made not to a DCO but to the FCM that carries the customer's account.

ISDA commented that any transfer rule must provide that a party seeking transfer not be in default to its existing clearing member. ISDA believes that the transfer rule must take into account any cross-cleared or cross-margined transactions and in the case where only a portion of a customer's portfolio is transferred, clearing members must have the ability to condition the transfer on the posting of additional margin by the customer.

KCC commented that this rule is not necessary because KCC has never required a futures position to be closed out and re-booked prior to transfer from the carrying clearing member to another clearing member, nor would KCC require a wheat calendar swap to be closed out and re-booked prior to transfer. The Commission notes that such a requirement has been imposed by other clearinghouses in connection with swaps.

In response to concerns raised by commenters, the Commission is revising § 39.15(d) to read as set forth in the regulatory text of this final rule.

The language making it explicit that positions and margin be transferred at the same time is responsive to the comments of MFA, Citadel, and LCH and consistent with prudent risk management procedures. The language clarifying that a customer transfer instruction would go to a clearing member and not directly to the DCO is responsive to the comments of FIA, OCC, and CME. The requirement that a customer may not be in default is responsive to the comments of FIA and ISDA and consistent with the statement in the notice of proposed rulemaking that transfers should be subject to contractual requirements. The requirement that positions at both clearing members will have appropriate margin is responsive to the comments of MFA, Citadel, and ISDA and consistent with the statement in the notice of proposed rulemaking that transfers should be subject to contractual requirements.

G. Core Principle G—Default Rules and Procedures—§ 39.16

Core Principle G,[205] as amended by the Dodd-Frank Act, requires each DCO to have rules and procedures designed to allow for the efficient, fair, and safe management of events during which clearing members become insolvent or otherwise default on their obligations to the DCO. In addition, Core Principle G requires each DCO to clearly state its default procedures, make its default rules publicly available, and ensure that it may take timely action to contain losses and liquidity pressures and to continue meeting its obligations. The Commission proposed § 39.16 to establish requirements that a DCO would have to meet in order to comply with Core Principle G.

1. General—§ 39.16(a)

Proposed § 39.16(a) would require a DCO to adopt rules and procedures designed to allow for the efficient, fair, and safe management of events during which clearing members become insolvent or default on the obligations of such clearing members to the DCO.

The Commission did not receive any comment letters discussing proposed § 39.16(a), although LCH stated that it concurs with all the provisions set out under proposed § 39.16. The Commission is adopting § 39.16(a) as proposed.

2. Default Management Plan—§ 39.16(b)

Proposed § 39.16(b) would require a DCO to maintain a current written default management plan that delineates the roles and responsibilities of its board of directors, its Risk Management Committee, any other committee that has responsibilities for default management, and the DCO's management, in addressing a default, including any necessary coordination with, or notification of, other entities and regulators. The proposed regulation also would require the default management plan to address any differences in procedures with respect to highly liquid contracts (such as certain futures) and less liquid contracts (such as certain swaps). In addition, proposed § 39.16(b) would require a DCO to conduct and document a test of its default management plan on at least an annual basis.

OCC agreed with the proposal for annual testing of a DCO's default management plan, while ISDA stated that such tests should be conducted at least on a semi-annual basis. FIA indicated that the default management plan should be subject to frequent, periodic testing. The Commission believes that it is appropriate and sufficient to require at least annual testing of a DCO's default management plan. A particular DCO could determine to test its plan on a semi-annual or other periodic basis, in its discretion.

ISDA expressed its view that regulators should review and sign off on the default management plans of DCOs. KCC requested that the Commission clarify that the default management plan concepts in proposed § 39.16(b) may be satisfied by annual testing of the DCO's existing set of default rules and procedures. The Commission does not believe that it is necessary to adopt an explicit requirement that the Commission review and approve a DCO's default management plan. However, Commission staff will review a DCO's default management plan in the context of the Commission's ongoing DCO review program, including a determination of whether a DCO's ''existing set of default rules and procedures'' meet the requirements of § 39.16(b).

The Commission is making a technical revision to § 39.16(b), removing the parentheticals and substituting the word ''products'' for the word ''contracts.'' The sentence now reads: ''Such plan shall address any differences in procedures with respect

[205] Section 5b(c)(2)(G) of the CEA, 7 U.S.C. 7a–1(c)(2)(G) (Core Principle G).

to highly liquid products and less liquid products.''

3. Default Procedures—§ 39.16(c)(1)

Proposed § 39.16(c)(1) would require a DCO to adopt procedures that would permit the DCO to take timely action to contain losses and liquidity pressures and to continue meeting its obligations in the event of a default on the obligations of a clearing member to the DCO.

The Commission did not receive any comment letters discussing proposed § 39.16(c)(1) and is adopting § 39.16(c)(1) as proposed.

4. Default Rules—§ 39.16(c)(2)

Proposed § 39.16(c)(2) would require a DCO to include certain identified procedures in its default rules. In particular, proposed § 39.16(c)(2)(i) would require a DCO to set forth its definition of a default. Proposed § 39.16(c)(2)(ii) would require a DCO to set forth the actions that it is able to take upon a default, which must include the prompt transfer, liquidation, or hedging of the customer or proprietary positions of the defaulting clearing member, as applicable. Proposed § 39.16(c)(2)(ii) would further state that such procedures could also include, in the DCO's discretion, the auctioning or allocation of such positions to other clearing members. Proposed § 39.16(c)(2)(iii) would require a DCO to include in its default rules any obligations that the DCO imposed on its clearing members to participate in auctions, or to accept allocations, of a defaulting clearing member's positions, and would specifically provide that any allocation would have to be proportional to the size of the participating or accepting clearing member's positions at the DCO.

Proposed § 39.16(c)(2)(iv) would require that a DCO's default rules address the sequence in which the funds and assets of the defaulting clearing member and the financial resources maintained by the DCO would be applied in the event of a default. Proposed § 39.16(c)(2)(v) would require that a DCO's default rules contain a provision that customer margin posted by a defaulting clearing member could not be applied in the event of a proprietary default.[206] Proposed § 39.16(c)(2)(vi) would require that a DCO's default rules contain a provision that proprietary margins posted by a defaulting clearing member would have to be applied in the event of a customer default, if the relevant customer margin were insufficient to cover the shortfall.

The Commission did not receive any comment letters discussing proposed § 39.16(c)(2)(i), (ii) or (iii). The Commission is adopting § 39.16(c)(2)(i) as proposed. The Commission is making technical revisions to §§ 39.16(c)(2)(ii), (iii), (v) and (vi), as well as § 39.16(d)(3), by replacing each use of the word ''proprietary'' with ''house.''

As discussed above in connection with participant eligibility requirements under § 39.12,[207] the Commission is revising § 39.16(c)(2)(iii) to require a DCO that imposes obligations on its clearing members to participate in auctions or to accept allocations of a defaulting clearing member's positions, to permit its clearing members to outsource these obligations to qualified third parties, subject to appropriate safeguards imposed by the DCO. The Commission believes that it is important to permit outsourcing, while recognizing that it is essential to limit participation only to qualified third parties. Accordingly, a DCO's rules may impose appropriate terms and conditions on outsourcing arrangements, addressing, for example, the necessary qualifications to be eligible to act in the clearing member's place and conflicts of interest issues. Thus, for example, a clearing member could hire a qualified third party to act as its agent in an auction. The Commission cautions, however, that any DCO imposing terms and conditions that could indirectly deny fair and open access and therefore are not ''appropriate,'' *i.e.,* not supported by sound risk management policies, may run afoul of Core Principle C and § 39.12.

The Commission is also making two additional technical revisions to § 39.16(c)(2)(iii). First, the Commission is replacing ''a defaulting clearing member's positions'' with ''the customer or house positions of the defaulting clearing member,'' to correct an oversight in the proposed language. Second, the Commission is revising § 39.16(c)(2)(iii)(A) to provide that any allocation shall be ''[p]roportional to the size of the participating or accepting clearing member's positions *in the same product class* at the derivatives clearing organization'' (added text in italics) to clarify the Commission's intent.

With respect to proposed § 39.16(c)(2)(iv), OCC agreed that it would be appropriate to require DCOs to adopt rules that would define the sequence in which the funds and assets of a defaulting clearing member and the financial resources maintained by the DCO would be applied in the event of a default.

Freddie Mac expressed concern with the broad discretion that would be given to DCOs to determine the sequence in which financial resources would be applied in the event of a clearing member default, and recommended that DCOs should be required to place non-customer resources (*e.g.,* clearing member guaranty funds and their own capital) ahead of non-defaulting customer collateral in the risk waterfall. In particular, Freddie Mac indicated that if the Commission does not require individual segregation of customer collateral, it should require DCOs to place non-defaulting customers at the bottom of the risk waterfall. Freddie Mac stated that the Commission should defer adoption of proposed § 39.16(c) until after adoption of rules relating to customer segregation.

The Commission is adopting § 39.16(c)(2)(iv) to require that a DCO adopt rules that identify the sequence of its default waterfall, as proposed, without imposing any substantive requirements with respect to such sequence, as suggested by Freddie Mac. The Commission is addressing the issue of the application of the collateral of non-defaulting swaps customers in a separate pending rulemaking,[208] but does not believe that it is appropriate to defer the adoption of proposed § 39.16(c) until that rulemaking is complete.

The Commission is making a technical revision to § 39.16(c)(2)(iv) by inserting ''and its customers'' after ''the funds and assets of the defaulting clearing member'' to correct an oversight in the proposed language.

ISDA commented that proposed § 39.16(c)(2)(v), which would require a DCO to adopt ''[a] provision that customer margin posted by a defaulting clearing member shall not be applied in the event of a proprietary default'' should be revised to replace the words ''in the event of'' with ''to cover losses in respect of''; otherwise, ISDA believed that customer margin would not be able to be applied even to cover customer losses. The Commission agrees with ISDA and is modifying § 39.16(c)(2)(v) by replacing ''in the event of'' with ''to cover losses with respect to'' and has made a similar modification to § 39.16(c)(2)(vi).

CME recommended that the Commission replace ''proprietary

[206] This is consistent with the segregation requirements of Section 4d of the CEA and § 1.20 of the Commission's regulations.

[207] *See* discussion in section IV.C.1.i, above.

[208] *See* 76 FR 33818 (June 9, 2011) (Protection of Cleared Swaps Customer Contracts and Collateral; Conforming Amendments to the Commodity Broker Bankruptcy Provisions).

margins posted by a defaulting clearing member'' in § 39.16(c)(2)(vi) with ''proprietary margins, positions and any other assets in the account of the defaulting clearing member.'' CME argued that the Commission's proposed reference to ''proprietary margins posted by a defaulting clearing member'' is too narrow in scope, since in the event of a clearing member default (whether originating in the customer origin or the house origin), a DCO would likely liquidate positions in the defaulting clearing member's house account and then apply excess funds and not just proprietary margins to cure the default. The Commission agrees that ''proprietary margins posted by a defaulting clearing member'' is too narrow and is replacing the phrase in § 39.16(c)(2)(vi) with ''house funds and assets of a defaulting clearing member.'' The Commission believes that ''house funds and assets'' is broad enough to include ''proprietary margins, positions and any other assets,'' as suggested by CME, and is consistent with the language in § 39.16(c)(2)(iv) and § 39.15. The Commission is similarly replacing ''customer margin posted by a defaulting clearing member'' in § 39.16(c)(2)(v) with ''the funds and assets of a defaulting clearing member's customers'' and is replacing ''customer margin'' in § 39.16(c)(2)(vi) with ''customer funds and assets.''

ISDA commented that proposed § 39.16(c)(2)(vi) should be revised to insert the word ''excess'' immediately before the words ''proprietary margins'' to make it clear that proprietary margin is to be applied first to cover proprietary losses, noting that the use of proprietary margin to cover customer losses ahead of proprietary losses would hasten the mutualization of losses among clearing members, which would likely result in higher margin levels being imposed with respect to customer positions in order to avoid that outcome. The Commission agrees with ISDA and is modifying § 39.16(c)(2)(vi) by inserting ''excess'' before ''house funds and assets of a defaulting clearing member,'' as suggested by ISDA.

The Commission is adopting § 39.16(c)(2) with the modifications described above.

5. Publication of Default Rules—§ 39.16(c)(3)

Proposed § 39.16(c)(3) would require that a DCO must make its default rules publicly available, and would cross-reference § 39.21, adopted herein, which also addresses this requirement.[209]

The Commission did not receive any comment letters discussing proposed § 39.16(c)(3) and is adopting § 39.16(c)(3) as proposed.

6. Insolvency of a Clearing Member—§ 39.16(d)

Proposed § 39.16(d)(1) would require a DCO to adopt rules that require a clearing member to provide prompt notice to the DCO if the clearing member becomes the subject of a bankruptcy petition, a receivership proceeding, or an equivalent proceeding, *e.g.,* a foreign liquidation proceeding. Proposed § 39.13(d)(2) would require a DCO to review the clearing member's continuing eligibility for clearing membership, upon receipt of such notice. Proposed § 39.16(d)(3) would require a DCO to take any appropriate action, in its discretion, with respect to the clearing member or its positions, including but not limited to liquidation or transfer of positions, and suspension or revocation of clearing membership, upon receipt of such notice.

CME recommended that, in order to preserve a DCO's right to take appropriate steps before a clearing member files for, or is placed into, bankruptcy, the Commission should amend proposed §§ 39.16(d)(2) and (3) to require DCOs to take appropriate actions ''no later than upon receipt'' of notice that the clearing member is the subject of a bankruptcy petition or similar proceeding. The Commission is adopting § 39.16(d) with the modifications to §§ 39.16(d)(2) and (3) suggested by CME. In addition, the Commission is making a technical revision to § 39.16(d)(3) by replacing the phrase ''with respect to such clearing member or its positions'' with the phrase ''with respect to such clearing member or its house or customer positions.'' This revision eliminates possible ambiguity in the reference to ''its positions,'' which was intended to reflect current industry practice and include both house and customer positions, not just house positions.

H. Core Principle H—Rule Enforcement—§ 39.17

Core Principle H,[210] as amended by the Dodd-Frank Act, requires a DCO to maintain adequate arrangements and resources for the effective monitoring and enforcement of compliance with its rules and resolution of disputes. It also requires a DCO to have the authority and ability to discipline, limit, suspend, or terminate the activities of a member or participant due to a violation by the member or participant of any rule of the DCO. It further requires that a DCO report to the Commission regarding rule enforcement activities and sanctions imposed against clearing members.

Proposed § 39.17 would codify these requirements, adding a provision that would require a DCO to report to the Commission in accordance with proposed § 39.19(c)(4)(xiii). As proposed, § 39.19(c)(4)(xiii) would require a DCO to report the initiation of a rule enforcement action against a clearing member or the imposition of sanctions against a clearing member, no later than two business days after the DCO takes such action. As discussed in connection with rules implementing Core Principle J (Reporting), the Commission is adopting that reporting requirement with a modification that only requires a DCO to report sanctions imposed against a clearing member.[211]

The Commission received no comments on proposed § 39.17. The Commission is adopting § 39.17 as proposed, but with a change to the cross-reference to § 39.19(c)(4)(xiii) in § 39.17(a)(3) to reflect the redesignation of that provision as § 39.19(c)(4)(xi).[212]

I. Core Principle I—System Safeguards—§ 39.18

Core Principle I,[213] as amended by the Dodd-Frank Act, requires a DCO to establish and maintain a program of risk analysis and oversight that identifies and minimizes sources of operational risk through the development of appropriate controls and procedures, and automated systems that are reliable, secure and have adequate scalable capacity. Core Principle I also requires that the emergency procedures, back-up facilities, and disaster recovery plans that a DCO is obligated to establish and maintain specifically allow for the timely recovery and resumption of the DCO's operations and the fulfillment of each obligation and responsibility of the DCO. Finally, Core Principle I requires that a DCO periodically conduct tests to verify that the DCO's back-up resources are sufficient to ensure daily processing, clearing, and settlement.

Proposed § 39.18 would codify the obligations contained in Core Principle I and delineate the minimum requirements that a DCO would be required to satisfy in order to comply with Core Principle I. Proposed § 39.18 also would define the terms ''relevant

[209] *See* discussion of § 39.21 in section IV.L, below.

[210] Section 5b(c)(2)(H) of the CEA, 7 U.S.C. 7a–1(c)(2)(H).

[211] *See* discussion of rule enforcement reporting in section IV.J.5.j, below.

[212] *See id.* (The Commission is adopting § 39.19(c)(4)(xiii) as a renumbered § 39.19(c)(4)(xi)).

[213] Section 5b(c)(2)(I) of the CEA, 7 U.S.C. 7a–1(c)(2)(I).

area,'' ''recovery time objective,'' and ''wide-scale disruption'' for purposes of that section.

The Commission received one general comment from LCH. LCH generally ''concurred with all the provisions set out under proposed rule 39.18,'' but urged the Commission to align these provisions with the CPSS–IOSCO standards, and to phase in such standards.

As discussed below, the Commission received comments on proposed §§ 39.18 (h), (j), and (k), and proposed § 39.30(a).

The Commission did not receive any comments specifically related to the definitions contained in proposed § 39.18(a); proposed §§ 39.18(b),(c) and (d), which would address the required program of risk analysis and oversight; proposed § 39.18(e), which would require a DCO to have a business continuity and disaster recovery (BC–DR) plan and resources sufficient to enable the DCO to resume daily processing, clearing and settlement no later than the next business day following a disruption; proposed § 39.18(f), which would address outsourcing by a DCO of resources required to meet its responsibilities with respect to business continuity and disaster recovery plans; proposed § 39.18(g), which would delineate certain exceptional events upon the occurrence of which a DCO would be obligated to notify promptly the Commission's Division of Clearing and Risk; proposed § 39.18(h)(1), which would require a DCO to provide timely advance notice to the Division of Clearing and Risk of certain planned changes to automated systems; or proposed § 39.18(i), which would set forth certain records that a DCO would be required to maintain. The Commission is adopting each of these provisions as proposed, except that the Commission is replacing ''contracts'' with ''products'' in § 39.18(a) and is adding ''of the derivatives clearing organization's'' before ''own and outsourced resources'' in § 39.18(f)(2)(ii) for clarification.

1. Notice of Changes to Program of Risk Analysis and Oversight—§ 39.18(h)(2)

Proposed § 39.18(h)(2) would require a DCO to give Division of Clearing and Risk staff ''timely advance notice'' of ''planned changes to the DCO's program of risk analysis and oversight.'' CME commented that this is an ''extraordinarily broad requirement'' and urged the Commission to ''appropriately consider[] context and relative risks.''

The Commission is adopting § 39.18(h)(2) as proposed. The provision merely requires that DCOs submit such notice as part of their planning process. The Commission expects that staff will evaluate compliance with this provision, as with all other provisions, giving appropriate consideration to context and relative risks.

2. Testing—§ 39.18(j)

Proposed § 39.18(j) would set forth the requirements for the testing that a DCO must conduct of its automated systems and BC–DR plans. Proposed § 39.18(j)(1) would require that DCOs conduct regular, periodic, and objective testing and review of (i) their automated systems, to ensure that such systems are reliable, secure, and have adequate scalable capacity, and (ii) their BC–DR capabilities, to ensure that the DCO's backup resources meet the standards set forth in proposed § 39.18(e). Proposed § 39.18(j)(2) would require that these tests ''be conducted by qualified, independent professionals * * * [who] may be independent contractors or employees [of the DCO] but shall not be persons responsible for development or operation of the capabilities being tested.'' Proposed § 39.18(j)(3) would require that reports setting forth the protocols for, and the results of, such tests ''be communicated to, and reviewed by, senior management of the [DCO]'' and that ''[p]rotocols of tests which result in few or no exceptions shall be subject to more searching review.''

ICE, OCC, and MGEX objected to the obligation that the testing required by § 39.18(j) be performed by ''qualified, independent professionals.'' ICE contended that the proper standard should be to have qualified, independent professionals review, rather than conduct testing of, systems or capabilities. Similarly, OCC suggested that the testing could be overseen, rather than conducted, by an independent professional. MGEX objected more generally to the requirement that tests of its BC–DR capabilities be performed by ''independent professionals'' and expressly objected to the proposal's prohibition on the use of any employees who participated in the development or the operation of the systems or capabilities being tested to fulfill this role. MGEX argued that such persons are the most qualified persons to run the tests. KCC requested that a DCO's CRO or other similar official qualify as an 'independent professional' for purposes of the testing rule.

The Commission is adopting § 39.18(j) as proposed. The Commission notes that the obligation that the required testing of automated systems and BC–DR capabilities be performed by qualified, independent professionals is consistent with the Commission's historical practice of requiring independent testing of systems where appropriate.[214]

The Commission recognizes that persons charged with developing or operating a system are frequently called upon to test that system. The Commission believes, however, that the active involvement and direction of qualified, independent professionals in the testing process is needed to ensure objective and accurate results.

MGEX's requested approach would result in tests being conducted only by persons with an inherent conflict of interest (because negative results of the tests might call into question the work of those who developed or operate the systems) and, separately, would deny the DCO the benefit of an independent analysis of the workings of the system. Accordingly, while some testing of a DCO's automated systems and BC–DR capabilities may be conducted by persons who design or operate such system or capabilities, the Commission has decided to retain the requirement that the objective testing performed to satisfy § 39.18(j) must be conducted by qualified, independent persons, as defined therein. While a DCO's CRO may appropriately serve this function if he or she has the appropriate training and experience to be ''qualified'' in this context, and the appropriate role in the organization to be ''independent,'' the Commission does not believe it would be advisable to determine that the person serving in such a role is *necessarily* qualified and independent.

3. Coordination of BC–DR Plans With Members and Providers of Essential Services—§ 39.18(k)

Proposed § 39.18(k) would require that a DCO to the extent practicable: (1) Coordinate its BC–DR plan with those of its clearing members, in a manner adequate to enable effective resumption of daily processing, clearing, and settlement following a disruption; (2) initiate and coordinate periodic, synchronized testing of its BC–DR plans and the plans of its clearing members; and (3) ensure that its BC–DR plan takes into account the plans of its providers

[214] For example, paragraph (a)(2) of the application guidance to Core Principle 9 (prior to amendment by the Dodd-Frank Act) for contract markets noted that ''Any program of independent testing and review of [an automated] system should be performed by a qualified, independent professional.'' 17 CFR part 38, appendix B at Core Principle 9, paragraph (a)(2).

of essential services, including telecommunications, power, and water.

MGEX proposed that industry-sponsored events should suffice to satisfy the requirement that a DCO must coordinate its BC–DR plan with those of its members. Similarly, KCC requested that the Commission clarify that coordination would be deemed to be satisfied if the DCO reviews the BC–DR plans of its clearing members and essential service providers and subsequently provides to such parties the DCO's own BC–DR plan. KCC stated that it does not believe that coordination should involve extensive efforts at achieving specific consistency between the procedures of each party, as each has a distinct business model that faces varying operational risks.

NYPC objected to the requirement contained in proposed § 39.18(k)(3). NYPC noted that its business continuity plan (BCP) would be invoked any time a service provider ceases to provide an essential service, regardless of whether that service provider has invoked its own BCP, and thus such information would not necessarily give DCOs any additional insight into their own BCP. Similarly, CME noted that, while it obtains representations that its major vendors have disaster recovery plans, CME does not control, or generally have access to, the details of the proprietary plans of those service providers.

The Commission is adopting § 39.18(k) as proposed. With respect to the requirements of §§ 39.18(k)(1) and (2), the Commission recognizes that participation in industry-sponsored events, such as the annual testing conducted by FIA, serves as an important assessment of the connectivity between the systems of DCOs and their members (including backup sites), but such participation would not, in and of itself, satisfy the requirements of these regulations. The level of participation of a particular DCO in a particular industry test is left to the discretion of the DCO, and different DCOs may participate in such tests to different extents. Moreover, while such industry-sponsored events may be helpful, it is the responsibility of each DCO—not that of an industry organization—to ensure that the functionality of clearing will be maintained between the DCO and its members. The Commission believes that a DCO will best be able to meet its responsibilities reliably in a wide-area disaster that affects a DCO and its clearing members if the DCO has actively worked together with those clearing members to coordinate their plans and has obtained some evidence that such plans will appropriately mesh when implemented.

While it is true that a DCO should have backup arrangements that promptly can be engaged to address a failure of essential services, it is likely that most DCOs will prepare for a temporary, rather than an indefinite, loss of such services. Among the benefits provided by coordination of a DCO's BCP with that of providers of essential services is an insight into the period of time for which the DCO should be prepared to provide such services itself.

The Commission recognizes that a service provider may reasonably be reluctant to provide sensitive details of its own BCP, such as the precise location of backup facilities, and notes that the proposed requirement is prefaced with the limitation that a DCO is required to obtain this information only ''to the extent practicable.'' Nonetheless, merely obtaining a representation that states that a service provider has a backup plan—with no detail as to the Recovery Time Objective (RTO) of that service provider, and no insight into how that service provider's BCP might affect the BCP of the DCO—would likely be insufficient.

4. Recovery Time Objective—§ 39.18(a)

Proposed § 39.18(a) would define an RTO as the period within which an entity should be able to achieve recovery and resumption of clearing and settlement of existing and new contracts after those capabilities become temporarily inoperable for any reason up to a wide-scale disruption, and defines a wide-scale disruption as an event that causes a severe disruption or destruction of transportation, telecommunications, power, water or other critical infrastructure components in a relevant area, or an event that results in an evacuation or unavailability of the population in a relevant area. Proposed § 39.18(e)(3) would require that a DCO have an RTO of the next business day, while proposed § 39.30(a) would require that a SIDCO have an RTO of two hours.

ICE noted that proposed § 39.18(a) does not specify a minimum time that a wide-scale disruption must be accommodated, and that costs would be higher if the unavailability of staff in the relevant area that must be accommodated is the total loss of personnel. ICE suggested that one week would allow relocation of personnel outside the affected area.

The Commission is adopting §§ 39.18(a) and 39.18(e)(3) as proposed. However, as discussed above in connection with the financial resources requirements, the Commission believes that it would be premature to take action regarding § 39.30 at this time. The Commission will consider the proposals relating to SIDCOs together in the future.

J. Core Principle J—Reporting Requirements—§ 39.19

Core Principle J,[215] as amended by the Dodd-Frank Act, requires a DCO to provide the Commission with all information that the Commission determines to be necessary to conduct oversight of the DCO. The Commission proposed § 39.19 to establish requirements that a DCO would have to meet in order to comply with Core Principle J. Under proposed § 39.19, certain reports would have to be made by a DCO to the Commission: (1) On a periodic basis (daily, quarterly, or annually), (2) where the reporting requirement is triggered by the occurrence of a significant event; and (3) upon request by the Commission. Section 39.19(a) states the general requirement of Core Principle J. The Commission did not receive any comment letters discussing § 39.19(a) and is adopting the provision as proposed.

1. Submission of Reports—§ 39.19(b)

The Commission proposed § 39.19(b) to establish procedural requirements for electronic submission of reports and determination of time zones applicable to filing deadlines. The Commission received no comments and is adopting §§ 39.19(b)(1) and (2) as proposed. For purposes of clarification, the Commission is also adopting § 39.19(b)(3) to provide a definition of ''business day'' as ''the intraday period of time starting at the business hour of 8:15 a.m. and ending at the business hour of 4:45 p.m., on all days except Saturdays, Sundays, and Federal holidays.'' This is consistent with the definition of ''business day'' set forth in § 40.1(a).[216]

2. Daily Reporting—§ 39.19(c)(1)

Proposed § 39.19(c)(1) would require a DCO to submit daily reports with certain initial margin and variation margin data as well as other cash flows for each clearing member. More specifically, § 39.19(c)(1)(i) would require a DCO to report both the initial margin requirement for each clearing member, by customer origin and house origin, and the initial margin on deposit for each clearing member, by origin.

[215] Section 5b(c)(2)(J) of the CEA, 7 U.S.C. 7a–1(c)(2)(J).

[216] *See* 76 FR at 44790 (July 27, 2011) (Provisions Common to Registered Entities; final rule).

Proposed § 39.19(c)(1)(ii) would require a DCO to report the daily variation margin collected and paid by the DCO, listing the mark-to-market amount collected from or paid to each clearing member, by origin.[217]

Proposed § 39.19(c)(1)(iii) would require a DCO to report all other cash flows relating to clearing and settlement including, but not limited to, option premiums and payments related to swaps such as coupon amounts, collected from or paid to each clearing member, by origin. Proposed § 39.19(c)(1)(iv) would require a DCO to report the end-of-day positions for each clearing member, by customer origin and house origin.

In addition, as discussed in section IV.D.6.h.(2), above, in connection with the Commission's proposal to require DCOs to collect initial margin for customer accounts on a gross basis under proposed § 39.13(g)(8)(i), the Commission further proposed an addition to proposed § 39.19(c)(1)(iv) that would also require DCOs to report, for each clearing member's customer account, the end-of-day positions of each beneficial owner. The Commission is adopting § 39.19(c)(1) with two modifications. First, the Commission is not requiring reporting of customer positions by beneficial owner, except upon Commission request.[218] Second, as discussed below, the Commission is renumbering the paragraphs in § 39.19(c)(1) and adding a new paragraph (ii) to clarify the applicability of the daily reporting requirements to FCM/BDs. In addition, the Commission is replacing ''by customer origin and house origin'' with ''by house origin and by each customer origin''; and is replacing ''options on futures positions'' with ''options positions.''

MGEX and KCC commented that while such information is available to them,[219] they are concerned that if the Commission mandates a specific form of delivery, the cost to DCOs will be significantly higher than expected. MGEX referred to its recent experience with the Trade Capture Reporting initiative conversion to the Commission's new FIXML standards, which was more costly and time consuming than expected. KCC commented that all of the data proposed to be reported to the Commission is already made readily available to the Commission in varying degrees, and there is little need for the Commission to require the increasing level of detailed information in specified formats. In addition, MGEX expressed concern with the Commission's potential data storage capacity limitations. MGEX concluded that the combination of these two factors suggest that the burden of the daily reporting requirements on DCOs and the Commission outweigh the value of these reports.

MGEX suggested that requiring such data on an as-needed, rather than a daily, basis would limit the burden on DCOs and the Commission while ensuring relevancy as to the data being requested. KCC asked that the Commission reconsider the amount and detail of information necessary for its oversight role. While CME supported the proposed reporting requirement, it suggested that the Commission work with DCOs to determine the form and manner of delivery.

As mentioned in the notice of proposed rulemaking, many DCOs already provide the Commission with much of the data required under this provision. The Commission recognizes that the daily reporting requirements may place an additional burden on a DCO, particularly if the DCO must employ a specific form of delivery that it does not already have in place. However, establishment of an automated reporting system is a one-time cost, and a uniform reporting format for all DCOs is necessary to facilitate the Commission's ability to receive data promptly and quickly disseminate it within the agency.[220]

The overall purpose of receiving the daily data is to enable Commission staff to analyze the data on a regular basis so that it can detect certain trends or unusual activity on a timely basis. Receiving such data less frequently would significantly reduce its usefulness. While there may be initial costs for DCOs to set up the reporting systems, there should be little cost to DCOs on a continuing basis.[221] Finally, MGEX's suggestion to require such data on an as-needed basis does not further the objective of enhanced risk surveillance, given that the purpose of gathering the data is to identify and address potential problems at the earliest possible time.

OCC expressed concern that the reporting requirements make no accommodation for clearing members that are FCM/BDs, with respect to their securities positions. In response to OCC's comment, the Commission is adding a new paragraph (ii) to § 39.19(c)(1) to clarify the limited applicability of the daily reporting requirements to securities positions. The final rule provides that ''The report shall contain the information required by paragraph (c)(1)(i) of this section for (A) all futures positions, and options on futures positions, as applicable; (B) all swaps positions; and (C) all securities positions that are held in a customer account subject to Section 4d of the Act or are subject to a cross-margining agreement.''

3. Quarterly Reporting—§ 39.19(c)(2)

The Commission is adopting § 39.19(c)(2), requirements for quarterly reporting of financial resources, as proposed.[222]

4. Annual Reporting—§ 39.19(c)(3)

Proposed § 39.19(c)(3) would require a DCO to submit a report of the CCO and an audited financial statement annually, as required by § 39.10(c). The Commission received no comments on proposed § 39.19(c)(3), and the Commission is adopting § 39.19(c)(3) as proposed.

The Commission notes that in a separate proposed rulemaking implementing Core Principle O (Governance Fitness Standards), it proposed a new § 39.24(b)(4) which would require annual verification that directors, members of the disciplinary panel and disciplinary committee, clearing members, persons with direct access, and certain affiliates of a DCO, satisfy applicable fitness standards.[223] In connection with this, the Commission subsequently proposed to cross-reference this annual reporting obligation as a renumbered § 39.19(c)(3)(iii). At such time as the Commission may adopt the verification requirement as a final rule, § 39.19(c)(3) will be amended accordingly.

5. Event-Specific Reporting—§ 39.19(c)(4)

a. Decrease in Financial Resources—§ 39.19(c)(4)(i)

Under proposed § 39.19(c)(4)(i), a DCO would be required to report to the

[217] This requirement would apply to options transactions only to the extent a DCO uses futures-style margining for options.

[218] *See* further discussion of reports of beneficial ownership in section IV.D.6.h.(2), above.

[219] MGEX noted that it is already ''internally performing these tasks'' in reference to the several daily reporting requirements. KCC has also noted that it already submits trading activity and positions by each clearing member by origin on a daily basis in file formats prescribed by the Commission.

[220] The Commission notes that its staff is in the process of developing a plan for uniform submission of DCO reports.

[221] *See* further discussion of the costs and benefits of the reporting requirements in section VII.J, below.

[222] *See* further discussion of the quarterly reporting requirement under § 39.11(f) in section IV.B.10, above.

[223] *See* 76 FR at 736 (Jan. 6, 2011) (Governance).

Commission a 10 percent decrease in the total value of the financial resources required to be maintained by the DCO under § 39.11(a), either from the last quarterly report. or from the value as of the close of the previous business day. Such notification would alert the Commission of potential strain on the DCO's financial resources, either gradual or precipitous.

The Commission invited comments regarding possible alternatives as to what would be considered a significant drop in the value of financial resources. Although many commenters opposed using the 10 percent threshold as a barometer for a ''significant'' decrease, no commenter questioned the Commission's objective in obtaining this type of information in a timely manner.

MGEX commented that 10 percent is an arbitrary threshold and it is not uncommon for financial resources to fluctuate by 10 percent even in a stable market. Similarly, OCC and KCC stated that the threshold is arbitrary and would most likely be crossed on a frequent basis during the ordinary course of business.[224] In addition, KCC suggested that this requirement is duplicative, as a material drop in financial resources would already be required to be reported by the proposed requirement to report all material adverse changes (Material Adverse Change Reporting Requirement).[225]

OCC, Better Markets, and Mr. Barnard were also concerned about the types of financial resources to consider when calculating a decrease. OCC suggested it is counterproductive to report a decrease in financial resources as a result of a decrease in margin requirements, which is a sign of risk reduction. Similarly, Better Markets suggested that coincidental increases in margin-based financial resources, which could fluctuate substantially, could offset decreases by more important financial resources. In addition, Mr. Barnard raised concerns regarding: (1) Grouping all types of financial resources together for purposes of calculating decreases, and (2) whether only requiring a report of a decrease in financial resources is sufficient.

Several commenters proposed using a different threshold: (1) OCC suggested 25 percent; (2) MGEX suggested allowing a DCO to determine what constitutes a material decrease or, as an alternative, adopting a threshold of 30 percent over a five-day period and 25 percent when compared to the previous quarter; and (3) Better Markets suggested adopting a threshold of 5 percent of non-margin-based financial resources. NYPC recommended taking an approach similar to the FCM ''early warning'' reporting requirement.[226]

To compensate for an upwards adjustment of the financial resources requirement, Better Markets suggested also requiring a report if the ratio of financial resources to minimum required levels decreases to 1 to 1. Mr. Barnard suggested splitting financial resources into two groups: (1) The more ''robust'' financial resources (a DCO's own capital and guaranty fund), and (2) market or risk-related items (margins); and requiring a report for a decrease in either amount or a decrease in the total of both amounts. Mr. Barnard also suggested requiring a DCO to report a calculation of its ''solvency ratio'' (available financial resources/financial resources requirements) and a 5 percent or more drop in such ratio.

In response to commenters' objections to setting the level at 10 percent, the Commission is setting the reporting threshold at a level of 25 percent for both the daily and quarterly financial resources decreases. As noted, OCC suggested 25 percent while MGEX suggested 25 percent for the quarterly and 30 percent for a report covering any 5-day period. MGEX did not explain why there should be a distinction between the percentage decrease triggering the quarterly and shorter-term reports. The Commission believes that a 25 percent level addresses the commenters' concerns about ''noise'' while providing the Commission with notification of material decreases.

The Commission is not excluding certain financial resources from the decrease calculation as suggested by several commenters. Although there are certain financial resources that may fluctuate in the ordinary course of business, the Commission believes that setting the reporting threshold level higher should resolve many of these issues because fewer fluctuations that occur in the ordinary course of business would trigger the higher 25 percent threshold. Additionally, the purpose of the financial resources requirement in Core Principle B and as codified in the Commission's regulations is to ensure that a DCO has adequate resources to cover the default of the clearing member with the largest exposure. Financial resources are looked at in the aggregate. Thus, fluctuations during the ordinary course of business, even coincidental decreases in financial resources, all reflect the financial health of the DCO at that time.

The Commission is not replacing the financial resources percentage decrease reporting requirement with a requirement similar to the FCM ''early warning'' reporting requirement, as suggested by NYPC. While FCMs do have an ''early warning'' reporting requirement, this is only in addition to an FCM's requirement to also report decreases of 20 percent pursuant to § 1.12(g)(1).[227] In fact, even with the new financial resources reporting requirement for DCOs, DCOs still have a lesser reporting requirement than FCMs in this regard: DCOs are only required to report 25 percent decreases, while FCMs are required to report 20 percent decreases in addition to reporting decreases below certain thresholds (the ''early warning'' requirement).

The Commission is adopting the modified § 39.19(c)(4)(i) reporting requirement described herein. The Commission does not consider it to be duplicative of the Material Adverse Change Reporting Requirement, or the quarterly financial resource reporting requirement under § 39.11(f), as suggested by KCC. Each reporting requirement, including the financial resources reporting requirement, relates to specific circumstances that the Commission has determined to be material and which, based on its experience in conducting financial risk surveillance, the Commission believes warrants notification. The Material Adverse Change Reporting Requirement is intended to cover more unusual changes that are not readily identifiable in advance but would nonetheless be of interest to Commission staff in conducting its oversight of a DCO. The Commission is also not requiring the solvency ratio decrease reporting requirement suggested by Mr. Barnard. The Commission believes that receiving reports regarding financial resources decreases will serve the purpose of alerting the Commission to possible financial distress at a DCO, without

[224] KCC mentioned that changes in the level of excess permanent margin deposited by clearing members, changes in the minimum margin requirements on contracts or in the level of the guarantee pool requirements, and changes in the level of assessments that can be levied against clearing members in the event of a default, could cause financial resources to drop more than 10 percent within the ordinary course of business. OCC stated it would cross the 10 percent threshold on an almost monthly basis, *i.e.,* the day after monthly expirations occur.

[225] *See* discussion of proposed § 39.19(c)(4)(xiv) (finalized as § 39.19(c)(4)(xii)) in section IV.J.5.k, below.

[226] Section 1.12(b)(2) requires an FCM to give 24 hours notice to the Commission if it ''knows or should have known'' that its adjusted net capital is at any time less than 110 percent of the amount required by the Commission's net capital rule.

[227] Section 1.12(g)(1) requires an FCM to provide written notice within two business days of a substantial reduction in capital as compared to that last reported in a financial report if there is a reduction in net capital of 20 percent or more.

unnecessarily burdening a DCO with additional reporting requirements.

NYPC pointed out that the proposed rule language referring to a decrease in the ''total value of financial resources'' could be read to refer to the total combined default and operating resources. It also raised a question as to whether the reference to financial resources ''required to be maintained * * * under § 39.11(a)'' referred to the minimum amount ''required'' or if it was intended to encompass all financial resources ''available to satisfy'' the requirements.

The Commission intends the reporting requirement in § 39.19(c)(4)(i) to refer only to financial resources available to cover a default in accordance with § 39.11(a)(1). A significant change in the amount of financial resources available to meet operating expenses is addressed by § 39.19(c)(4)(iv).[228] In response to the interpretive issues raised by NYPC, the Commission is revising the language in § 39.19(c)(4)(i) to clarify that the decrease in financial resources refers to a decrease in resources ''available to satisfy the requirements under § 39.11(a)(1)'' so it is clear that the reporting requirement applies only to default resources and refers to those resources available to the DCO to satisfy the default resource requirements, even if the amount of those resources exceeds the minimum amount that is required by § 39.11(a)(1).[229]

The Commission notes that it should be apprised when a DCO experiences a 25 percent decrease in the value of its default resources from the value as of the close of the previous business day, even if their value has increased substantially since the last quarterly report. Such a change could signal a significant change in a DCO's risk profile and early reporting will enable the Commission to take appropriate measures to facilitate proper risk management at the DCO.

b. Decrease in Ownership Equity—§ 39.19(c)(4)(ii)

Proposed § 39.19(c)(4)(ii) would require a DCO to report an expected 20 percent decrease in ownership equity two business days prior to the event (or two business days following the event, if the DCO does not and reasonably should not have known prior to the event). Such report must include pro forma financial statements (or current financial statements) reflecting the anticipated condition of the DCO following the decrease (or current condition). The report is intended to alert the Commission of major planned events that would significantly affect ownership equity, most of which are events of which the DCO would have advance knowledge, such as a reinvestment of capital, dividend payment, or a major acquisition.

Better Markets commented that a decrease in ownership equity is an extraordinary event which would warrant notification for even a 5 percent decrease, the threshold the SEC uses for triggering reporting of acquisition of beneficial ownership of a class of shares. While a decrease in ownership equity can have a significant effect on the financial resources of a DCO, the Commission determined that 20 percent is a level that would represent a significant decrease and yet would not occur on a frequent basis. The Commission believes that setting the threshold lower than 20 percent would unnecessarily increase the potential burden on DCOs as well as on the Commission, which could then be responsible for reviewing a larger number of reports.

Better Markets also suggested that five business days advance notice is more appropriate and would not pose a significant burden for DCOs. While changing the requirement to five business days does not itself pose an additional burden on a DCO, the Commission is adopting the two-day notification requirement, as proposed. The Commission has determined that requiring the report two days prior to such an event is sufficient for its purposes in reviewing the transaction, particularly given the confidential nature of such a transaction.

OCC expressed concern that it would be problematic to provide the necessary financial statements within the time frame required; OCC stated that it runs financial statements on a monthly basis, thus it would not have them readily available within two days. Rather, OCC suggested keeping the notification time frame at two days, but allowing up to 30 days, or when the financial statements are ready, whichever occurs first, to provide the financial statements. The Commission is adopting the two-day requirement, as proposed. A 20 percent decrease in ownership equity is generally a major, planned event and the Commission believes it would be highly unusual for a DCO not to have financial statements prepared in connection with such a transaction.

The Commission is adopting § 39.19(c)(4)(ii) as proposed.

c. Six-Month Liquid Asset Test—§ 39.19(c)(4)(iii)

Proposed § 39.19(c)(4)(iii) would require immediate notice of a deficit in the six months of liquid assets required by § 39.11(e)(2). CME expressed concern with other ''immediate notice'' events,[230] stating that this would require a DCO to immediately notify the Commission, in the specific form and manner requested, even before the DCO attends to the situation and gathers all the relevant information. CME recommended only requiring ''prompt'' notice, which would require the DCO to notify the Commission ''quickly and expeditiously,'' while allowing the DCO to first attend to the situation at hand and ensure that the information reported to the Commission is correct and accurate. CME also suggested ''prompt'' notice for the Material Adverse Change Reporting Requirement.

The Commission is adopting the rule as proposed and retaining the ''immediate'' reporting requirement for both § 39.19(c)(4)(iii) and the Material Adverse Change Reporting Requirement.[231] While the Commission appreciates that in such situations a DCO would be busy attending to the matter at hand, the burden to contact the Commission is minimal. The Commission does not specify a particular form or manner of delivery, so as to minimize the burden on the DCO. Moreover, the Commission is concerned that using a time frame of ''prompt'' would leave too much open to interpretation by the DCO and could lead to untimely notices.

d. Change in Working Capital (Current Assets)—§ 39.19(c)(4)(iv)

Proposed § 39.19(c)(4)(iv) would require a DCO to report to the Commission no later than two business days after working capital is negative. The report must include a current balance sheet of the DCO. Better Markets commented that allowing a DCO two days to report negative working capital is too much time, given the potential gravity of the situation, and that anything less than a requirement of immediate notification is ''simply indefensible.''

[228] *See* discussion of § 39.19(c)(4)(iv) in section IV.J.5.d, below.

[229] As a technical matter, ICE Clear sought clarification in the rule text regarding the reference to § 39.11(a), pointing out that § 39.11(a) sets the standard for financial resources and § 39.11(b) lists the financial resources available to satisfy those standards. ICE Clear recommended that § 39.19(c)(4)(i) be revised to refer to both §§ 39.11(a) and (b). The Commission declines to include a reference to § 39.11(b) as the purpose of the cross-reference is to incorporate by reference the standard, not the means for satisfying the standard.

[230] CME referred to the immediate notice required under proposed §§ 39.19(c)(4)(v)–(ix).

[231] *See* further discussion of the Material Adverse Change Reporting Requirement in section IV.J.5.k, below.

As with the ownership equity decrease reporting requirement, OCC commented that it is problematic to submit a balance sheet in two business days. OCC suggested keeping the notification requirement at two days, but allowing up to 30 days (or sooner if ready) to provide a balance sheet.

The Commission is adopting § 39.19(c)(4)(iv) as proposed, except that it is revising certain terminology to clarify the intended meaning of the term ''working capital.'' While the Commission agrees that negative working capital is a serious matter, immediate reporting is not necessary to further the Commission's purpose in obtaining this information. The Commission is allowing up to two days for notification because immediate notification would require a DCO to put in place a potentially expensive system to allow for real-time tracking of working capital. Nonetheless, a DCO is expected to have a general knowledge of the level of its working capital at all times. By allowing two days for notification, a DCO will have time to compute whether working capital is negative if it has reason to believe that this may be the case, without being required to implement a real-time notification system. Thus, the purpose of the two business days is actually to give a DCO time to become aware of its obligation to report, not to allow the DCO to wait two days after it becomes aware of the situation.

The Commission is also requiring the DCO to submit a balance sheet within two business days of the DCO experiencing negative working capital. Given that a DCO would be expected to update its balance sheet upon realizing that it has negative working capital, the Commission does not believe this requirement imposes an additional burden on the DCO.

As ''working capital'' is not a defined term, the Commission is substituting the term ''current assets'' for ''working capital'' for purposes of clarification. Thus, ''negative working capital'' now refers to a situation when current liabilities exceed current assets. Section 39.19(c)(4)(iv) now reads as follows: ''*Change in current assets.* No later than two business days after current liabilities exceed current assets; the notice shall include a balance sheet that reflects the derivatives clearing organization's current assets and current liabilities and an explanation as to the reason for the negative balance.''

e. Intraday Initial Margin Calls—§ 39.19(c)(4)(v)

Proposed § 39.19(c)(4)(v) would require a DCO to report to the Commission any intraday margin call to a clearing member, no later than one hour following the margin call. Several commenters stated that the requirement is unnecessary and a burden on DCOs, while other commenters requested certain modifications to the proposal.

The Commission is not adopting the intraday margin call reporting requirement in proposed § 39.19(c)(4)(v). While such information could provide early notice of potential problems at a DCO, the Commission has concluded that the requirement would be overly burdensome to DCOs given the amount of work commenters indicated it would entail. In addition, the Commission will still receive much of the same information as part of each DCO's daily reporting under § 39.19(c)(1), and unusual intraday initial margin calls that reflect a material adverse change will still be reported under the Material Adverse Change Reporting Requirement.

f. Issues Related to Clearing Members—§§ 39.19(c)(4)(vi)–(ix)

Proposed §§ 39.19(c)(4)(vi)–(ix) would require a DCO to report the following issues related to clearing members: (1) A delay in collection of initial margin; (2) a request to clearing members to reduce positions; (3) a determination by the DCO to transfer or liquidate a clearing member position; and (4) a default of a clearing member. The Commission received comments suggesting that these reporting requirements are unnecessary or, at the very least, require some modification. KCC suggested not adopting these requirements altogether, because notification of these events would still be required under the Material Adverse Change Reporting Requirement.

The Commission has concluded that delays in the collection of initial margin are not necessarily signs of a financial problem at either the DCO or its clearing members. The Commission therefore is not adopting the requirement to report such delays under proposed § 39.19(c)(4)(vi). Nonetheless, if a delay is evidence of a material adverse change in the financial condition of a clearing member, it would still have to be reported under the Material Adverse Change Reporting Requirement.

The Commission is adopting the remainder of these reporting requirements as proposed. However, it is redesignating proposed §§ 39.19(c)(4)(vii)–(ix) as §§ 39.19(c)(4)(v)–(vii). These reporting requirements relate to events that occur infrequently but can be of significance to the Commission's risk surveillance program even if they do not rise to the level of having ''a material adverse financial impact'' on the DCO or represent ''a material adverse change in the financial condition of any clearing member'' under the Material Adverse Change Reporting Requirement. Thus, with respect to these reports, the Commission is not relying on the Material Adverse Change Reporting Requirement as suggested by KCC.

In connection with these proposed requirements, the Commission also proposed removing § 1.12(f)(1) in light of the fact that its requirements were substantially similar to those being proposed as § 39.19(c)(4)(viii). The Commission did not receive any comments on this proposal and is removing § 1.12(f)(1) as proposed.

g. Change in Ownership or Corporate or Organizational Structure—§ 39.19(c)(4)(x)

Proposed § 39.19(c)(4)(x) would require a DCO to report certain changes in ownership or corporate or organizational structure. In general, such reports must be submitted to the Commission three months in advance of the anticipated change. With the exception of the change discussed below, the Commission is adopting § 39.19(c)(4)(x) as proposed, redesignated as § 39.19(c)(4)(viii).

Proposed § 39.19(c)(4)(x)(A)(2) (redesignated as § 39.19(c)(4)(viii)(A)(2)) would require a DCO to report the creation of a new subsidiary, or the elimination of a current subsidiary, of the DCO or its parent company. CME commented that the creation or elimination of a separate subsidiary of the DCO's parent company would not serve the Commission's purpose of conducting effective oversight of the DCO or enhance the Commission's ability to conduct timely analysis of a DCO's activities. CME added that the plans of a DCO's parent company to create (or eliminate) a subsidiary may be highly confidential.[232] CME urged the Commission to eliminate such reporting requirement, asserting that ''the value of this information to the [Commission] is questionable, and the burdens associated with providing it may be substantial.'' CME did not provide any explanation as to why the burden of reporting might be substantial.

While information about corporate changes that potentially impact a DCO's

[232] MGEX also commented on the highly confidential nature of changes in ownership, corporate or organizational structure. The Commission believes MGEX's concerns are addressed by the Commission's procedures for nonpublic records and confidential treatment requests set forth in Part 145 of the Commission's regulations.

financial standing or operations is helpful to the Commission in its oversight of a DCO, to avoid creating an unintended burden on DCOs and Commission staff, particularly where a DCO is part of a complex corporate structure, the Commission is modifying § 39.19(c)(4)(viii)(A)(2) to eliminate the requirement to report a change in subsidiaries of the DCO's parent company. Thus, § 39.19(c)(4)(viii)(A) now requires only that a DCO report ''[a]ny anticipated change in the ownership or corporate or organizational structure of the [DCO] or its parent(s) that would: * * * (2) Create a new subsidiary or eliminate a current subsidiary of the [DCO]. * * *[233]

h. Change in Key Personnel—§ 39.19(c)(4)(xi)

Proposed § 39.19(c)(4)(xi) would require a DCO to report the departure or addition of any person who qualifies as ''key personnel,'' as defined in § 39.2, no later than two business days following the change. KCC suggested requiring a report ''within a reasonable period of time.'' The Commission notes that key personnel are not likely to change often, and KCC did not provide any explanation as to why the two business day notification period is inappropriate. The Commission is adopting § 39.19(c)(4)(xi) as proposed, but redesignated as § 39.19(c)(4)(ix).

i. Change in Credit Facility Funding Arrangement—§ 39.19(c)(4)(xii)

Proposed § 39.19(c)(4)(xii) would require a DCO to report no later than one business day after a DCO changes an existing credit facility funding arrangement, is notified that such arrangement has changed, or knows or reasonably should have known that the arrangement will change. KCC commented that this requirement is duplicative: such reports would already be required by the Material Adverse Change Reporting Requirement. CME had no objection to the requirement to report such changes, but opposed the requirement to notify the Commission when it knows that the arrangement will change in the future, stating that it serves little purpose to notify the Commission without knowing what will change. CME suggested that the requirement should be to report to the Commission after the terms have changed. Conversely, Better Markets opposed several components of the proposed rule, asserting that it is ''too narrow and too loose,'' allowing one business day is too long, and the standard of reporting when the DCO ''knows or reasonably should have known'' is insufficient. Better Markets suggested expanding the reporting requirement to cover alternative sources of liquidity such as access to commercial paper and repurchase agreement markets. It also suggested requiring such a report (i) immediately, and (ii) when ''there is a reasonable likelihood that the arrangement may change.''

The Commission is modifying the rule as suggested by CME by removing the following: ''or knows or reasonably should have known that the arrangement will change.'' Thus, a DCO is required to report a change in a credit facility funding arrangement no later than one business day after it changes the arrangement or is notified that such arrangement has changed. The provision is also being redesignated as § 39.19(c)(4)(x). The Commission is not adopting KCC's suggestion to rely on the Material Adverse Change Reporting Requirement because a change in a credit facility funding arrangement would be of specific interest to the Commission in its conduct of DCO oversight, but such a change is not likely to rise to the level of being a material adverse change. The Commission also is declining to adopt Better Markets' recommendations because they would result in the filing of multiple reports, many of limited usefulness, which, on balance, would place an unnecessary burden on DCOs and Commission staff. Nonetheless, the Commission notes that unusual market conditions such as those that might limit a DCO's access to commercial paper or ability to enter into repurchase agreements, thereby adversely affecting the DCO's liquidity, could constitute a material adverse change that would have to be reported under the Material Adverse Change Reporting Requirement.

j. Rule Enforcement—§ 39.19(c)(4)(xiii)

Proposed § 39.19(c)(4)(xiii) would require a DCO to report the initiation of a rule enforcement action against a clearing member or the imposition of sanctions against a clearing member, no later than two business days after the DCO takes such action. Several commenters observed that this would result in multiple reports with little useful information. They further noted that the DCO would otherwise inform the Commission about serious financial issues, as a matter of current practice and pursuant to the Material Adverse Change Reporting Requirement. MGEX recommended that the Commission not adopt the rule enforcement reporting requirement. OCC and CME recommended that the Commission not adopt the enforcement reporting requirement as proposed.

MGEX commented that requiring notification of the initiation of rule enforcement is unnecessary and premature, noting that many investigations are unrelated to financial risk and many are routine. OCC made a similar comment. MGEX expressed concern about the harm such a report could cause to a clearing member's reputation by notifying the Commission before there has been any determination of any guilt. MGEX also noted that the Commission is already routinely informed or is aware of ongoing or potential actions.

OCC stated that the proposed enforcement reports would serve no purpose because if there were serious financial issues, the DCO would already have been in regular contact with the Commission long before the DCO reached the stage of initiating a rule enforcement action. Thus, OCC believes these reports would not serve as an effective early warning sign. OCC further opposed this reporting requirement because a clearing member could appeal a decision after a sanction is imposed. OCC recommended notification to the Commission within 30 days after a final decision on a disciplinary matter.

CME believes it is unclear when the notification requirement would be triggered, and that there are situations when it is unclear when an enforcement action is considered to be initiated.

The Commission is adopting the rule with modifications. While the Commission considers information about enforcement actions to be useful in its oversight of a DCO's rule enforcement program under Core Principle H, and more broadly in its oversight of a DCO's overall risk management program, the Commission has concluded that the requirement, as proposed, could result in the reporting of many events that are not material to the Commission's oversight of a DCO.[234] The Commission recognizes that many enforcement actions may be based on relatively minor offenses and are

[233] As proposed, the provision referred to the DCO's ''parent company.'' The Commission is adopting a technical amendment to refer to the ''parent(s)'' to clarify that there could be more than one parent, such as in the case of a DCO owned by a joint venture, and the parent need not have any particular corporate form. For purposes of these reporting requirements, a ''parent'' is a direct parent, not an entity further up the chain of ownership.

[234] Core Principle H provides in relevant part that ''each derivatives clearing organization shall * * * (iii) report to the Commission regarding rule enforcement activities and sanctions imposed against members and participants. * * * '' *See also* discussion of § 39.17 in section IV.H, above.

unlikely to have a significant impact on a DCO's ability to manage risk related to the provision of clearing and settlement services.

Therefore, the Commission is adopting the regulation with a modification such that it would only require the reporting of sanctions against clearing members, no later than two business days after the DCO takes such action, and would not require the reporting of the initiation of rule enforcement actions. The Commission is also redesignating the provision as § 39.19(c)(4)(xi). The Commission notes that events or circumstances that rise to the level of having a material adverse impact on a DCO's ability to comply with the requirements of Part 39, or relate to a material adverse change in the financial condition of any clearing member, whether or not they form the basis of an enforcement action, will have to be formally reported under § 39.19(c)(4)(xii)(B) or (C), respectively.

Last, OCC requested clarification as to whether the rule enforcement reporting requirement applies to DCO enforcement activities involving a clearing member that is only registered as a BD. The Commission confirms that the requirement to report the imposition of sanctions against clearing members does not apply to a DCO's clearing members that are registered as BDs only and engaged solely in securities-based transactions. However, insofar as such a clearing member's actions might have a material adverse impact on the DCO's ability to comply with the requirements of Part 39 or would constitute a material adverse change in the financial condition of a clearing member, the DCO would be required to submit a Material Adverse Change Report, as discussed below.

k. Financial Condition and Events (Material Adverse Change Reporting Requirement)—§ 39.19(c)(4)(xiv)

Proposed § 39.19(c)(4)(xiv) would require a DCO to immediately notify the Commission after the DCO knows or reasonably should have known of certain material adverse changes, *i.e.,* the institution of any legal proceedings which may have a material adverse financial impact on the DCO; any event, circumstance or situation that materially impedes the DCO's ability to comply with part 39 of the Commission's regulations and is not otherwise required to be reported; or a material adverse change in the financial condition of any clearing member that is not otherwise required to be reported.[235] CME and OCC are opposed to this ''catch-all'' requirement. In particular, CME is concerned that the requirement is too broad and thus would include a reporting requirement for anything that is technically in violation of Part 39, *e.g.,* even if the DCO's email or Web site goes down temporarily. OCC also commented that the requirement is unnecessary because the Commission will be receiving adequate reporting as a result of other reporting requirements in Part 39 and the reporting requirements for FCMs. Alternatively, CME suggested requiring ''prompt'' notice, rather than ''immediate'' notice.

The Commission is adopting § 39.19(c)(4)(xiv) as proposed, but redesignated as § 39.19(c)(4)(xii). CME's concerns are unwarranted as the reporting requirement would only require reporting incidents that could have a material adverse effect on the DCO. A Web site temporarily going down would not necessarily be expected to have a ''material'' adverse effect on the DCO. However, if it did have a material adverse impact, the Commission would expect it to be reported. The Commission recognizes that it is requiring a DCO to exercise its discretion in the first instance to determine what events trigger this reporting requirement, but the Commission considers this to be an appropriate responsibility for a DCO.

Moreover, while the Commission will be getting information as a result of other Part 39 and FCM reporting requirements, there may be certain conditions or events that could materially impact a DCO that the Commission could not anticipate, yet about which it would still be important for the Commission to be notified. This is especially important in light of the Commission's decision not to adopt certain proposed reporting requirements, as discussed above.

The Commission is also keeping the timing of the reporting requirement as ''immediate'' rather than ''prompt,'' as these are material changes for which immediate notification is essential and for which the more ambiguous ''prompt'' is not appropriate.[236]

l. Financial Statements Material Inadequacies—§ 39.19(c)(4)(xv)

Proposed § 39.19(c)(4)(xv) would require a DCO to report material inadequacies in its financial statements. The Commission received no comments on this requirement, and the Commission is adopting § 39.19(c)(4)(xv) as proposed (redesignated as § 39.19(c)(4)(xiii)), with the exception of a technical revision to add a reference to ''in a financial statement'' so that the language now reads ''If a derivatives clearing organization discovers or is notified by an independent public accountant of the existence of any material inadequacy in a financial statement, such derivatives clearing organization shall give notice. * * *''[237]

m. Action of Board of Directors or Risk Management Committee—§ 39.19(c)(4)(xvi)

In a separate proposed rulemaking that would implement Core Principle P (Conflicts of Interest), the Commission proposed § 39.25(b), which would require a DCO to report when the board of directors of a DCO rejects a recommendation or supersedes an action of the DCO's Risk Management Committee, or when the Risk Management Committee rejects a recommendation or supersedes an action of its subcommittee.[238] In connection with this, the Commission subsequently proposed to cross reference this reporting obligation in proposed § 39.19(c)(4)(xvi). At such time as the Commission may adopt the reporting requirement in § 39.25(b) as a final rule, § 39.19(c)(4) will be amended accordingly.

n. Election of Board of Directors—§ 39.19(c)(4)(xvii)

In a separate proposed rulemaking that would implement Core Principles P (Conflicts of Interest) and Q (Composition of Governing Boards), the Commission proposed § 40.9(b)(1)(iii), which would require a DCO to report certain information to the Commission after each election of its board of directors.[239] In connection with this, the Commission subsequently proposed to cross-reference this reporting obligation in proposed § 39.19(c)(4)(xvii). At such time as the Commission may adopt the reporting requirement in § 40.9(b)(1)(iii) as a final rule, § 39.19(c)(4) will be amended accordingly.

o. System Safeguards—§ 39.19(c)(4)(xviii)

Proposed § 39.19(c)(4)(xviii) would require a DCO to report certain exceptional events and planned changes as required by § 39.18(g) and § 39.18(h),

[235] Because of the potential impact on a DCO of an adverse change in the financial condition of a clearing member, this reporting requirement would apply to ''any'' clearing member, including one that is solely a BD engaging in securities activities.

[236] *See* discussion of timing requirements in section IV.J.5.c, above.

[237] The Commission is also making a technical non-substantive change by substituting the word ''shall'' for the word ''must'' to conform this provision with other provisions in § 39.19.

[238] *See* 76 FR at 736 (Jan. 6, 2011) (Governance).

[239] *Id.*

respectively. The Commission received no comments on this reporting requirement, and the Commission is adopting § 39.19(c)(4)(xviii), redesignated as § 39.19(c)(4)(xvi), as proposed.[240]

K. Core Principle K—Recordkeeping—§ 39.20

Core Principle K,[241] as amended by the Dodd-Frank Act, requires a DCO to maintain records of all activities related to the business of the DCO as a DCO, in a form and manner that is acceptable to the Commission and for a period of not less than 5 years. The Commission proposed § 39.20 to establish requirements that a DCO would have to meet in order to comply with Core Principle K.

Under proposed § 39.20(b), a DCO would have to maintain records of all activities related to its business as a DCO ''for a period of not less than 5 years,'' except for swap data that must be maintained in accordance with the SDR rules in part 45 of the Commission's regulations. Mr. Barnard expressed the view that limiting record retention to five years is insufficient and records should be required to be kept indefinitely.

The Commission is adopting § 39.20 as proposed. The Commission believes that codifying the statutory minimum requirement of five years is appropriate, noting that a five-year minimum is consistent with other Commission recordkeeping requirements.[242] In addition, the exception for swap data recordkeeping addresses situations where the Commission has previously determined that a five-year minimum may not be sufficient.[243]

L. Core Principle L—Public Information—§ 39.21

Core Principle L,[244] as amended by the Dodd-Frank Act, requires a DCO to provide market participants sufficient information to enable the market participants to identify and evaluate accurately the risks and costs associated with using the DCO's services. More specifically, a DCO is required to make available to market participants information concerning the rules and operating and default procedures governing its clearing and settlement systems and also to disclose publicly and to the Commission the terms and conditions of each contract, agreement, and transaction cleared and settled by the DCO, each clearing and other fee charged to members,[245] the DCO's margin-setting methodology, daily settlement prices, and other matters relevant to participation in the DCO's clearing and settlement activities.

Proposed § 39.21 would require a DCO to provide market participants with sufficient information to enable the market participants to identify and evaluate accurately the risks and costs associated with using the services of the DCO. In particular, proposed §§ 39.21(c)(2), (3) and (4) would require a DCO to disclose publicly and to the Commission information concerning its margin-setting methodology and the size and composition of the financial resource package available in the event of a clearing member default.

KCC, MGEX, and NGX variously commented that DCO fees and charges, margin methodology and financial resource information are confidential and should not be required to be publicly disclosed for the following reasons: (1) It is intellectual property, (2) there is no correlation between the availability of such information and the decision whether to invest in or trade with a DCO, and (3) privately held companies (or non-intermediated DCOs in the case of NGX) should not have to disclose such information. MGEX also suggested that making margin methodology information available to the public could lead to market manipulation by those who might attempt to influence the margin level. MGEX suggested that the rule should only require making the financial resource package information available upon request by a clearing member that has signed the DCO's confidentiality agreement. Conversely, Better Markets believes that § 39.21 does not go far enough and that many of the DCO reports required by § 39.19 should also be required to be disclosed to the public, as the Dodd-Frank Act requires that market participants and the public be informed of the risks and other potential consequences of transacting with a DCO.[246] Similarly, Mr. Barnard suggested requiring public disclosure of all items of public interest, including event-specific reports under § 39.19(c)(4), except for those that would expose business-specific confidential issues.

The Commission is adopting § 39.21 as proposed, except for proposed § 39.21(c)(7), which would require the public disclosure of information related to governance and conflicts of interest in accordance with provisions that were proposed in a separate rulemaking. At such time as the Commission adopts those provisions, § 39.21 will be amended accordingly. The requirement to publicly disclose clearing and other fees charged by the DCO, margin methodology and financial resources information comes directly from Core Principle L. Moreover, the Commission believes that concerns regarding the confidential nature of this information are unfounded because such information would seem to be fundamental to a clearing member or potential clearing member's assessment of the strengths and weaknesses of a DCO. This does not necessarily require disclosure of proprietary information; certain DCOs, *e.g.,* CME, already disclose this type of information on their Web sites.

The Commission is not revising the rule to incorporate Better Markets' or Mr. Barnard's proposals. From a practical standpoint, some of the information Better Markets and Mr. Barnard have requested to be publicly disclosed is otherwise going to be public information, particularly if the DCO is a public company, and thus subject to SEC filing requirements. Regardless, the Commission does not interpret Core Principle L as requiring disclosure of all of the financial workings of a DCO.

M. Core Principle M—Information Sharing—§ 39.22

Core Principle M,[247] as amended by the Dodd-Frank Act, requires a DCO to enter into and abide by the terms of each appropriate and applicable domestic and international information-sharing agreement and to use relevant information obtained under such agreements in carrying out its risk management program. The Commission proposed § 39.22 to codify the statutory requirement.

Proposed § 39.22 would require a DCO to enter into certain information-sharing agreements and use relevant information obtained from those

[240] *See* discussion of system safeguards reporting in section IV.I, above.

[241] Section 5b(c)(2)(K) of the CEA, 7 U.S.C. 7a–1(c)(2)(K).

[242] *See, e.g.,* § 1.31 of the Commission's regulations.

[243] *See* 75 FR 76574 (Dec. 8, 2010) (Swap Data Recordkeeping and Reporting Requirements).

[244] Section 5b(c)(2)(L) of the CEA, 7 U.S.C. 7a–1(c)(2)(L).

[245] The statutory language refers to fees charged to ''members and participants,'' and the Commission interprets this phrase to mean fees charged to ''clearing members.''

[246] In particular, Better Markets stated that, at a minimum, a DCO should be required to publicly disclose (i) the adequacy of its financial resources, measured by the required level of financial resources under Commission rules, and (ii) to the extent they must be reported to the Commission, a reduction in financial resources, decrease in ownership equity, or change in ownership or corporate structure.

[247] Section 5b(c)(2)(M) of the CEA, 7 U.S.C. 7a–1(c)(2)(M).

agreements in carrying out the risk management program of the DCO. MGEX is opposed to sharing confidential information such as proprietary intellectual property. MGEX also asked for further clarity to be able to comment further on this requirement.

The Commission is adopting § 39.22 as proposed. The provision purposely lacks specific details to allow each DCO the discretion to make its own determination as to which information-sharing agreements are necessary and appropriate, including taking into account confidentiality concerns. DCOs may seek further guidance from Commission staff if they have specific questions about existing or potential information-sharing arrangements.

N. Core Principle N—Antitrust Considerations—§ 39.23

Core Principle N,[248] as amended by the Dodd-Frank Act, conforms the standard for DCOs with the standard applied to DCMs under Core Principle 19.[249] Proposed § 39.23 would codify Core Principle N. CME commented that the proposed regulation is adequate, and the Commission is adopting the rule as proposed.

O. Core Principle R—Legal Risk—§ 39.27

Section 725(c) of the Dodd-Frank Act sets forth a new Core Principle R (Legal Risk).[250] Core Principle R requires a DCO to have a well-founded, transparent, and enforceable legal framework for each aspect of the DCO's activities. Proposed § 39.27 would set forth the required elements of such a legal framework. The Commission solicited comment as to the legal risks addressed in proposed § 39.27 and whether the rule should address additional legal risks.

CME commented that proposed § 39.27(c)(1), which would require a DCO that provides clearing services outside the United States to identify and address all conflict of law issues, should only require a DCO to identify and address any ''material'' conflict of law issues. The Commission agrees with CME that a DCO should not be burdened to identify non-material conflict of law issues and has revised § 39.27(c)(1) to provide that such a DCO must identify and address ''any material conflict of law issues.'' The Commission is otherwise adopting the rule as proposed.

[248] Section 5b(c)(2)(N) of the CEA, 7 U.S.C. 7a–1(c)(2)(N).

[249] *See* Section 5(d)(19) of the CEA, 7 U.S.C. 7(d)(19) (DCM Core Principle 19).

[250] Section 5b(c)(2)(R) of the CEA, 7 U.S.C. 7a–1(c)(2)(R).

P. Special Enforcement Authority for SIDCOs

Under Section 807(c) of the Dodd-Frank Act, for purposes of enforcing the provisions of Title VIII, a SIDCO is subject to, and the Commission has authority under the provisions of subsections (b) through (n) of Section 8 of, the Federal Deposit Insurance Act[251] in the same manner and to the same extent as if the SIDCO were an insured depository institution and the Commission were the appropriate Federal banking agency for such insured depository institution. Proposed § 39.31 would codify this special authority. The Commission did not receive any comments on this provision. Nevertheless, as discussed above in connection with the proposals relating to SIDCO financial resources and system safeguards for SIDCOs, the Commission is not finalizing the rules relating to SIDCOs at this time. The Commission expects to consider all the proposals relating to SIDCOs together in the future.

V. Part 140 Amendments—Delegations of Authority

Under § 140.94, the Commission delegates the authority to perform certain functions that are reserved to the Commission to the Director of the Division of Clearing and Risk. In connection with the regulations the Commission is adopting herein, as well as previously adopted § 39.5, the Commission is amending § 140.94 to delegate authority to perform certain functions to the Director of the Division of Clearing and Risk, as discussed below.

With respect to DCO applications, under § 140.94(a)(6), the Commission is delegating authority to determine whether a DCO application is materially complete under § 39.3(a)(2), and to request that an applicant submit supplemental information in order for the Commission to process a DCO application under § 39.3(a)(3).

In addition to the authority delegated to the Director of the Division of Clearing and Risk in connection with the Commission's final rulemaking for § 39.5,[252] § 140.94(a)(7) delegates authority to request specific additional information as part of a DCO's swap submission under § 39.5(b)(3)(ix).

Section 140.94(a)(8) delegates authority to grant an extension of time for a DCO to file its annual compliance report under § 39.10(c)(4)(iv).

With respect to financial resources requirements for DCOs, § 140.94(a)(9) delegates authority to: (1) determine whether a particular financial resource may be used to satisfy the requirements of § 39.11(a)(1) under § 39.11(b)(1)(vi); (2) determine whether a particular financial resource may be used to satisfy the requirements of § 39.11(a)(2) under § 39.11(b)(2)(ii); (3) review the methodology used to compute the requirements of § 39.11(a)(1) and require changes as appropriate under § 39.11(c)(1); (4) review the methodology used to compute the requirements of § 39.11(a)(2) and require changes as appropriate under § 39.11(c)(2); (5) request financial reporting from a DCO (in addition to the quarterly reports) under § 39.11(f)(1); and (6) grant an extension of time for a DCO to file its quarterly financial report under § 39.11(f)(4).

Section 140.94(a)(10) delegates authority to request the periodic financial reports of a DCO's clearing members that are not FCMs under § 39.12(a)(5)(i)(B).

With respect to risk management requirements, § 140.94(a)(11) delegates authority to: (1) Review percentage levels for customer initial margin requirements and require different percentage levels if levels are deemed insufficient under § 39.13(g)(8)(ii); (2) review methods, thresholds, and financial resources and require the application of different methods, thresholds, and financial resources as appropriate (relating to risk limits on clearing members) under § 39.13(h)(1)(i)(C); (3) review the amount of additional initial margin required of a clearing member permitted to exceed its risk threshold and require a different amount as appropriate under § 39.13(h)(1)(ii); (4) review the selection of accounts and methodology used in daily stress testing of large trader positions and require changes as appropriate under § 39.13(h)(3)(i); (5) review methodology for weekly stress testing of clearing member accounts and swap portfolios and require changes as appropriate under § 39.13(h)(3)(ii); and (6) request clearing member information and documents regarding their risk management policies, procedures, and practices under § 39.13(h)(5)(i)(A).

With respect to rule submissions and 4d petitions relating to the commingling of futures, options on futures, and cleared swaps in a cleared swaps

[251] 12 U.S.C. 1818.

[252] The Commission has already delegated authority to the Director of the Division of Clearing and Risk to: (1) consolidate multiple swap submissions from one DCO or subdivide a submission as appropriate for review under § 39.5(b)(2); and request information from a DCO to assist the Commission's review of a clearing requirement that has been stayed under § 39.5(d)(3). *See* 76 FR at 44474 (July 26, 2011) (Process for Review of Swaps for Mandatory Clearing; final rule).

account or futures account, respectively, § 140.94(a)(12) delegates authority to request additional information in support of a rule submission, under § 39.15(b)(2)(iii)(A), and to request additional information in support of a 4d petition, under § 39.15(b)(2)(iii)(B).

With respect to DCO reporting requirements, § 140.94(a)(13) delegates authority to: (1) Grant an extension of time for filing of reports required to be filed annually under § 39.19(c)(3)(iv); (2) request that a DCO file information related to its business as a clearing organization, including information relating to trade and clearing details, under § 39.19(c)(5)(i); (3) request that a DCO file a written demonstration that the DCO is in compliance with one or more core principles and relevant rule provisions under § 39.19(c)(5)(ii); and (4) request that a DCO file, for each clearing member, by customer origin, the end-of day positions for each beneficial owner under § 39.19(c)(5)(iii).

Finally, § 140.94(a)(14) delegates authority to permit a DCO to refrain from publishing on its Web site information that is otherwise required to be published under § 39.21(d).

VI. Effective Dates

For purposes of publication in the Code of Federal Regulations, all of the rules adopted herein will have an effective date of 60 days after publication in the **Federal Register**. The Commission received a number of comments, however, that discussed a DCO's need for time to develop appropriate systems and procedures to come into compliance with some of the rules. The Commission is extending the date by which DCOs must come into compliance for certain rules as follows:

DCOs must comply with the following rules 180 days after publication in the **Federal Register**: Financial resources—§ 39.11; participant and product eligibility—§ 39.12; risk management—§ 39.13 (except gross margin—§ 39.13(g)(8)(i)); and settlement procedures—§ 39.14.

DCOs must comply with the following rules 1 year after publication in the **Federal Register**: chief compliance officer—§ 39.10(c); gross margin—§ 39.13(g)(8)(i); system safeguards—§ 39.18; reporting—§ 39.19; and recordkeeping—§ 39.20.

VII. Section 4(c)

Proposed §§ 39.15(b)(2)(i) and 39.15(b)(2)(ii) would establish procedures for permitting futures and options on futures to be carried in a cleared swaps account (subject to Section 4d(f) of the CEA), and for cleared swaps to be carried in a futures account (subject to Section 4d(a) of the CEA), respectively. In connection with proposing those rules, the Commission proposed to grant an exemption under Section 4(c) of the CEA and requested comment on its proposed exemption.[253]

Section 4(c) of the CEA provides that, in order to promote responsible economic or financial innovation and fair competition, the Commission, by rule, regulation or order, after notice and opportunity for hearing, may exempt any agreement, contract, or transaction, or class thereof, including any person or class of persons offering, entering into, rendering advice or rendering other services with respect to, the agreement, contract, or transaction, from the contract market designation requirement of Section 4(a) of the CEA, or any other provision of the CEA other than certain enumerated provisions, if the Commission determines that the exemption would be consistent with the public interest.[254]

Proper treatment of customer funds requires, among other things, segregation of customer money, securities and property received to margin, guarantee, or secure positions in futures or options on futures, in an account subject to Section 4d(a) of the CEA (i.e., a futures account), and segregation of customer money, securities and property received to margin, guarantee, or secure positions in cleared swaps, in an account subject to Section 4d(f) of the CEA (*i.e.,* a cleared swaps account). Customer funds required to be held in a futures account cannot be commingled with non-customer funds and cannot be held in an account other than an account subject to Section 4d(a), absent Commission approval in the form of a rule, regulation or order. Section 4d(f) of the CEA mirrors these limitations as applied to customer positions in cleared swaps.

Under the proposed exemption, a DCO and its clearing members would be exempt from complying with the segregation requirements of Section 4d(a) when holding customer segregated funds in a cleared swaps account subject to Section 4d(f) of the CEA, instead of a futures account; and similarly, a DCO and its clearing members would be exempt from complying with the segregation requirements of Section 4d(f) when holding customer funds related to cleared swap positions in a futures account subject to Section 4d(a) of the CEA, instead of a cleared swaps account. For the reasons discussed below, the Commission has determined to grant the exemption under Section 4(c) of the CEA.

In the notice of proposed rulemaking, the Commission expressed its view that the adoption of proposed §§ 39.15(b)(2)(i) and 39.15(b)(2)(ii) would promote responsible economic and financial innovation and fair competition, and would be consistent with the ''public interest,'' as that term is used in Section 4(c) of the CEA. However, the Commission solicited public comment on whether the proposed regulations would satisfy the requirements for exemption under Section 4(c) of the CEA.

The Commission received one comment. CME supported the Commission's conclusion, agreeing that in appropriate circumstances, the commingling of customer positions in futures, options on futures, and cleared swaps could achieve important benefits with respect to greater capital efficiency resulting from margin reductions for correlated positions. CME believes that adoption of a regulation permitting such commingling would be consistent with the public interest, adding that ''[h]aving positions in a single account can also enhance risk management practices and systemic risk containment by allowing the customer's portfolio to be handled in a coordinated fashion in a transfer or liquidation scenario.''

In light of the foregoing, the Commission finds that permitting the commingling of positions pursuant to §§ 39.15(b)(2)(i) and 39.15(b)(2)(ii) will promote responsible economic and financial innovation and fair competition, and is consistent with the ''public interest,'' as that term is used in Section 4(c) of the CEA.

VIII. Considerations of Costs and Benefits

Section 15(a) of the CEA requires the Commission to ''consider the costs and benefits'' of its actions before promulgating a regulation.[255] In particular, these costs and benefits must be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. In conducting its evaluation, the Commission may, in its discretion, give greater weight to any one of the five enumerated areas and it may determine that, notwithstanding

[253] *See* 76 FR at 3715–3716 (Jan. 20, 2011) (Risk Management).

[254] 7 U.S.C. 6(c).

[255] 7 U.S.C. 19(a).

costs, a particular rule is necessary to protect the public interest or to effectuate any of the provisions or to accomplish any of the purposes of the CEA.[256]

In the following discussion, the Commission presents its considerations of the costs and benefits of the final rulemaking in light of the comments it received, other relevant data and information, and the five broad areas of market and public concern as required by section 15(a) of the CEA.

A. Background

A derivatives clearing organization (DCO) is an entity registered with the Commission through which derivatives transactions are cleared and settled. A DCO acts as a central counterparty, serving principally to ensure performance of the contractual obligations of the original counterparties to derivatives transactions and to manage and mitigate counterparty risk and systemic risk in the markets they serve. This is accomplished by interposing the DCO between the counterparties so that the DCO becomes the buyer to every seller and the seller to every buyer. Upon novation by the original parties to a transaction, the contractual obligations of the original parties to one another are extinguished and replaced by a pair of equal and opposite transactions between the DCO and the counterparties or their agents.

The DCO's role as central counterparty potentially exposes the DCO itself to risk from every user whose transactions are cleared through the DCO. Conversely, if a DCO itself fails or suffers a risk of failure, the consequences for the market at large are likely to be serious and widespread. Effective risk management, therefore, is critical to the functioning of a marketplace in which swaps are cleared through DCOs.

Clearing members are the entities that deal directly with DCOs. They may be acting on their own behalf or as agents. DCOs establish rules and risk management requirements for their clearing members, which typically include specified levels of financial resources, operational capacity, and risk management capability; deposit of risk-based initial margin and payment of daily variation margin sized to cover current and potential losses of the member; and contribution to a guaranty fund that can be used in the event of a clearing member default. These requirements lower systemic risk by reducing the likelihood of a clearing member default and, in the event a clearing member default does occur, reducing the likelihood that it will result in the default of other market participants.

Additionally, unlike bilateral derivatives transactions where parties do not know the exposures their counterparties have to other market participants, as a result of the multilateral nature of centralized clearing, DCOs have a real-time, more complete picture of each clearing member's risk exposure to multiple parties. Thus the DCO can more effectively and quickly identify developing risk exposures for individual clearing members and better manage these risks if clearing members become distressed.

B. General Comments and Considerations

The Dodd-Frank Act is intended to facilitate stability in the financial system of the United States by reducing risk, increasing transparency, and promoting market integrity. To accomplish these objectives, among other things, the Dodd-Frank Act provides for the mandatory clearing of certain swaps by DCOs and explicitly authorizes the Commission to promulgate rules to establish appropriate standards for DCOs in carrying out their risk mitigation function. Regulatory standards for DCOs will serve to assure market participants that credit and other risks associated with cleared swap transactions are being appropriately managed by DCOs. This, in turn, can promote the use of cleared swaps. Regulatory standards also can foster market confidence in the integrity of the derivatives clearing system.

In this final rulemaking, the Commission is adopting regulations to implement 15 DCO core principles: A (Compliance), B (Financial Resources), C (Participant and Product Eligibility), D (Risk Management), E (Settlement Procedures), F (Treatment of Funds), G (Default Rules and Procedures), H (Rule Enforcement), I (System Safeguards), J (Reporting), K (Recordkeeping), L (Public Information), M (Information Sharing), N (Antitrust Considerations), and R (Legal Risk). In addition, the Commission is adopting regulations to implement the Chief Compliance Officer provisions of Section 725 of the Dodd-Frank Act, and to update the regulatory framework for DCOs to reflect standards and practices that have evolved over the past decade since the enactment of the CFMA.

This rulemaking process has generated an extensive record, which is discussed at length throughout this notice as it relates to the substantive provisions in the final rules. A number of commenters expressed the view that there would be significant costs associated with implementing and complying with proposed rules. The Commission also received comments from KCC, CME, and OCC who stated generally that the cost-benefit analysis presented in the proposed rulemakings was insufficient. The Commission has carefully considered alternatives suggested by commenters, and in a number of instances, for reasons discussed in detail above, has adopted such alternatives or modifications to the proposed rules where, in the Commission's judgment, the alternative or modified standard accomplishes the same regulatory objective in a more cost-effective manner.

The Commission invited comments on the comprehensive or ''systemic'' costs and benefits of the proposed rules. MFA and Better Markets addressed this issue stating that the Commission's cost-benefit analyses presented in the notices of proposed rulemaking may have understated the benefits of the proposed rules.[257] MFA commented that the costs to market participants would be substantial if the Commission does not adopt the proposed regulations. Better Markets commented that the only reasonable way to consider costs and benefits of any of the Commission's rule proposals under Dodd-Frank is to view them as a whole. According to Better Markets:

> It is undeniable that the Proposed Rules are intended and designed to work as a system. Costing-out individual components of the Proposed Rules inevitably double counts costs which are applicable to multiple individual rules. It also prevents the consideration of the full range of benefits that arise from the system as a whole that provides for greater stability, reduces

[256] *See, e.g., Fisherman's Doc Co-op., Inc* v. *Brown,* 75 F.3d 164 (4th Cir. 1996); *Center for Auto Safety* v. *Peck,* 751 F.2d 1336 (D.C. Cir. 1985) (noting that an agency has discretion to weigh factors in undertaking cost-benefit analysis). Section 3 of the CEA states the purposes of the Act:

> It is the purpose of this Act to serve the public interests described in subsection (a) through a system of effective self-regulation of trading facilities, clearing systems, market participants and market professionals under the oversight of the Commission. To foster these public interests, it is further the purpose of this Act to deter and prevent price manipulation or any other disruptions to market integrity; to ensure the financial integrity of all transactions subject to this Act and the avoidance of systemic risk; to protect all market participants from fraudulent or other abusive sales practices and misuses of customer assets; and to promote responsible innovation and fair competition among boards of trade, other markets and market participants.

[257] *See* Letter from Better Markets dated June 3, 2011; Letter from MFA dated March 21, 2011 (comment file for 76 FR 3698 (Risk Management)).

systemic risk and protects taxpayers and the public treasury from future bailouts.

Better Markets believes that the benefits must include the avoided risk of a new financial crisis and the best measure of this benefit is the cost of the 2008 financial crisis, which is still accumulating. It cited Andrew G. Haldane, Executive Director, Financial Stability of the Bank of England, who estimated that the worldwide cost of the crisis in terms of lost output was between $60 trillion and $200 trillion, depending primarily on the long term persistence of the effects.

The Commission agrees with Better Markets that the DCO rules operate in an integrated, systemic manner to ensure that the risks associated with cleared swap transactions are being appropriately managed or addressed by DCOs. When implemented in their entirety, these rules have the potential to significantly change not only the aggregate risk profile of the entire derivatives clearing industry, but also the allocation of risks among DCOs, clearing firms, and market participants. The final rules require DCOs to admit firms as clearing members that may differ substantially from existing members with respect to size, risk profiles, specializations, and risk management abilities. The rules also help create an environment in which DCOs will compete for the business of clearing trades of different sizes, and of many different derivatives products—both futures and swaps. In a potentially much more diverse range of both participants and products, these final rules will allow, and in some cases require, DCOs to make use of a number of risk management tools, including, among others, periodic valuation of financial resources; a potentially more rigorous design for margins; stress testing and back testing for financial resources and margin, respectively; and additional rules and procedures designed to allow for management of events associated with a clearing member defaulting on its obligations to the DCO. These rules help reduce the potential for DCO default, and the potential follow-on effects on financial markets as a whole. In addition, the daily, quarterly, annual, and event-specific reporting requirements for DCOs enhance the tools available to the Commission in conducting its financial risk surveillance in connection with derivatives clearing by DCOs.

Certain of the regulations promulgated in this final rulemaking merely codify the requirements of the CEA, as amended by the Dodd-Frank Act, *e.g.,* §§ 39.10(a) and (b) (compliance with core principles); 39.17 (rule enforcement); 39.22 (information sharing); and 39.23 (antitrust considerations). For such provisions, the Commission has not considered alternatives to the statute's prescribed requirements, even though a DCO may incur costs to comply with these provisions. As these requirements are imposed by the Dodd-Frank Act, any associated costs and benefits are the result of statutory directives, as previously determined by the Congress, that govern DCO activities independent of the Commission's regulations. By its terms, CEA Section 15(a) requires the Commission to consider and evaluate the prospective costs and benefits of regulations and orders of the Commission prior to their issuance; it does not require the Commission to evaluate the costs and benefits of the actions or mandates of the Congress.

In its notice of proposed rulemaking, the Commission requested data or other information in connection with its cost-benefit considerations. The Commission received only a few comments providing quantitative information on the costs of the proposed rules. It received two comments on the benefits of the proposed rules.

The Commission invited but did not receive public comments specific to, or related to, its consideration of costs and benefits for proposed §§ 1.3, 39.1, 39.2, 39.4, 39.9, 39.16, 39.18, 39.20, 39.21, and 39.27. However, the Commission received comments on substantive provisions of those proposed rules and such comments are addressed above.

The following discussion summarizes the Commission's consideration of the costs and benefits of the final rules pursuant to CEA Section 15(a).

C. Form DCO—§ 39.3(a)(2)

Section 5b(c)(1) of the CEA provides that ''[a] person desiring to register as a derivatives clearing organization shall submit to the Commission an application in such form and containing such information as the Commission may require for the purpose of making the determinations required for approval under paragraph (2).'' Paragraph (2), which sets forth the 18 core principles applicable to DCOs, further provides in paragraph (i) that ''[t]o be registered and to maintain registration as a derivatives clearing organization, a derivatives clearing organization shall comply with each core principle described in this paragraph and any requirement that the Commission may impose by rule or regulation pursuant to section 8a(5) [of the CEA].'' Accordingly, the standard for approval of DCO registration is the applicant's ability to satisfy the DCO core principles.

Proposed § 39.3(a)(2) would require that any person seeking to register as a DCO submit a completed Form DCO, which would be provided as an appendix to part 39 of the Commission's regulations. The Form DCO, composed of a cover sheet and list of exhibits, would replace the general guidance contained in Appendix A to Part 39, ''Application Guidance and Compliance With Core Principles'' (Guidance), which was adopted by the Commission in 2001. In accordance with Section 5b(c) of the Act, the Form DCO is designed to elicit a demonstration that an applicant can satisfy each of the DCO core principles. Toward this end, the Form DCO requires submission of extensive information about an applicant's intended operations. This information has been required of applicants under the previous Guidance, and the use of the Form DCO does not represent a departure in substance from the Commission's practices over the past decade.

Rather, as explained in the proposed rulemaking, the Form DCO was designed to standardize and clarify the information that the Commission has required from DCO applicants in the past, in an effort to facilitate a more streamlined and efficient application process. The Commission has learned from experience that the general guidance contained in the previous Appendix A did not provide sufficiently specific instructions to applicants. As a result, the registration process has been prolonged in some cases because of the need for Commission staff to provide applicants with additional guidance about the nature of the information that the Commission requires to conclude that the applicant has demonstrated its ability to comply with the core principles.

The Commission did not receive comments specifically with respect to its cost-benefit analysis of proposed § 39.3(a)(2) or to its Paperwork Reduction Act estimate that the cost of preparing a completed application would be $100,000. The Commission notes that applicants for DCO registration will incur direct costs associated with the preparation of the completed Form DCO. However, because the Form DCO to a large extent captures information that has already been required by the Commission under the Guidance or, with respect to new core principles, captures information that tracks the statutory

requirements,[258] the use of the Form DCO will not impose greater costs than have been imposed in the past. In fact, by providing greater clarity as to what is expected from an applicant and by reducing the need for Commission staff to request, and the applicant to provide, supplementary information, the Form DCO should reduce costs for applicants.

As discussed in more detail in this notice of final rulemaking, the Commission received two comment letters that addressed the proposed Form DCO.[259] The comments did not oppose the concept of the Form DCO. The comments were directed at the large amount of information required and the necessity of submitting certain specific information. One of the comment letters focused on the use of the Form DCO for amending an existing DCO registration, and the Commission has provided a clarification to address that commenter's concerns. The Commission has determined to adopt the final Form DCO largely as proposed, but it has modified several of the exhibits in response to specific comments.

The Commission has evaluated the costs and benefits of the required use of Form DCO, under § 39.3(a)(2), in light of the specific considerations identified in Section 15(a) of the CEA as follows:

1. Protection of Market Participants and the Public

Costs

Applicants currently incur costs in demonstrating compliance with the core principles. As described above, based on the staff's experience in processing DCO applications over the last ten years, the Commission believes that use of the Form DCO will not increase, and often may decrease, the time and expense associated with applying for registration as a DCO for future applicants.

Benefits

The Commission expects that use of the Form DCO will promote the protection of market participants and the public. Given the critical role that DCOs play in providing financial integrity to the markets for which they clear—which now include swaps as well as futures markets—it is essential that the Commission conduct a comprehensive and thorough review of all DCO applications. Such review is essential for the protection of market participants and the public insofar as it serves to limit the performance of DCO functions to only those entities that have provided adequate demonstration that they are capable of satisfying the core principles.

2. Efficiency, Competitiveness, and Financial Integrity

Costs

As noted, the Commission believes that use of the Form DCO will not increase, and often may decrease, the time and expense associated with applying for registration as a DCO for future applicants.

Benefits

The Commission expects that use of the Form DCO will promote efficiency, competitiveness, and financial integrity. As discussed above, the CEA requires that prospective DCO registrants submit an application and comply with the core principles. In connection with these requirements, in 2001, the Commission adopted the Guidance to assist applicants in preparing application materials. However, the Commission's experience with protracted reviews of draft applications and materially incomplete final submissions has indicated a need for streamlining the application process.

By requiring the use of Form DCO, the Commission is promoting increased efficiency by providing greater clarity to applicants before they undertake the application process, thereby facilitating the submission of a materially complete final application in the first instance. This will also reduce the need for submission of supplemental materials and consultation between applicants and the Commission staff. The result will be more cost effective and expeditious review and approval of applications. This will benefit applicants as well as free Commission staff to handle other regulatory matters.

In addition, use of the Form DCO makes available to the public the Commission's informational requirements so that all prospective applicants have a heightened understanding of what is involved in the preparation and processing of an application. It promotes greater transparency in the process and will enhance competition among DCOs by making it easier for qualified applicants to undertake and navigate the application process in a timely manner.

The Form DCO is designed to address an applicant's ability to comply with the core principles. Compliance with the core principles is essential to ensure the financial integrity of the derivatives clearing process and of derivatives markets, generally. In particular, the required information in Form DCO Exhibits B (financial resources), D (risk management), E (settlement procedures), F (treatment of funds), G (default rules and procedures) and I (system safeguards) elicits important information supporting the applicant's ability to operate a financially sound clearing organization that can provide reliable clearing and settlement services and appropriately manage the risks associated with its role as a central counterparty.

3. Price Discovery

The Commission does not anticipate that use of the Form DCO will impact the price discovery process.

4. Sound Risk Management Practices

Costs

As noted, the Commission believes that use of the Form DCO will not increase, and often may decrease, the time and expense associated with applying for registration as a DCO for future applicants.

Benefits

The Commission expects that use of the Form DCO will promote sound risk management practices. Use of the Form DCO will reinforce sound risk management by requiring an applicant to examine its proposed risk management program through the preparation of a series of detailed exhibits. The submission of exhibits relating to risk management also make it easier for Commission staff to analyze and evaluate an applicant's ability to comply with Core Principle D (risk management, which includes monitoring and addressing credit exposure through margin requirements and other risk control mechanisms). Sound risk management practices are required by the CEA and Commission regulations, and are essential to the effective functioning of a DCO.

5. Other Public Interest Considerations

Costs

As noted, the Commission believes that use of the Form DCO will not increase, and often may decrease, the time and expense associated with applying for registration as a DCO for future applicants.

Benefits

There are considerable benefits to the public in standardizing and streamlining the DCO application process in terms of more efficient use of Commission resources and more cost-effective and transparent requirements for applicants. DCOs play a key role in

[258] Exhibits O, P, and Q, relating to the requirements of Core Principles O (Governance Fitness Standards), P (Conflicts of Interest), and Q (Composition of Governing Boards), respectively.

[259] *See* discussion in Section III.C.1, above.

supporting the financial integrity of derivatives markets, and this role takes on even greater significance with the Dodd-Frank requirements for swaps clearing. A coherent and comprehensive approach to DCO registration is needed to ensure that only qualified applicants will be approved and that they are capable of satisfying the requirements of the core principles and Commission regulations.

D. Chief Compliance Officer—§ 39.10(c)

Section 725(b) of the Dodd-Frank Act added a new paragraph (i) to Section 5b of the CEA to require each DCO to designate an individual as its CCO, responsible for the DCO's compliance with the CEA and Commission regulations and the filing of an annual compliance report.

The provisions regarding the CCO in proposed § 39.10(c) would largely codify Section 5b(i) of the CEA. There are certain provisions, however, that effectuate or implement the statutory requirements. For example, the proposed rules would require that the CCO have the appropriate background and skills for the position and not be disqualified from registration under Sections 8a(2) or 8a(3) of the CEA; meet with the board of directors or the senior officer at least once a year to discuss the DCO's compliance program; and perform duties including establishing a code of ethics. In addition, with respect to the annual report, the proposed rules would set forth certain content requirements (*e.g.,* discussing areas for compliance program improvement and listing any material changes to compliance policies and procedures since the last annual report) and procedural requirements (*e.g.,* submitting the annual report to the board of directors or senior officer prior to submitting the report to the Commission, and submitting the annual report not more than 90 days after the end of the DCO's fiscal year unless the Commission grants an extension of time.)

As discussed in detail above, the Commission received a number of comments that supported the proposed rules for CCOs and the annual compliance report, and other comments that suggested alternatives or refinements to the Commission's proposed rules. Commenters did not provide any quantitative data regarding the costs to either DCOs or market participants and the public. The Commission addressed those comments above and, where appropriate, the final rules reflect commenters' suggestions.

One commenter, MGEX, expressed concerns that relate to the Commission's implementation of the compliance framework established by Congress. MGEX stated that the regulations regarding organizational structure and reporting lines seem ''excessive and beyond what was contemplated by the passage of the Dodd-Frank Act.'' It also believes that the regulations do not ''guarantee improved market protection, which is one of the main goals of the Dodd-Frank Act.''

The Commission does not agree with MGEX that the rules exceed what was contemplated by Congress. To a great extent the rules codify the relevant provisions of the CEA, as amended, and it was Congress, not the Commission, that specified the compliance framework that the Commission is now implementing. The additional requirements set forth by the rules are designed to increase the CCO's effectiveness and ensure that the annual report is a useful compliance and oversight tool.

MGEX also commented that ''the rules will impose a cost and burden on the market that will be passed along to the market participants which decreases the overall efficiency and risk mitigation.'' MGEX did not provide any details to support its conclusion.

The Commission disagrees with MGEX that the Commission's rules will impose such a significant burden on the market and market participants. The principal costs of the CCO requirement result from the statutory provisions of the CEA which, as amended by the Dodd-Frank Act, requires each DCO to designate a CCO and submit an annual compliance report. Although the Commission's rules would impose certain additional costs in order to implement this statutory requirement, these additional costs are not expected to significantly increase costs to the DCO or market participants. For example, a DCO may incur higher costs to the extent that it needs to pay a higher salary to a person who has the qualifications set forth in the rule to perform the statutory and regulatory duties of the CCO.[260] The Commission believes that such costs are appropriate because it has determined that a CCO should have these qualifications to be effective, and notes that the standards are general enough to provide reasonable discretion to the DCO in its designation of a CCO.[261] Similarly, a DCO may have to incur higher costs in terms of staff time to prepare an annual report that contains the information required by § 39.10(c)(3), as opposed to a less comprehensive annual report. However, the Commission believes that the annual report must contain adequate information if it is to be useful to the DCO and the Commission. The Commission does not anticipate that these costs of hiring a qualified CCO, or of preparing a more detailed annual report, will be significantly higher than the costs to the DCO imposed by the basic statutory requirements for the CCO.[262]

For purposes of the Paperwork Reduction Act, the notice of proposed rulemaking estimated the cost of preparing the annual report to be $8000 to $9000 per year. The Commission received no comments on this estimate. The Commission received comments that the annual report should be more limited than proposed. The Commission notes that those comments did not suggest limiting the annual report to achieve a more favorable cost-benefit ratio, and the Commission addressed those comments above.

The Commission has evaluated the costs and benefits of § 39.10(c) in light of the specific considerations identified in Section 15(a) of the CEA as follows:

1. Protection of Market Participants and the Public

Costs

As discussed above, there are likely to be direct costs to DCOs in connection with designating a qualified CCO and annually preparing a comprehensive compliance report. To the extent that the Commission's regulations impose more specific or supplemental requirements when compared to those requirements explicitly imposed by Section 5b(i) of the CEA, those incremental costs are not likely to be significant. While it is possible that those incremental costs will be passed along to clearing members and market participants in the form of increased clearing fees, the size of those incremental costs, when spread across recipients of clearing services, are likely to be negligible.

[260] The Commission believes that even in the absence of this specific rule many DCOs would employ well-qualified persons to perform the responsibilities of the statutorily-required CCO. In such circumstances this rule would not result in any additional costs for a DCO.

[261] As noted in section IV.A.3, above, the rules do not require that the person designated as the CCO hold that position, exclusively. A CCO may have dual responsibilities so long as the CCO can effectively carry out his or her duties as the CCO. Accordingly, depending on the skills and background of the personnel within a particular DCO, a DCO may be able to use an existing staff member to perform the duties of the CCO.

[262] In light of the variations that exist today among DCO compliance programs, including the qualifications of DCO compliance personnel, the Commission does not believe it is feasible to quantify the incremental costs associated with § 39.10(c).

Benefits

The Commission believes that the CCO rules will protect market participants and the public by promoting compliance with the core principles and Commission regulations through the designation and effective functioning of the CCO, and the establishment of a framework for preparation of a meaningful annual review of a DCO's compliance program. While there may be incremental costs associated with imposition of the Commission's regulatory standards, those costs may be mitigated by the countervailing benefits of an effective compliance program that fosters financial integrity of the clearing process and responsible risk management practices to protect the public from the adverse consequences that would result from a DCO failure.

The annual compliance report, in particular, will help the DCO and the Commission to assess whether the DCO has mechanisms in place to adequately address compliance issues and whether the DCO remains in compliance with the core principles and the Commission's regulations. Such compliance will protect market participants and the public.

2. Efficiency, Competitiveness, and Financial Integrity

Costs

The Commission believes that designation of a qualified CCO who will effectively perform required duties, including the preparation of an annual compliance report, will not increase costs and is likely to lead to reduction of costs, in terms of the efficiency, competitiveness, and financial integrity of the derivatives markets.

Benefits

Clearing is a critical component of the efficient, competitive, and financially sound functioning of derivatives markets. The financial integrity of these markets, in particular, is achieved through layers of protection. Requirements for an effective DCO compliance program will add a new layer of protection to ensure that the DCO remains compliant with the CEA and Commission regulations, especially relating to Core Principles B (financial resources), D (risk management), E (settlement procedures), F (treatment of funds), G (default rules and procedures), I (system safeguards), and N (antitrust considerations).

An effective CCO will provide benefits to DCOs and the markets they serve by implementing measures that enhance the safety and efficiency of DCOs and reduce systemic risk. Reliable and financially sound DCOs are essential for the stability of the derivatives markets they serve, and for the greater public which benefits from a sound financial system.

3. Price Discovery

The Commission does not anticipate that § 39.10(c) will impact the price discovery process.

4. Sound Risk Management Practices

Costs

The Commission does not believe that the CCO provisions will impose costs in terms of sound risk management practices. To the contrary, the Commission perceives there to be benefits that will result from its CCO implementing regulations.

Benefits

The regulatory provisions that interpret or implement the statutory requirements for the CCO and annual report serve to enhance the standards for a DCO's compliance program which will necessarily emphasize risk management compliance because of its significance to the overall purpose and functioning of the DCO. Compliance with Core Principle D (risk management) and related regulations encompasses, among other things, measurement and monitoring of credit exposures to clearing members, implementation of effective risk-based margin methodologies, and appropriate calculation and back testing of margin levels. It is the responsibility of the CCO to ensure that the DCO is compliant with Core Principle D and the regulations thereunder, and is otherwise engaged in appropriate risk management activities in accordance with the DCO's own rules, policies and procedures.

5. Other Public Interest Considerations

The Commission does not believe that the rule will have a material effect on public interest considerations other than those identified above.

E. Financial Resources—§ 39.11

Section 5b(c)(2)(B) of the CEA, Core Principle B, as amended by the Dodd-Frank Act, requires a DCO to possess financial resources that, at a minimum, exceed the total amount that would enable the DCO to meet its financial obligations to its clearing members notwithstanding a default by the clearing member creating the largest financial exposure for the DCO in extreme but plausible market conditions, and to cover its operating costs for a period of one year, calculated on a rolling basis.

Proposed § 39.11 would codify these requirements and set forth additional standards for the types of financial resources that are acceptable (§ 39.11(b)); computation of the amount of financial resources required to satisfy the statutory default and operational resources requirements (§ 39.11(c)); valuation of financial resources (§ 39.11(d)); liquidity of financial resources (§ 39.11(e)); and quarterly reporting of financial resources (§ 39.11(f)).[263]

As discussed in more detail above, the Commission received comment letters requesting further clarity as to the proposed requirements. The Commission also received comment letters that discussed how the proposed rules might impose costs or burdens on DCOs.[264] Two commenters objected to the requirement that DCOs must monitor ''on a continual basis'' a clearing member's ability to meet potential assessments, which one of the commenters characterized as ''overly burdensome and difficult to administer.'' Regarding the proposed restrictions on the use of assessment powers, another commenter stated that the inclusion of assessment powers as a financial resource is necessary for it to meet its obligations in the event of a default. Two commenters recommended that the Commission permit letters of credit to be considered in the financial resources computation. Finally, several DCOs urged the Commission to allow U.S. Treasuries, in addition to cash, as a financial resource sufficient to meet the proposed financial resource liquidity requirement.

As discussed above, in proposing that a DCO ''monitor, on a continual basis, the financial and operational capacity of its clearing members to meet potential assessments,'' the Commission did not intend to require real-time monitoring of clearing members. Rather, the purpose of the provision was to require a DCO to monitor often enough to enable it to become aware of any potential problems in a timely manner. The Commission has modified § 39.11(d)(2)(ii) to remove the ''continual basis'' standard, leaving the DCO to exercise its discretion in determining the appropriate frequency of periodic reviews or more frequent reviews as circumstances warrant in connection with particular clearing members.

The Commission is permitting DCOs to include potential clearing member

[263] The Commission also proposed § 39.29 which would apply certain stricter requirements to SIDCOs. As discussed above, the Commission is not taking action on those proposed rules as part of this final rulemaking.

[264] *See* discussion in Section IV.B, above.

assessments in calculating default financial resources, as proposed, subject to the limitations of § 39.11(d)(2)(iii) (30 percent haircut) and § 39.11(d)(2)(iv) (DCO may count the value of assessments, after the haircut, to meet up to 20 percent of its default resources requirement). The comments on this proposal were varied. Some commenters stated that the Commission had proposed an appropriate, balanced approach; others stated that the limitations on assessments were too strict; and still others stated that the Commission should not permit assessments to count at all.

It is the Commission's view that, in light of recent market events and as a general matter, it is not prudent to permit a DCO to rely on letters of credit. However, for the reasons discussed above, the Commission would consider permitting letters of credit to be included as a DCO financial resource on a very limited case-by-case basis.

Finally, the Commission is revising § 39.11(e)(1) so that, in addition to cash, a DCO may use U.S. Treasury obligations and high quality, liquid, general obligations of a sovereign nation to satisfy financial resource liquidity requirements. This revised standard reflects the current practices of U.S. and foreign-based DCOs.

The Commission has evaluated the costs and benefits of § 39.11 in light of the specific considerations identified in Section 15(a) of the CEA as follows:

1. Protection of Market Participants and the Public

Costs

The regulations require DCOs to take specific actions to ensure that they are able to meet the statutory requirements for covering default and operating expenses. These actions include monthly stress testing to calculate what those financial obligations are, and quarterly reporting to the Commission to demonstrate the adequacy of financial resources in terms of dollar amount and liquidity. DCOs will incur direct costs related to staffing and technology programming to calculate, monitor, and report financial resources.

Existing DCOs will have already implemented certain practices and systems for tracking and managing financial resources in order to comply with Core Principle B, as originally enacted in 2000. Given the staffing and operational differences among DCOs, the Commission is unable to accurately estimate or quantify the additional costs DCOs may incur to comply with the new financial resource rules.[265] Moreover, the cost-effects of new cleared products and new market participants clearing those products are too speculative and uncertain for the Commission to be able to quantify or estimate at this time. Such costs or benefits will depend upon a number of variables that are not estimable or quantifiable at this time, such as the nature and number of the new products that become subject to clearing, the nature and number of market participants that enter into transactions involving such products, and the resulting costs or benefits to such market participants from the clearing of such products.

As to costs associated with restrictions the Commission is imposing on the types and valuation of financial resources that may be counted as financial resources for purposes of satisfying Core Principle B, those too will vary among DCOs. For example, for DCOs that do not include potential clearing member assessments in their calculations of financial resources, the limitations on assessments will not result in increased costs. For DCOs that to any extent rely on potential assessments, the new limitations might require revisions to their default management plans, an increase in guaranty fund requirements, or an infusion of additional capital. The same would apply to letters of credit that cannot be considered to be financial resources for purposes of complying with Core Principle B, absent relief. Again, because of the range of circumstances of different DCOs, it is not feasible to estimate or quantify the costs of the safeguards imposed by the Commission's financial resource rules.

Benefits

The financial resource rules establish uniform standards that further the goals of avoiding market disruptions and financial losses to market participants and the general public, and avoiding systemic problems that could arise from a DCO's failure to maintain adequate default or operating resources. While it is not possible to estimate or quantify the benefits to market participants and the public in facilitating the financial soundness of a DCO, the Commission believes that a DCO failure, regardless of the size of the DCO, could adversely affect the financial markets, market participants, and the public.

[265] Commenters did not provide the Commission with quantitative data regarding such costs.

2. Efficiency, Competitiveness, and Financial Integrity

Costs

As discussed in connection with factor 1 above, quantification or estimation of these costs and benefits is not readily feasible. For some DCOs, the financial resource rules will have little or no direct or indirect impact. For others, the impact may be more substantial. Although there may be disparate impact among DCOs, overall the rules are not expected to impose significant costs in terms of efficiency, competitiveness, or financial integrity of derivatives markets.

Benefits

The regulations promote financial strength and stability, thereby fostering efficiency and a greater ability to compete in the broader financial markets. The regulations promote competition by preventing DCOs that lack adequate financial safeguards from expanding in ways that may ultimately harm the broader financial market. The regulations promote efficiency insofar as DCOs that operate with adequate financial resources are less likely to fail. The regulations are designed to ensure that DCOs can meet their financial obligations to market participants, thus contributing to the financial integrity of the derivatives markets as a whole.

As highlighted by recent events in the global financial markets, maintaining sufficient financial resources is a critical aspect of any financial entity's risk management system, and ultimately contributes to the goal of stability in the broader financial markets. Therefore, the Commission believes it is prudent to include financial resources requirements for entities applying to become or operating as DCOs. Finally, Congress has determined that a DCO must comply with Core Principle B to achieve the purposes of the CEA and the Commission has determined that § 39.11 sets forth the minimum standards for a DCO to do so.

3. Price Discovery

The Commission does not believe that this rule will have a material effect on price discovery.

4. Sound Risk Management Practices

Costs

Adequate financial resources are a corollary to strong risk management. To the extent that the financial resource rules result in additional costs, these costs are associated with implementing the practices and procedures that are necessary to ensure a DCO has adequate financial resources.

Benefits

The regulations, by setting specific standards with respect to how DCOs should assess, monitor, and report the adequacy of their financial resources, contribute to DCOs' maintenance of sound risk management practices and further the goal of minimizing systemic risk. The reporting requirements, in particular, will enable the Commission to conduct more thorough and meaningful oversight of DCOs that will contribute to improved risk management by DCOs overall.

5. Other Public Interest Considerations

Costs

The Commission has not identified any public interest considerations that would be negatively affected by the provisions of the financial resource rules that effectuate or implement the statutory requirements of Core Principle B (financial resources).

Benefits

The benefits to the public of a DCO maintaining adequate financial resources are discussed above.

F. Participant and Product Eligibility—§ 39.12

Participant Eligibility

Section 5b(c)(2)(C) of the CEA, Core Principle C, as amended by the Dodd-Frank Act, requires each DCO to establish appropriate admission and continuing eligibility standards for members of, and participants in, the DCO, including sufficient financial resources and operational capacity to meet the obligations arising from participation. Core Principle C further requires that such participation and membership requirements be objective, be publicly disclosed, and permit fair and open access. Core Principle C also requires that each DCO establish and implement procedures to verify compliance with each participation and membership requirement, on an ongoing basis.

As discussed above, the Commission crafted the provisions of proposed § 39.12(a) and related rules to establish a regulatory framework that accomplishes two goals: (1) to provide for fair and open access, while (2) limiting risk to the DCO and its clearing members. The provisions in § 39.12(a)(1) provide for fair and open access in a number of ways. A DCO is prohibited from adopting restrictive clearing member standards if less restrictive requirements that would not materially increase risk to the DCO or clearing members could be adopted (§ 39.12(a)(1)(i)); a DCO must allow all market participants who satisfy participation requirements to become clearing members (§ 39.12(a)(1)(ii)); the standards must be non-discriminatory (§ 39.12(a)(1)(iii)); and they may not require clearing members to be swap dealers (§ 39.12(a)(1)(iv)), or clearing members to maintain a swap portfolio of any particular size or meet a swap transaction volume threshold (§ 39.12(a)(1)(v)).

Section 39.12(a)(2) facilitates greater participation by requiring that capital requirements for clearing members be based on objective, transparent, and commonly accepted standards that appropriately match capital to risk (§ 39.12(a)(2)(i)); and by setting the minimum capital requirement at not more than $50 million (§ 39.12(a)(2)(ii)).

A number of commenters supported the proposed rules. They asserted that increased access to clearing would stimulate competition and diversify risk. A number of other commenters opposed aspects of the proposed rules, particularly the $50 million capital standard. They argued that these provisions could increase risk by providing access to firms with insufficient financial resources or operational capacity.

The Commission did not receive any comments that quantified the costs associated with the proposed participation rules. Instead, commenters focused on qualitative considerations, including how the proposed rules would affect market participants, market risk, efficiency, competitiveness, the financial integrity of futures markets, and price discovery.

The Commission is adopting these provisions essentially as proposed.

The Commission has evaluated the costs and benefits of the proposed regulations in light of the specific considerations identified in Section 15(a) of the CEA, as follows:

1. Protection of Market Participants and the Public

Costs

The participant eligibility rules may result in costs beyond those incurred in the normal course of operating a DCO or clearing firm, but such potential costs are, at this time, speculative in nature and impossible to estimate or quantify. By providing access to clearing to additional firms, the rules could impose costs on DCOs, other clearing members, or customers if a firm admitted to clearing membership in a DCO pursuant to these rules failed to meet its obligations. Any such costs depend upon a number of factors that are not presently knowable, quantifiable, or estimable.

It is not possible to estimate or quantify these costs in a reliable way for a number of reasons. The historical record prior to the enactment of the Dodd-Frank Act with respect to the operation of clearing organizations provides little guidance as to the costs that may be incurred in the future in the unlikely event of a default at a DCO. Defaults at DCOs are very rare and the circumstances of each one are unique. Moreover, the Dodd-Frank Act and implementing regulations will alter the landscape significantly. Existing DCOs and FCMs will be clearing new products. New DCOs and FCMs will enter the market. Mandatory clearing will bring new products and participants to DCOs and FCMs. The interaction of all these factors creates a wide range of uncertainty as to the nature of the potential consequences of a default under the new regulatory regime. In sum, the Commission believes that the possible future circumstances leading to and potential resulting consequences of a DCO default are too speculative and uncertain to be able to quantify or estimate the resulting costs to DCOs, clearing members, or market participants with any precision or degree of magnitude.

Whatever these potential costs, the Commission believes that the participant eligibility rules will reduce the risk that clearing members will in fact incur such costs. First, increased access to clearing membership should reduce concentration at any one clearing member and diversify risk. Second, the rules contain risk management provisions specifically designed to minimize the likelihood and extent of defaults. The provisions in § 39.12(a)(2) set forth requirements that mandate DCOs: Require that all clearing members have sufficient financial resources to meet obligations arising from participation in the DCO (§ 39.12(a)(2)(i)); establish capital requirements that are scalable so that they are proportional to the risks posed by clearing members (§ 39.12(a)(2)(ii)); require that clearing members have adequate operational capacity to meet obligations arising from participation in the DCO (§ 39.12(a)(3)); verify the compliance of each clearing member with the requirements of the DCO (§ 39.12(a)(4)); satisfy certain reporting requirements (§ 39.12(a)(5)); and have the ability to enforce participation requirements (§ 39.12(a)(6)).

For reasons similar to those described above, it is also not feasible to quantify or estimate this reduction in costs with any confidence. Based on its judgment and experience with the regulation and operation of clearing organizations, the

Commission believes that these rules will lower the risk that clearing members will in fact incur such costs. However, the possible future circumstances leading to and potential resulting consequences of a future default are too speculative and uncertain to quantify or estimate, either under the current regulatory regime or under the rules being adopted by the Commission.

Benefits

Greater access to clearing should benefit market participants by increasing competition among clearing members. Allowing more firms to clear should increase competition among clearing firms on both price and service which should, in turn, reduce costs to market participants. Further, the safeguards in § 39.12(a)(2) will benefit DCOs, clearing members, and market participants by reducing risk. Reductions in risk also benefit the general public by decreasing the probability of a systemic failure.

For the reasons described above in connection with costs, it is also impractical to quantify or estimate these benefits associated with reductions in risk to clearing members, market participants, and the public.

2. Efficiency, Competitiveness, and Financial Integrity

Costs

The considerations under this factor are very similar to the considerations under the previous factor with respect to participant eligibility requirements. Quantification or estimation of these costs and benefits is not feasible for the reasons set forth under the first factor. The potential increase in risk of default resulting from open access is mitigated by the decrease in risk resulting from diversification of risk, increased competition, and the safeguards set forth in § 39.12(a)(2).

Benefits

By opening access the rules should increase competition among clearing members thereby resulting in increased efficiency in the provision of clearing services. The safeguards in the rules such as the requirement that DCOs impose risk limits on clearing members will enhance the financial integrity of the DCO and its clearing members.

3. Price Discovery

Costs

The Commission has not identified any way in which the rules will impair price discovery.

Benefits

Increased competition among clearing members could bring more participants into the markets which could result in more competitive pricing and enhanced price discovery.

4. Sound Risk Management Practices

Costs

According to some commenters, the open access rules could hinder sound risk management practices by admitting clearing members unable to participate in the default management process. Other commenters assert that the rules provide appropriate protections and will facilitate sound risk management practices. The Commission believes that the open access rules, when coupled with the default management rules discussed below, will not impair sound risk management practices. Under the rules, clearing members will be required to demonstrate that they have operational capacity to carry out their responsibilities as well as sufficient financial resources to meet their obligations.

Benefits

As explained above, the provisions in § 39.12(a)(2) require that DCOs establish a risk management framework with respect to their members. In addition, open access should lead to diversification of risk at DCOs and allow additional firms to assist in the resolution of any defaults.

5. Other Public Interest Considerations

Costs

The Commission has not identified any other public interest considerations that would be negatively affected by the potential costs of the eligibility requirements.

Benefits

The CEA, as amended by the Dodd-Frank Act, requires DCOs to allow for open access and, therefore, broader participation. The Commission believes that greater participation in clearing could increase liquidity in the markets. This could help prevent price manipulation or other anti-competitive practices because it will be harder to organize concerted efforts to achieve such ends. Finally, Congress has determined that a DCO must comply with Core Principle C to achieve the purposes of the CEA and the Commission has determined that § 39.12(a) sets forth the minimum standards for a DCO to comply with the CEA's participation requirements.

Product Eligibility

Core Principle C also requires a DCO to establish ''appropriate standards for determining the eligibility of agreements, contracts, or transactions submitted to the [DCO] for clearing.'' Section 39.12(b) implements this provision.

Proposed § 39.12(b)(1) would require a DCO to establish requirements for determining product eligibility taking into account the DCO's ability to manage risks associated with the product. Proposed §§ 39.12(b)(2) and (b)(3) would codify section 2(h)(1)(B) of the CEA. Proposed § 39.12(b)(4) would prohibit a DCO from requiring an executing party to be a clearing member in order for the product to be eligible for clearing. Proposed § 39.12(b)(5) would require a DCO to select contract units for clearing purposes that maximize liquidity, facilitate transparency, promote open access, and allow for effective risk management. Proposed § 39.12(b)(6) would require novation upon acceptance of a swap. Finally, proposed § 39.12(b)(8) would require a DCO to confirm the terms of a swap at the time the swap is accepted for clearing.[266]

The Commission did not receive any comments directly addressing cost-benefit considerations. The Commission did receive several comments on substantive provisions that bear on those considerations. One commenter suggested that § 39.12(b)(4) may be an impediment to the development of new DCOs. Several commenters suggested that it would be impractical or inappropriate for a DCO to establish unit sizes for clearing that differ from the unit size at execution (§ 39.12(b)(5)).

The Commission also received several comments requesting clarification of certain provisions. As discussed above, the Commission has made changes to these rules that are responsive to the comments.

The Commission is adopting § 39.12(b) largely as proposed with several clarifying amendments as discussed above.

The Commission has evaluated the costs and benefits of § 39.12(b) in light of the specific considerations identified in Section 15(a) of the CEA, as follows:

1. Protection of Market Participants and the Public

Costs

The Commission has not identified any new costs arising out of §§ 39.12(b)(1), 39.12(b)(6), or

[266] Proposed § 39.12(b)(7) will be addressed in a separate rulemaking.

39.12(b)(8). DCOs currently perform risk analysis before accepting new products for clearing, currently novate trades upon acceptance, and currently issue confirmations to clearing members.

As noted, one commenter suggested that prohibiting a DCO from requiring one of the original executing parties to be a clearing member in order for a contract to be eligible for clearing may be an impediment to the development of new DCOs. The Commission believes that, to the contrary, such restrictions on product eligibility for clearing increase overall costs for market participants, and that prohibiting such restrictions will lead to lower overall costs. Such restrictions deny the availability and benefits of clearing to non-clearing members. Open access will enable non-clearing members to obtain the benefits of clearing and increase competition in clearing and trading, thereby increasing liquidity, and reducing costs.

The commenters who questioned the unit size provision did not elaborate on the costs. It is not feasible to quantify these costs for a number of reasons. The rule provides DCOs with significant flexibility in selecting unit sizes. Different DCOs may select different sizes for the same or similar products. Numerous SEFs will also be making judgments concerning unit size which will influence the decisions of DCOs and traders. Some products will be subject to mandatory clearing and others to voluntary clearing. The unpredictable interaction of these variables creates a wide range of uncertainty as to the nature of the consequences of the selection of unit sizes by DCOs. Similar considerations apply to the other provisions of § 39.12(b). In sum, the Commission believes that the possible future circumstances leading to, and the potential resulting consequences of, the implementation of § 39.12(b) are too speculative and uncertain to be able to quantify or estimate resulting costs with any precision or degree of magnitude.

Benefits

The Commission believes that § 39.12(b) will protect market participants and the public in many ways. First, these provisions are likely to facilitate the standardization of swaps, thereby eliminating differences between the terms of a swap as cleared at the DCO level and as carried at the customer level. Any such outstanding differences would raise both customer protection and systemic risk concerns. From a customer protection standpoint, if the terms of the swap at the customer level differ from those at the clearing level, then the customer still has a bilateral position opposite its counterparty. The customer is still exposed to the credit risk of the counterparty and the position would not be able to be offset against other positions at the DCO. Similarly, from a systemic perspective, any differences in terms between the trades would eliminate the possibility of multilateral offset and thereby diminish liquidity.

Second, § 39.12(b) can promote liquidity by permitting more parties to trade the product and by permitting more clearing members to clear the product. Third, it can enhance risk management by enabling a DCO, in the event of a default, to have more potential counterparties for liquidation.

Fourth, these provisions will support the requirement in section 2(h)(1)(B) of the CEA and proposed § 39.12(b)(2) that a DCO must adopt rules providing that all swaps with the same terms and conditions submitted to the DCO are economically equivalent within the DCO and may be offset with each other.

Fifth, clearing will eliminate the need for a counterparty to ascertain the credit-worthiness of each of its counterparties. This will promote liquidity, competition, and financial integrity to the benefit of all market participants.

2. Efficiency, Competitiveness, and Financial Integrity

Costs

The Commission has not identified any ways in which the proposals would reduce efficiency, competitiveness, or financial integrity.

Benefits

The rules should increase participation by clearing members, which should increase competition among clearing members to provide services to customers. In addition, the rules will lead to standardization of products. Finally, the rules will allow for more clearing through novation, which should result in increased open interest and liquidity. In turn, this should lead to more competitive and efficient markets. As noted above, smaller units can promote liquidity and encourage prospective clearing members to bid on positions and enable them to accept a forced allocation in the event of a clearing member's default. This facilitates open access, and at same time promotes risk management by enabling a DCO, in the event of a default, to be able to rely on more potential counterparties for liquidation.

3. Price Discovery

Costs

The Commission has not identified any ways in which the rules would reduce price discovery.

Benefits

As discussed above, the rules will increase competition, which should enhance price discovery by bringing more participants into the markets. In addition, standardization means that prices observed on different trades are more directly comparable, which can improve price discovery.

4. Sound Risk Management Practices

Costs

The Commission has not identified any ways in which the rules would impair sound risk management practices.

Benefits

The rules require DCOs to establish appropriate standards for determining the eligibility of contracts submitted to the DCO for clearing taking into account the DCO's ability to manage risks associated with the product. Such standards are a sound risk management practice.

5. Other Public Interest Considerations

Costs

The Commission has not identified any ways in which the rules would harm any other public interest considerations.

Benefits

As discussed above, open access, increased competition, greater liquidity, improved price discovery, and greater financial integrity are all benefits of the rules. All these factors will benefit the general public, which may not participate in these markets directly but may feel their impact on the larger economy.

G. Risk Management—§ 39.13

In General

Core Principle D,[267] as amended by the Dodd-Frank Act, requires each DCO to ensure that it possesses the ability to manage the risks associated with discharging the responsibilities of the DCO through the use of appropriate tools and procedures. It further requires each DCO to measure its credit exposures to each clearing member not less than once during each business day and to monitor each such exposure

[267] Section 5b(c)(2)(D) of the CEA; 7 U.S.C. 7a–1(c)(2)(D).

periodically during the business day. Core Principle D also requires each DCO to limit its exposure to potential losses from defaults by clearing members, through margin requirements and other risk control mechanisms, to ensure that its operations would not be disrupted and that non-defaulting clearing members would not be exposed to losses that non-defaulting clearing members cannot anticipate or control. Finally, Core Principle D provides that a DCO must require margin from each clearing member sufficient to cover potential exposures in normal market conditions and that each model and parameter used in setting such margin requirements must be risk-based and reviewed on a regular basis.

The Commission proposed § 39.13 to establish requirements that a DCO would have to meet in order to comply with Core Principle D. For a number of provisions of proposed § 39.13, the Commission did not receive any comments on the associated costs or on cost-benefit analysis. The Commission discussed in the notice of proposed rulemaking and above why it believes a DCO must satisfy each of those provisions to be in compliance with the Core Principle D and why it is appropriate for market participants to incur any costs associated with implementing each of those provisions. The Commission also addressed comments that suggested alternative standards, frameworks, or procedures. Where appropriate, the Commission revised the proposed rules. To avoid repetition, the Commission incorporates by reference the above discussion of § 39.13.

Commenters raised concerns about the costs of §§ 39.13(g)(2)(ii) (minimum liquidation time), 39.13(g)(2)(iii) (margin confidence level), 39.13(g)(8)(i) (gross margin), 39.13(h)(1)(i) (risk limits), 39.13(h)(2) (large trader reports), and 39.13(h)(5)(ii) (clearing member risk review) or the Commission's cost-benefit analysis relating to these rules. The Commission's consideration of the costs and benefits associated with these rules is discussed in greater detail below.

Minimum Liquidation Time

As proposed, § 39.13(g)(2)(ii) would require a DCO to use a liquidation time that is a minimum of five business days for cleared swaps that are not executed on a DCM, and a liquidation time that is a minimum of one business day for all other products that it clears, although it would be required to use longer liquidation times, if appropriate, based on the unique characteristics of particular products or portfolios.

Numerous commenters objected to the proposed difference in requirements that would subject swaps that were either executed bilaterally or executed on a SEF to a minimum five-day liquidation time, while permitting equivalent swaps that were executed on a DCM to be subject to a minimum one-day liquidation time. The Commission did not receive any comments that quantified the costs of this rule.

As to the actual periods proposed, commenters variously contended that a liquidation time of five business days may be excessive for some swaps, a one-day liquidation period is too short, a one-day liquidation period is appropriate for swaps executed on a DCM or a SEF, and a two-day liquidation period is appropriate for cleared swaps.

Some commenters encouraged the Commission to permit a DCO to determine the appropriate liquidation time for all products that it clears based on the unique characteristics and liquidity of each relevant product or portfolio. Two commenters recommended that if the Commission were to mandate minimum liquidation times in the final rules, it should allow DCOs to apply for exemptions for specific groups of swaps if market conditions prove that such minimum liquidation times are excessive.

Upon consideration of the comments, the Commission is adopting § 39.13(g)(2)(ii) with a number of modifications. First, the final rule requires a DCO to use the same liquidation time for a product whether it is executed on a DCM, a SEF, or bilaterally. Second, the final rule provides that the minimum liquidation time for swaps based on certain physical commodities, *i.e.,* agricultural commodities, energy, and metals, as well as futures and options, is one day. For all other swaps, the minimum liquidation time is five days. Third, to provide further flexibility, the Commission is adding a provision specifying that, by order, the Commission may provide for a different minimum liquidation time for particular products or portfolios.

The Commission has evaluated the costs and benefits of the proposed regulations in light of the specific considerations identified in Section 15(a) of the CEA, as follows:

1. Protection of Market Participants and the Public

Costs

The Commission anticipates that using only one criterion—*i.e.,* the characteristic of the commodity underlying a swap—to determine liquidation time could result in less-than-optimal margin calculations. For some products, a five-day minimum may prove to be excessive and tie up more funds than are strictly necessary for risk management purposes. For other products, a one-day or even a five-day period may be insufficient and expose a DCO and market participants to additional risk.

The Commission believes that it is not feasible to estimate or quantify these costs reliably. In addition to the liquidation time frame, the margin requirements for a particular instrument depend upon a variety of characteristics of the instrument and the markets in which it is traded, including the risk characteristics of the instrument, its historical price volatility, and liquidity in the relevant market. Determining such margin requirements does not solely depend upon such quantitative factors, but also requires expert judgment as to the extent to which such characteristics and data may be an accurate predictor of future market behavior with respect to such instruments, and applying such judgment to the quantitative results. Thousands of different swap products may be subject to clearing. Determining the risk characteristics, price volatility, and market liquidity of even a sample for purposes of determining a liquidation time specifically for such instrument would be a formidable task for the Commission to undertake and any results would be subject to a range of uncertainty. Reliable data is not readily available for many swaps that prior to the Dodd-Frank Act were executed in unregulated markets.

Given the amount of uncertainty in estimating margin requirements using either a five-day liquidation time or a one-day liquidation time, the amount of uncertainty in estimating the cost of using one rather than the other is compounded. For all the reasons stated in the previous paragraph, the possible range within which the size of the difference would fall is very large. In sum, in the absence of a reasonably feasible and reliable methodology at the present time for the Commission to use in calculating the appropriate margin requirements for swaps with either five-day or one-day liquidation times,[268] the

[268] The Commission notes that ''[t]he existence of significant outstanding notional exposures, trading liquidity, and adequate pricing data'' is one of the factors the Commission must consider in reviewing whether a swap or group or class of swaps is subject to the mandatory clearing requirement in CEA Section 2(h)(1). *See* Section 2(h)(2)(D) of the CEA. To enable the Commission to make this determination, the Commission requires DCOs that

Commission believes that possible future circumstances surrounding margin levels are too speculative and uncertain to be able to quantify or estimate the resulting costs to DCOs, clearing members, or the public from the rule with any precision or degree of magnitude.

Moreover, any potential costs of this rule may be mitigated by the provision that allows DCOs to request, or the Commission on its own initiative to make, a determination that the liquidation time for a particular contract is too long or too short. As markets evolve, it may become appropriate to ease the requirement for certain swaps subject to the five-day minimum. Conversely, analysis may reveal that for other products or portfolios the five-day or one-day minimum is insufficient. This procedure could serve to reduce costs that may arise from application of the rule.

Benefits

A minimum liquidation time is a standard input in value-at-risk models used by DCOs to compute a confidence interval to estimate their risk. The value-at-risk confidence interval protects DCOs, their clearing members, market participants, and the public by fixing the probability that a default will occur and the position cannot be liquidated in time.

The five-day/one-day distinction for different types of swaps is based on the ease of liquidation of different product groups and is consistent with existing requirements that reflect the risk assessments DCOs have made over the course of their experience clearing these types of swaps. Several DCOs have determined that these are the appropriate standards for these instruments and apply it to their margin requirements. The Commission believes that this is a reasonable and prudent judgment.

A minimum standard is designed to prevent DCOs from competing by offering lower margin requirements than other DCOs and, as a result, taking on more risk than is prudent. In addition, the Commission is concerned that a DCO may misjudge the appropriate liquidation time frame because of limited experience with clearing and managing the risks of financial swaps. A minimum liquidation time frame should prevent DCOs from taking on too much risk.

While it is not possible to estimate or quantify the benefits to market participants and the public in facilitating the financial soundness of DCOs, the Commission believes that a DCO failure, regardless of the size of the DCO, could adversely affect the financial markets, market participants, and the public. This rule will diminish the chances that such a failure will occur.

2. Efficiency, Competitiveness, and Financial Integrity

Costs

The considerations under this factor are similar to the considerations under the first factor.

Benefits

The rule will promote efficiency, competitiveness and financial integrity by establishing a minimum standard for all DCOs. While a DCO will still have considerable latitude in setting risk-based margin levels, the Commission has determined that establishing a minimum liquidation time will provide legal certainty for an evolving marketplace, will offer a practical means for assuring that the thousands of different swaps that are going to be cleared subject to the Commission's oversight will have prudent minimum margin requirements, and will help prevent a potential ''race to the bottom'' by competing DCOs. Competition among DCOs will be channeled to other areas such as level of service.

The Commission believes that default by a clearing member could have a significant, adverse effect on market participants or the public. Market participants may have to incur the costs of making up any shortfall in margin through guaranty fund deposits and/or assessments, and any costs associated with participation in an auction or allocation of the positions of a defaulting clearing member. In a worst case scenario, a default by a clearing member may undermine the financial integrity of the DCO, which could have serious and widespread consequences for the U.S. financial markets. This rule protects market participants and the public from bearing these costs by requiring a DCO to follow certain minimum standards in establishing margin requirements.

3. Price Discovery

The Commission does not believe that this rule will have a material effect on price discovery.

4. Sound Risk Management Practices

Costs

Because the rule simply establishes minimums, it will not hinder the exercise of sound risk management practices. The rule specifically requires DCOs to use longer liquidation times if appropriate for particular products.

Benefits

As discussed under the first two factors, the rule will foster sound risk management practices.

5. Other Public Interest Considerations

The Commission has not identified any costs or benefits beyond those discussed under the first factor.

Margin Confidence Level

As proposed, § 39.13(g)(2)(iii) would require a DCO's initial margin models to meet an established confidence level of at least 99% based on data from an appropriate historical period.

A number of commenters stated that each DCO should have discretion to establish confidence levels based on the particular characteristics of the products and portfolios it clears and their underlying markets. However, a number of other commenters stated that a 99% confidence level was the proper minimum.

The Commission is adopting the rule as proposed.

The Commission has evaluated the costs and benefits of the proposed regulation in light of the specific considerations identified in Section 15(a) of the CEA, as follows:

1. Protection of Market Participants and the Public

Costs

A 99% confidence level will require that more money be held as margin as compared to a lower confidence level. There is an opportunity cost to clearing members holding this money as margin.

The Commission believes that it is not feasible to estimate or quantify this cost reliably. In addition to the confidence level, the margin requirements for a particular instrument depend upon a variety of characteristics of the instrument and the markets in which it is traded, including the risk characteristics of the instrument, its historical price volatility, and liquidity in the relevant market. Determining such margin requirements does not solely depend upon such quantitative

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submit swaps to the Commission for a mandatory clearing determination to submit data and other information that would enable the Commission to effectively consider this factor. *See* § 39.5(b)(3)(ii)(A), 76 FR at 44473 (July 26, 2011) (Process for Review of Swaps for Mandatory Clearing; final rule). Not only is this type of information needed for the Commission to consider the statutory factors and make the determinations as to which swaps should be subject to mandatory clearing, but it also would be needed to calculate appropriate margin amounts for such swaps, were the Commission to attempt such calculations.

factors, but also requires expert judgment as to the extent to which such characteristics and data may be an accurate predictor of future market behavior with respect to such instruments, and applying such judgment to the quantitative results. Thousands of different swap products may be subject to clearing. Determining the risk characteristics, price volatility, and market liquidity of even a sample for purposes of determining a confidence level specifically for such instrument would be a formidable task for the Commission to undertake and any results would be subject to a range of uncertainty. Reliable data is not readily available for many swaps that prior to the Dodd-Frank Act were executed in unregulated markets. In sum, in the absence of a reasonably feasible and reliable methodology at the present time for the Commission to use in calculating the margin requirements for swaps,[269] the Commission believes that possible future circumstances surrounding margin levels are too speculative and uncertain to be able to quantify or estimate the resulting costs to DCOs, clearing members, or the public from the rule with any precision or degree of magnitude.

Benefits

A minimum confidence level is essential to protect market participants and the public. A minimum confidence level will prevent DCOs from competing with respect to how much risk they are willing to take on or from misjudging the amount of risk they would take on if they operated under lower standards. In addition, it will provide assurance to market participants that every DCO has sufficient margin to effectively manage a default.

Some DCOs currently apply the 99 percent standard. Others use 95–99 percent for some contracts depending on facts and circumstances. International standards currently recommend 99 percent.[270] In view of the increased risk that DCOs will face as a result of clearing swaps, the Commission believes that protection of market participants and the public dictates that the minimum standard on this key risk management element should be set in accordance with current best practices among DCOs and international standards.

2. Efficiency, Competitiveness, and Financial Integrity

Costs

The considerations under this factor are very similar to the considerations under the first factor.

Benefits

The rule will promote efficiency, competitiveness and financial integrity by establishing a minimum standard for all DCOs. While a DCO will still have considerable latitude in setting risk-based margin levels, the Commission has determined that establishing a minimum confidence level will provide legal certainty for an evolving marketplace, will offer a practical means for assuring that the thousands of different swaps that are going to be cleared subject to the Commission's oversight will have prudent minimum margin requirements, and will prevent a potential ''race to the bottom'' by competing DCOs. As noted above, the Commission is adopting a 99% standard in order to conform to current best practices among DCOs as well as international standards. Competition among DCOs will be channeled to other areas such as level of service.

The Commission believes that default by a clearing member could have a significant, adverse effect on market participants and the public. Market participants may have to incur the costs of making up any shortfall in margin through guaranty fund deposits and/or assessments, and any costs associated with participation in an auction or allocation of the positions of a defaulting clearing member. In a worst case scenario, a default by a clearing member may undermine the financial integrity of the DCO, which could have significant negative consequences for the financial stability of U.S. financial markets. As highlighted by recent events in the global financial markets, the ability to manage the risks associated with clearing is critical to the goal of stability in the broader financial markets. This rule protects market participants and the public from bearing these costs by requiring a DCO to follow certain minimum standards in establishing margin requirements.

3. Price Discovery

The Commission does not believe that this rule will have a material effect on price discovery.

4. Sound Risk Management Practices

Costs

Because the rule simply establishes minimums, it will not hinder the exercise of sound risk management practices. The rule specifically requires DCOs to use higher confidence levels if appropriate for particular products.

Benefits

As discussed under the first two factors, the rule will foster sound risk management practices.

5. Other Public Interest Considerations

The Commission does not believe that the rule will have a material effect on public interest considerations other than those identified above.

Gross Margin

As proposed, § 39.13(g)(8)(i) would require a DCO to collect initial margin on a gross basis for customer accounts.

Two commenters supported the proposal. Several commenters stated that the provision of individual customer position information to DCOs may entail significant, costly, and time-consuming changes to systems infrastructure at the clearing member level and the DCO level.

In light of the various concerns regarding the operational and technology changes that would be needed and related costs of requiring a DCO to obtain individual customer position information from its clearing members and to use such information to calculate the margin requirements for each individual customer, the Commission is modifying § 39.13(g)(8)(i). As amended, the rule provides a DCO with the discretion to either calculate customer gross margin requirements based on individual customer position information that it obtains from its clearing members or based on the sum of the gross positions of all of a clearing member's customers that the clearing member provides to the DCO, without forwarding individual customer position information to the DCO.

The Commission has evaluated the costs and benefits of the proposed regulation in light of the specific considerations identified in Section 15(a) of the CEA, as follows:

1. Protection of Market Participants and the Public

Costs

Three kinds of costs could result from a change from net to gross margining, for those DCOs that currently use net margining.[271] First, gross margining could change the loss that customers of a clearing member may face in the event

[269] *Id.*

[270] *See* CPSS–IOSCO Consultative Report, Principle 6: Margin, Key Consideration 3, at 40; EMIR, Article 39, paragraph 1, at 46.

[271] As discussed in section IV.D.6.h.(1), above, certain DCOs already use a version of gross margining, in which case the costs of complying with § 39.13(g)(8)(i) would be considerably less.

of default by a fellow customer of that clearing member. Under net margining, a greater portion of customer margin is held at the clearing member and thereby insulated from the DCO, so that non-defaulting customers face lower risk of losing their margin deposits to the DCO if a fellow customer defaults. Gross margining gives a DCO access to the margin deposits of non-defaulting customers of a defaulting FCM.[272] In this sense, gross margining could shift a portion of the default risk from the DCO to fellow customers.[273]

It is not possible to estimate or quantify these costs—which would only arise in the event of a default of a customer—in a reliable way for a number of reasons. The historical record prior to the enactment of the Dodd-Frank Act with respect to the operation of clearing organizations provides little guidance as to the costs that may be incurred in the future in the unlikely event of a default at a DCO. Defaults at DCOs are very rare and the circumstances of each one are unique. Moreover, the Dodd-Frank Act and implementing regulations will alter the landscape significantly. Existing DCOs and FCMs will be clearing new products. New DCOs and FCMs will enter the market. Mandatory clearing will bring new products and participants to DCOs and FCMs. The interaction of all these factors creates a wide range of uncertainty as to the nature of the potential consequences of a default under the new regulatory regime. In sum, the Commission believes that the possible future circumstances leading to and potential resulting consequences of a future default are too speculative and uncertain to be able to quantify or estimate the resulting costs to clearing members with any precision or degree of magnitude.

Second, because gross margining means that more customer margin is held at the DCO, rather than the FCM, gross margining also means that any return on this margin (*e.g.,* interest earned) is earned by the DCO, rather than the FCM. This is largely a transfer between those parties. If there is no offsetting change in other terms of the relationship between customers, FCMs and DCOs, gross margining leads to a cost for FCMs and a benefit to DCOs from this change.

Third, gross margining could result in changes in operating costs for DCOs and clearing members. Gross margining could require the DCO to possess more detailed information about customer positions. The provision of individual customer position information to DCOs may entail significant, costly, and time-consuming changes to systems infrastructure at the clearing firm level and the DCO level. For example, NYPC stated that its preliminary cost estimate for compliance with the customer gross margin and large trader report requirements contained in proposed §§ 39.13(g)(8)(i) and 39.13(h)(2) was approximately 128,650 hours and $14.5 million.

In order to reduce the potential costs, the Commission has revised § 39.13(g)(8)(i) to allow a DCO to permit an FCM to provide the DCO with the sum of the gross positions of all of its customers so that the DCO may calculate the applicable gross margin requirement based on that sum. Under this scenario, a DCO will not have to establish a framework to receive each customer's position information and calculate the initial margin requirement applicable to each customer's positions. The Commission believes this alternative framework will be significantly less expensive for market participants. Whether a DCO chooses to make the calculation based on individual customer position information or the sum of customers' gross positions submitted by the clearing member, the clearing member's customer gross margin requirement will be the same.

NYPC also commented that such implementation costs could significantly deter new clearinghouses like NYPC from launching. However, NYPC did not provide an estimate for the costs of a new clearinghouse system capable of gross margining in relation to the cost of retrofitting an existing net margin system. The Commission believes that retrofitting an existing system may be more expensive than implementing a new system from scratch, and that it is unclear whether additional implementation costs would deter any new clearinghouses.

Benefits

The Commission believes that the clearing of swaps will increase the risk that DCOs face. Gross margining will increase the amount of money that DCOs hold. Under gross margining, the amount of margin at the DCO more accurately approximates the risks posed to a DCO by its clearing members' customers than net margining and increases the financial resources available to a DCO in the event of a customer default.

A DCO may not be able to collect initial customer margin from an FCM if the FCM defaults. This could have a serious adverse impact on the financial stability of a DCO, non-defaulting customers, and potentially wider markets. In this regard, a significant customer default leading to an FCM default could strain a DCO's financial resources, causing it to exhaust the initial margin available to cover the default and forcing other clearing members and/or the DCO to incur related costs. In the worst case, an FCM default resulting from a large customer default could cause a DCO to fail if its financial resources are inadequate to cover the losses it incurs as a result of the default. Gross margining provides the DCO with a larger financial cushion that can be tapped in the event of a default. Initial margin is the DCO's first ''line of defense'' in managing a default, and a larger initial margin held at the DCO will help compensate for the DCO's inability to collect additional margin from a defaulting clearing member. This rule protects market participants and the public from bearing these costs by requiring a DCO to hold additional margin.

2. Efficiency, Competitiveness, and Financial Integrity

Costs

The considerations under this factor are very similar to the considerations under the first factor.

Benefits

The rule promotes efficiency, competitiveness, and financial integrity by providing that the amount of margin at the DCO more accurately approximates the risks posed to a DCO by its clearing members' customers and by increasing the financial resources available to a DCO in the event of a customer default.

3. Price Discovery

The Commission does not believe that this rule will have a material effect on price discovery.

4. Sound Risk Management Practices

The considerations relating to sound risk management practices are very similar to the considerations under the first factor.

5. Other Public Interest Considerations

The Commission does not believe that the rule will have a material effect on

[272] Offsetting this effect is the potential for a failing FCM to misappropriate customer funds. That potential is greater under net margining.

[273] The Commission has proposed rules that would not permit this in the case of swaps. *See* 76 FR 33818 (June 9, 2011) (Protection of Cleared Swaps Customer Contracts and Collateral; Conforming Amendments to the Commodity Broker Bankruptcy Provisions).

public interest considerations other than those identified above.

Risk Limits

As proposed, § 39.13(h)(1)(i) would require a DCO to impose risk limits on each clearing member, by customer origin and house origin, in order to prevent a clearing member from carrying positions where the risk exposure of those positions exceeds a threshold set by the DCO relative to the clearing member's financial resources, the DCO's financial resources, or both.

Several commenters supported the rule as an appropriate risk management procedure. Two commenters suggested that the rule is overly prescriptive. The Commission did not receive any comments that quantified the costs of this rule.

The Commission is adopting § 39.13(h)(i) as proposed.

The Commission has evaluated the costs and benefits of the proposed regulation in light of the specific considerations identified in Section 15(a) of the CEA, as follows:

1. Protection of Market Participants and the Public

Costs

Some DCOs already set limits and will not incur any costs. Others will incur the costs of calculating limits for each clearing member. Such costs will be incremental because all DCOs currently have procedures for monitoring clearing member risk and may already have informal triggers or alerts in place. For clearing members, the rule would impose opportunity costs to the extent the limits constrain their activities.

Under the rule each DCO would have discretion to set limits for each clearing member. It would be pure conjecture for the Commission to estimate what levels DCOs would set for their clearing members and how much that would constrain such clearing members. Each DCO would rely on the informed judgment of its risk management committee and/or risk management staff to assess the risks and resources of each clearing member and arrive at the applicable limits for each one. Estimating the extent to which this would constrain clearing members is even more speculative. That would entail a guess as to the risk appetite of each clearing member. In sum, the Commission believes that possible future circumstances surrounding risk limits are too speculative and uncertain to be able to quantify or estimate the resulting costs to DCOs, clearing members, or the public with any precision or degree of magnitude.

Benefits

The rule will benefit market participants by reducing the ability of clearing members and their customers to assume excessive risks. This will diminish the chances of default with all the attendant consequences previously discussed.

2. Efficiency, Competitiveness, and Financial Integrity

Costs

The considerations under this factor are very similar to the considerations under the first factor.

Benefits

Because the rule provides DCOs the discretion to tailor the limits for each clearing member in accordance with the DCO's assessment of the risk that the clearing member poses, it will foster efficiency and competitiveness in the markets. Because it will decrease the chance of default it will foster financial integrity.

The Commission believes that default by a clearing member could have a significant, adverse effect on market participants or the public. Market participants may have to incur the costs of making up any shortfall in margin through guaranty fund deposits and/or assessments, and any costs associated with participation in an auction or allocation of the positions of a defaulting clearing member. In a worst case scenario, a default by a clearing member may undermine the financial integrity of the DCO, which could have serious and widespread consequences for the stability of U.S. financial markets. This rule protects market participants and the public from bearing these costs by requiring a DCO to analyze the risk posed by each clearing member and impose appropriate limits.

3. Price Discovery

The Commission does not believe that this rule will have a material effect on price discovery.

4. Sound Risk Management Practices

Costs

The considerations under this factor are very similar to the considerations under the first factor.

Benefits

Risk limits are a sound risk management practice currently employed by several DCOs. The rule will extend the practice across all DCOs.

5. Other Public Interest Considerations

The Commission does not believe that the rule will have a material effect on public interest considerations other than those identified above.

Large Trader Reports

As proposed, § 39.13(h)(2) would require a DCO to obtain from its clearing members, copies of all reports that such clearing members are required to file with the Commission pursuant to part 17 of the Commission's regulations, *i.e.,* large trader reports. Proposed § 39.13(h)(2) would further require a DCO to review the large trader reports that it receives from its clearing members on a daily basis to ascertain the risk of the overall portfolio of each large trader.

One commenter supported the proposal. One commenter argued that the proposed requirement that DCOs obtain large trader reports from clearing members is duplicative because a DCO receives large trader information from the exchange. One commenter stated that a DCO would need new technology to implement the rule. One commenter stated that a DCO would need additional surveillance staff.

The Commission is modifying § 39.13(h)(2) to require a DCO to obtain large trader reports either from its clearing members or from a DCM or a SEF for which it clears.

The Commission has evaluated the costs and benefits of the proposed regulations in light of the specific considerations identified in Section 15(a) of the CEA, as follows:

1. Protection of Market Participants and the Public

Costs

The Commission notes that some DCOs already receive large trader reports from DCMs and review large trader reports for risk surveillance purposes on a daily basis. For them, this rule imposes no additional cost. For other DCOs, the receipt and analysis of large trader information may entail significant, costly, and time-consuming changes to systems infrastructure. Clearing members could also incur costs to provide large trader reports to DCOs. For example, NYPC stated that its preliminary cost estimate for compliance with the customer gross margin and large trader report requirements contained in proposed §§ 39.13(g)(8)(i) and 39.13(h)(2) was approximately 128,650 hours and $14.5 million.

In order to reduce costs, the Commission modified § 39.13(h)(2) to permit a DCO to obtain large trader reports either from its clearing members or from a DCM or a SEF for which it clears. The latter approach would

eliminate duplicative reporting for clearing members and would significantly reduce costs for DCOs by enabling them to obtain the data from a single source.

Benefits

Currently, at some DCOs, the receipt and analysis of large trader reports is an integral part of their risk management programs. Extension of this practice to all DCOs would benefit market participants and the public. Proactive analysis of this information allows DCOs to identify and to address incipient problems in customer accounts before they get out of hand. In particular, large trader reports are an essential part of a rigorous risk management system because they provide information that is required for stress testing.

A default by a clearing member could have a significant, adverse effect on market participants or the public. Market participants may have to incur the costs of making up any shortfall in margin through guaranty fund deposits and/or assessments, and any costs associated with participation in an auction or allocation of the positions of a defaulting clearing member. In a worst case scenario, a default by a clearing member may undermine the financial integrity of the DCO, which could have serious and widespread consequences for the stability of U.S. financial markets. This rule protects market participants and the public by requiring a DCO to analyze the potential risks at an earlier stage.

2. Efficiency, Competitiveness, and Financial Integrity

The considerations under this factor are very similar to the considerations under the first factor.

3. Price Discovery

The Commission does not believe that this rule will have a material effect on price discovery.

4. Sound Risk Management Practices

The considerations under this factor are very similar to the considerations under the first factor.

5. Other Public Interest Considerations

The Commission does not believe that the rule will have a material effect on public interest considerations other than those identified above.

Clearing Member Risk Review

As proposed, § 39.13(h)(5)(ii) would require each DCO to review the risk management policies, procedures, and practices of each of its clearing members on a periodic basis.

Several commenters asserted that the review would be burdensome for such clearing members. The Commission did not receive any comments that quantified the costs of this rule.

The Commission is adopting the rule with two modifications. These changes clarify that a DCO's review need only cover those procedures of a clearing member which address the risks that such clearing member may pose to the DCO.

The Commission has evaluated the costs and benefits of § 39.13(h)(5)(ii) in light of the specific considerations identified in Section 15(a) of the CEA, as follows:

1. Protection of Market Participants and the Public

Costs

Those DCOs that currently conduct risk reviews of their clearing members are not likely to incur any additional costs as a result of the rule.[274] Those DCOs that do not currently have such a program will incur costs to build on existing procedures for reviewing applicants for clearing membership in order to develop programs for ongoing review of clearing members. Clearing members will incur costs in working with the DCOs that review them. Commission staff intends to work with the DCOs to develop arrangements designed to avoid duplicative efforts without compromising the requirement that each DCO maintain an understanding of the risks of each of its clearing members.

In recognition that each DCO has a unique product mix and set of rules, the rule does not prescribe the specific frequency, depth, or methodology of such reviews, nor does it specify when an on-site audit may or may not be appropriate. Nevertheless, based on the Commission's experience overseeing DCOs that currently conduct risk reviews of clearing members, the Commission estimates the approximate costs of this rule as follows.[275]

The Commission estimates that a risk review by a large DCO typically would require on the order of 100 person-hours of work by a supervisor and several risk analysts. This includes preparation, an on-site visit, and drafting the report. The Commission also estimates that a large DCO would perform, on average, 40 risk reviews a year, although the number would vary depending on the number of clearing members a particular DCO has, and other circumstances. The Commission estimates compensation costs on the order of $150 an hour for risk analysts, and $250 an hour for a supervisor. Based on these estimates, the Commission estimates that the annual cost to a large DCO would be roughly on the order of $700,000.[276] Costs for particular DCOs are likely to vary from this amount based on the size of the DCO, the DCO's management and compensation practices, and the DCO's exercise of the flexibility allowed by the rule provision. In light of the potential consequences of risk management failures by clearing members discussed below, and of the Commission's judgment that DCOs are the market participants in the best position to review clearing member risk management programs, the Commission believes that the benefits of this provision would justify the costs even if costs proved to be substantially larger than the Commission's estimate.

Benefits

Rigorous risk management programs at clearing members benefit market participants by providing safeguards to prevent default. Clearing members are at the front line of risk management. The Commission believes that risk reviews are important to ensure that each clearing member's risk management framework is sufficient and properly implemented. The Commission believes that a clearing member's DCO should undertake the review because that DCO is in the best position to review the risk management policies, procedures, and practices of its clearing members in the context of the clearing members' obligations under the DCO's rules.

2. Efficiency, Competitiveness, and Financial Integrity

Costs

The considerations under this factor are very similar to the considerations under the first factor.

Benefits

Ensuring that each clearing member has proper risk management procedures for each DCO at which it clears will promote efficiency and competitiveness in the clearing process by ensuring that the clearing member is in compliance

[274] To the extent that some DCOs would conduct risk reviews in the absence of a rule, the incremental benefits of the rule are reduced. Even for these DCOs, however, a rule provides the market with the benefit of greater certainty that risk reviews of members will be continued in the future.

[275] Figures used in the estimate are based on the judgment of Commission staff with experience overseeing DCO reviews of clearing member risk.

[276] For example, 20 hours supervisor time per review × $250/hr plus 80 hours analyst time per review × $150/hr = $17,000 × 40 reviews = $680,000.

with each such DCO's rules and encouraging the exercise of best practices. The rule will foster financial integrity for the reasons set forth under the first factor.

The Commission believes that default by a clearing member could have a significant, adverse effect on market participants and the public. Market participants may have to incur the costs of making up any shortfall in margin through guaranty fund deposits and/or assessments, and any costs associated with participation in an auction or allocation of the positions of a defaulting clearing member. In a worst case scenario, a default by an FCM may undermine the financial integrity of the DCO, which could have serious and widespread consequences for the stability of U.S. financial markets. This rule protects market participants and the public from bearing these costs by requiring a DCO to periodically review the risk management procedures of each of its clearing members.

3. Price Discovery

The Commission does not believe that this rule will have a material effect on price discovery.

4. Sound Risk Management Practices

The considerations under this factor are similar to the considerations under the first factor.

5. Other Public Interest Considerations

The Commission does not believe that the rule will have a material effect on public interest considerations other than those identified above.

H. Settlement Procedures—§ 39.14(c)(3)

Section 5b(c)(2)(E) of the CEA, Core Principle E, as amended by the Dodd-Frank Act, requires a DCO to: (1) complete money settlements on a timely basis, but not less frequently than once each business day; (2) employ money settlement arrangements to eliminate or strictly limit its exposure to settlement bank risks (including credit and liquidity risks from the use of banks to effect money settlements); (3) ensure that money settlements are final when effected; (4) maintain an accurate record of the flow of funds associated with money settlements; (5) possess the ability to comply with the terms and conditions of any permitted netting or offset arrangement with another clearing organization; (6) establish rules that clearly state each obligation of the DCO with respect to physical deliveries; and (7) ensure that it identifies and manages each risk arising from any of its obligations with respect to physical deliveries.

The Commission proposed § 39.14 to implement Core Principle E. With the exception of proposed § 39.14(c), the commenters did not address the costs of the proposed rule or the Commission's consideration of costs and benefits.

Proposed § 39.14(c)(3) would require a DCO to ''monitor the full range and concentration of its exposures to its own and its clearing members' settlement banks and assess its own and its clearing members' potential losses and liquidity pressures in the event that the settlement bank with the largest share of settlement activity were to fail.'' It would further require that a DCO (i) maintain settlement accounts at additional settlement banks; (ii) approve additional settlement banks for use by its clearing members; (iii) impose concentration limits with respect to its own or its clearing members' settlement banks; and/or (iv) take any other appropriate actions reasonably necessary in order to eliminate or strictly limit such exposures.

As discussed above, several commenters expressed concern that these provisions would impose costly requirements that are unnecessary or could have unintended adverse consequences. In this regard, one commenter claimed that the requirement to monitor clearing members' exposure to their settlement banks could result in a duplication of effort that would be burdensome for a DCO. Commenters also stated that there are a limited number of banks that are qualified and willing to serve as settlement banks; as such, it may be difficult for smaller DCOs to maintain more than one settlement bank given the associated costs. Further, commenters stated that imposing concentration limits could increase systemic risk because a DCO would need to distribute funds across multiple banks and as settlement funds increased, highly rated banks would eventually reach the applicable concentration limit, potentially forcing DCOs to open accounts with lower rated banks.

None of the commenters provided quantitative data or information to support their assertions as to the potential costs and burdens of compliance with § 39.14(c)(3), and none addressed the benefits of the rule.

As discussed above, the Commission believes that there are risks associated with a DCO concentrating all its funds in a single settlement bank. Bank failure in such a circumstance could have adverse consequences for the DCO, its clearing members, and their customers. However, the Commission also acknowledges the concerns expressed by commenters, particularly given the settlement practices and procedures that DCOs currently maintain in the absence of such a regulation.

Accordingly, the Commission is modifying § 39.14(c)(3) to eliminate any implied requirement that all DCOs must maintain settlement accounts at more than one bank, and is retaining the requirement that a DCO monitor exposure to its settlement bank(s) and those of its clearing members, including an ongoing assessment of the effect to the DCO of a failure of the settlement bank that has the largest share of settlement activity. It is also clarifying its intent to qualify the need to take actions set forth in § 39.14(c)(3)(i)–(iv) (such as imposing concentration limits) ''to the extent that any such action or actions are reasonably necessary in order to eliminate or strictly limit such exposures.'' Thus, the Commission is providing DCOs with more flexibility than would have been provided under the proposed rule which, in turn, should reduce the costs associated with compliance.

The Commission has evaluated the costs and benefits of § 39.14(c)(3) in light of the specific considerations identified in Section 15(a) of the CEA, as follows:

1. Protection of Market Participants and the Public

Costs

A DCO's monitoring of its exposure to its settlement bank(s) and those of its clearing members is a sound business practice in which a DCO should be engaged notwithstanding the rule. Nevertheless, the Commission believes the rule will require commitment of DCO staff resources, the costs of which could be passed along to clearing members and market participants as part of the DCO's clearing fees. Such costs could vary significantly across DCOs given differences in operational and risk management procedures, settlement arrangements, and fee pricing practices. Given these circumstances, the Commission is unable to quantify the costs attributable to the Commission's rule, and no commenter provided an estimate. As a general matter, however, the Commission is mindful that the measures set forth in § 39.14(c)(3)(i)–(iv), specifically the requirement that DCOs take actions that are ''reasonably necessary in order to eliminate or strictly limit'' exposure to settlement banks, could cause DCOs to incur costs. Such costs could include, for example, the costs of establishing an account at an additional settlement bank, which would entail evaluating the bank to ensure that it meets the DCO's

criteria for a settlement bank, reviewing account agreements, and establishing connectivity to the bank. There may also be fees charged by a bank for standby services if the bank is not used as the primary settlement bank, or there may be other account-related fees. The Commission is unable to ascertain the specific amount of any such costs for DCOs because of the varying nature of settlement bank arrangements across DCOs.

Benefits

Use of multiple settlement banks by DCOs, as well as imposition of concentration limits and other safeguards provided for in § 39.14(c)(3)(i)–(iv), when reasonably necessary, could help insulate the DCO and its members from the risk of default by a settlement bank. This in turn could provide market participants and the public with greater protection from disruption of markets, as well as the clearing and settlement system.

Affording a DCO flexibility in managing its settlement bank arrangements and, to a lesser degree, those of its clearing members, benefits market participants and the public by reducing the costs and potential inefficiencies associated with maintaining settlement arrangements with multiple settlement banks when that might not yield a concomitant benefit in the form of risk reduction. The rule sets forth general standards while permitting each DCO to tailor its settlement bank arrangements to its unique circumstances and risk tolerances.

2. Efficiency, Competitiveness, and Financial Integrity

Costs

Quantification or estimation of costs to efficiency, competitiveness, and financial integrity of markets are not readily ascertainable, and no commenter provided an estimate.

Benefits

The rule permits DCOs to obtain settlement services from a single bank if the size and needs of the DCO, as well as the availability of suitable settlement bank services, makes the use of more than one settlement bank cost-prohibitive and it is not reasonably necessary to have more than one settlement bank in order to eliminate or strictly limit the DCO's exposures. More efficient use of DCO resources can result in enhanced efficiency and financial integrity of the markets for which the DCO clears. Particularly for smaller DCOs, it may not be practical to obtain settlement services from more than one settlement bank because of the costs of evaluating a bank's suitability to perform settlement functions, reviewing account agreements, and establishing connectivity to the bank. There also may be account-related fees charged by a bank, including fees for standby services, if the bank is used as a back-up settlement bank and not the primary settlement bank.

3. Price Discovery

The Commission has not identified any ways in which § 39.14(c)(3) could affect price discovery.

4. Sound Risk Management Practices

Costs

The Commission has not identified any ways in which § 39.14(c)(3) could impair sound risk management practices.

Benefits

The Commission regards an effective settlement framework as a sound risk management practice because it reduces the risks associated with a bank's potential failure to make timely settlement. The requirements that a DCO monitor risk exposures to settlement banks and address diversification concerns, as reasonably necessary, are important adjuncts to a DCO's overall risk management practices.

5. Other Public Interest Considerations.

The Commission has not identified any other costs or benefits that should be taken into account.

I. Treatment of Funds—§ 39.15

Core Principle F, as amended by the Dodd-Frank Act, requires a DCO to: (i) Establish standards and procedures that are designed to protect and ensure the safety of its clearing members' funds and assets; (ii) hold such funds and assets in a manner by which to minimize the risk of loss or of delay in the DCO's access to the assets and funds; and (iii) only invest such funds and assets in instruments with minimal credit, market, and liquidity risks.[277]

Proposed § 39.15 would establish minimum standards for DCO compliance with Core Principle F. Among other things, it would set forth standards for the types of assets that could be accepted as initial margin. In this regard, proposed § 39.15(c)(1) would require a DCO to limit the assets it accepts as initial margin to those that have minimal credit, market, and liquidity risk. It would further specify that a DCO may not accept letters of credit as initial margin.

The Commission received comments on substantive aspects of the proposed rules, and it has addressed those comments above. The Commission also received several comments on potential costs associated with the proposed § 39.15(c)(1) prohibition on the acceptance of letters of credit as initial margin.[278] CME asserted that the prohibition is unnecessary because letters of credit provide an absolute assurance of payment and, therefore, the issuing bank must honor the demand even in circumstances where the beneficiary is unable to reimburse the bank for its payment. Other commenters suggested that letters of credit should be acceptable if they are subject to appropriate conditions. Finally, several commenters warned of the potential risks associated with prohibiting letters of credit, including higher costs for clearing members and their customers, the potential placement of U.S. DCOs at a disadvantage as compared to foreign clearing houses, and increased systemic risk as a result of decreased voluntary clearing.

Taking into account both the strong track record of letters of credit in connection with cleared futures and options on futures and the potentially greater risks of cleared swaps, the Commission has determined to modify the rule to permit letters of credit in connection with cleared futures and options on futures but to retain the prohibition on letters of credit as initial margin for swaps. Certain DCOs have accepted letters of credit as initial margin for futures and options on futures for a number of years without incident and continue to do so. On the other hand, letters of credit are only a promise by a bank to pay, not an asset that can be sold. The Commission is concerned that the potential losses that swap market participants could incur may be of a greater magnitude than potential losses with respect to futures and options. Initial margin is the first financial resource that a DCO will apply in the event of a clearing member default. If a DCO were to need to draw on a letter of credit posted by a clearing member whose customers had suffered such losses, the larger the amount that it would need to draw, the greater the risk that the issuing bank may be unable to pay under the terms of the letter of credit. Accordingly, the Commission is modifying the proposal as described.

[277] Section 5b(c)(2)(F) of the CEA; 7 U.S.C. 7a–1(c)(2)(F) (Core Principle F).

[278] The Commission notes that proposed 39.15(c)(1) regarding types of assets that can be accepted as initial margin has been redesignated as § 39.13(g)(10) under the risk management rules.

The Commission has evaluated the costs and benefits of § 39.13(g)(10) in light of the specific considerations identified in Section 15(a) of the CEA, as follows:

1. Protection of Market Participants and the Public

Costs

The prohibition on accepting letters of credit as initial margin for swaps may impose higher costs for clearing members because they will have to deposit cash or other assets that have minimal credit, market, and liquidity risk for those products. This could increase costs for market participants and decrease capital efficiency. It may also place U.S. DCOs at a disadvantage to those foreign clearing houses that permit letters of credit to be used as initial margin for swaps. The Commission notes, however, that in response to the comments it has modified the rule to permit letters of credit for futures. Therefore, futures market participants will not incur any costs as a result of this provision.

It is not possible to estimate or quantify these costs for a number of reasons. The Dodd-Frank Act and implementing regulations will significantly affect the manner in which swaps are developed, traded, executed, and cleared. Existing DCOs and FCMs will be clearing new products. New DCOs and FCMs will enter the market. Mandatory clearing will bring new products and participants to DCOs and FCMs. The interaction of all these factors creates a wide range of uncertainty as to which products will be cleared, what their margin requirements will be, and the extent to which clearing members would post letters of credit as margin if permitted. Under these circumstances, the potential opportunity costs that may arise from the deposit of cash or other assets rather than letters of credit depends on a variety of future circumstances and actions of market participants that cannot be known or predicted at the present time. In sum, the Commission believes that the possible future circumstances involving the posting of letters of credit as margin is too speculative and uncertain to be able to quantify or estimate the resulting costs to clearing members with any precision or degree of magnitude.

Benefits

One of the primary functions of a DCO is to guarantee financial performance, which includes performing daily variation settlement. Daily pays are made in cash, and to the extent a DCO relies on margin deposits to meet its end-of-day obligations, it must have access to sufficient cash or highly liquid assets. Similarly, initial margin may be tapped by a DCO in the event of a clearing member default. By limiting the use of letters of credit, the DCO will avoid the possibility that a letter of credit would be dishonored when presented to the issuing bank.

Thus, requiring initial margin in the form of assets that can be immediately sold provides greater financial protection to the DCO, clearing members, and market participants.

2. Efficiency, Competitiveness, and Financial Integrity

Costs

As noted above, there could be competitive disadvantages to DCOs if foreign competitors do not impose similar restrictions on initial margin deposits. In addition, the prospect of increased costs may reduce voluntary clearing of swaps, which would be inconsistent with the goals of the Dodd-Frank Act and could potentially lead to systemic risk.

Benefits

A DCO can be more efficient in facilitating payments if it has readily available liquid assets as opposed to a conditional obligation that must be presented for payment. Holding actual assets provides greater assurance of financial integrity to the clearing process, as the DCO will not have to bear the costs of possible default on the part of the issuing bank. Even an irrevocable letter of credit can be dishonored, with the DCO's only recourse being a lawsuit.

3. Price Discovery

The Commission does not believe this rule will have a material effect on price discovery.

4. Sound Risk Management Practices

Costs

The Commission does not believe this rule will have a material adverse impact on sound risk management practices.

Benefits

The Commission expects that prohibiting the use of letters of credit as initial margin for swaps could serve to strengthen a DCO's risk management program. It eliminates the risk of funds not being available if a letter of credit were to be dishonored, which could have a significant impact because initial margin is the first financial resource to be tapped in the event of a clearing member default.

5. Other Public Considerations

The Commission does not believe this rule will have a material impact on public interest considerations other than those discussed above.

J. Reporting—§ 39.19

Core Principle J,[279] as amended by the Dodd-Frank Act, requires a DCO to provide the Commission with all information that the Commission determines to be necessary to conduct oversight of the DCO.

The Commission proposed § 39.19 to establish minimum requirements that a DCO would have to meet in order to comply with Core Principle J. Under proposed § 39.19, certain reports would have to be made by a DCO to the Commission (1) On a periodic basis (daily, quarterly, or annually); (2) where the reporting requirement is triggered by the occurrence of a significant event; and (3) upon request by the Commission.

The rules would require DCOs to provide information that the Commission has determined is necessary to conduct oversight of DCOs. The proposed reporting regime would assist the Commission in monitoring the financial strength and operational capabilities of a DCO and in evaluating whether a DCO's risk management practices are effective. The required reports also would assist the Commission in taking prompt action as necessary to identify incipient problems and address them at an early stage. A self-reporting program of this type enhances the Commission's ability to conduct oversight given its limited resources which do not permit routine on-site surveillance of DCOs.

The proposed rules would require submission of information electronically and in a form and manner prescribed by the Commission. These general procedural standards would provide flexibility to the Commission in establishing and updating uniform format and delivery protocols that would assist the Commission in conducting timely review of submissions. In this regard, the transmission of information using a uniform format would enable Commission staff to sort and interpret data without the need to convert the data into a format that provides the necessary functionality, *e.g.,* it would be designed to provide the Commission with the ability to compare data across DCOs when necessary.

A number of commenters discussed costs associated with proposed § 39.19

[279] Section 5b(c)(2)(J) of the CEA, 7 U.S.C. 7a–1(c)(2)(J).

in the form of comments on the substantive provisions of the proposed rule. For example, a number of commenters discussed whether alternative reporting requirements might better inform the Commission of potential risks. Some commenters questioned the need for certain information and some commenters questioned the feasibility of the reporting requirements. The Commission has addressed those comments above.

The Commission also received comments that directly addressed two areas of the Commission's cost-benefit analysis of proposed § 39.19: (1) The cost of preparing and submitting daily and annual audited financial reports; and (2) the cost of reporting a 10 percent decrease in financial resources. Those comments are discussed in detail below.

a. Cost of Preparing and Submitting Daily and Annual Reports

Proposed § 39.19(c) would require a DCO to submit various periodic reports for the purposes of risk surveillance and oversight of the DCO's compliance with the core principles and Commission regulations. In the notice of proposed rulemaking, the Commission observed that the information that would be reported was information readily available to a DCO and which, in certain instances, was already being reported to the Commission. The Commission requested data or other information that could quantify or qualify costs.

Only NYPC provided an estimate of the fixed cost of implementing an automated system for daily reporting. In a comment letter submitted by NYPC, the cost was estimated at $582,000.

In a follow-up phone conversation with representatives of NYPC, Commission staff discussed the basis for NYPC's estimate that implementing an automated system for daily reporting would cost $582,000. Staff was told that NYPC already provides certain daily reports to the Commission, but that the additional data that it would have to report under the proposal (not including the proposed gross margin data or large trader data) would necessitate implementing an automated system. NYPC representatives confirmed that the estimate was for a one-time cost, not the cost of generating and transmitting the actual daily reports. NYPC also confirmed that the cost of generating and transmitting the actual daily reports would be minimal.

The Commission was able to estimate the costs of providing reports and presented this information in the Paperwork Reduction Act discussion. It estimated that daily reporting could require a DCO to expend up to $8,280 per year, and an annual report could require a DCO to expend up to $482,110 per year.

KCC and MGEX commented that the variable cost for daily reporting could be significantly more than the Commission's estimates if the Commission were to require a costly format and method of delivery. MGEX also commented that the Commission may have underestimated the cost of providing the annual report (audited financial report under § 39.19(c)(3)(ii)), and that the Commission's estimate is ''extremely excessive, particularly when most of [the annual reporting requirements do] not appear to be required by the Dodd-Frank Act.'' Finally, MGEX believes that the proposed rules will not guarantee increased market participation or improve legitimate risk management and hedging activity, and the additional costs will create barriers to entry and decrease DCO competition.

Although KCC and MGEX commented that the costs of preparing the reports may be greater than the Commission's estimates, neither DCO provided an alternative estimate. Nor did they suggest alternative reporting requirements that would achieve the purposes of the CEA with a more favorable cost-benefit ratio. As to the estimated costs of the required format and method of delivery, the Commission notes that it based its estimate on the cost of using the SHAMIS system. The Commission has no basis for concluding that the cost of using an alternative system would be less substantial and it received no comments on this.

The Commission believes that the costs that DCOs will incur to implement a system to provide such information to the Commission are necessary and justified. As explained above, the Commission has determined that the information required in the reports is necessary for the Commission to conduct adequate oversight of DCOs, particularly given its limited ability to conduct on-site reviews.

b. Reporting a 10 Percent Decrease in Financial Resources

Under proposed § 39.19(c)(4)(i), a DCO would be required to report a decrease of 10 percent in the total value of its financial resources either from (1) the value reported in the DCO's last quarterly report or (2) from the value as of the close of the previous business day. This would allow the Commission to more quickly identify and address financial problems at the DCO. As discussed above, the Commission raised the reporting threshold from 10 percent to 25 percent in response to comments that a higher percentage might yield more meaningful results. In addition, the higher threshold is likely to reduce the number of reports that might be submitted under this requirement.

NYPC commented that compliance with the proposed reporting requirement would necessitate an expenditure of approximately 15,000 hours and $1.7 million. NYPC explained that this estimate reflects implementing a system that would track default resources and working capital, combined. After talking with Commission staff, NYPC submitted a comment letter that provided a preliminary estimate of approximately 4,600 hours and $566,000 for designing, building, and testing a reporting system for a decline in default resources only.

Based on NYPC's initial comment letter, the Commission believes that the material costs associated with § 39.19(c)(4)(i) are the initial investments made by a DCO to develop and implement a system (automated or not) to alert the DCO that the valuation threshold has been met. As discussed above, it is important for the Commission to be apprised of a 25% reduction in default resources because it could indicate that the DCO's financial resources are strained and corrective action may be needed.

The Commission has evaluated the costs and benefits of § 39.19 in light of the specific considerations identified in Section 15(a) of the CEA as follows:

1. Protection of Market Participants and the Public

Costs

Section 39.19 requires DCOs to provide information that the Commission has determined is necessary for oversight of DCOs and to provide that information in a time frame, format, and delivery method that will enable effective use of the information. To the extent that DCOs do not already have an infrastructure for preparing and transmitting reports, they will incur one-time costs to put such a framework in place.

Benefits

The comprehensive regulatory reporting program will enhance protection of market participants and the public by promoting more in-depth and effective oversight by the Commission. The reports will assist the Commission's Risk Surveillance staff in monitoring clearing house risk and evaluating DCOs' management and mitigation of that risk. In addition, the

information will assist the Commission to identify incipient problems and address them at an early stage.

2. Efficiency, Competitiveness, and Financial Integrity

Costs

The Commission does not believe that the reporting requirements will adversely impact efficiency, competitiveness, or the financial integrity of derivatives markets.

Benefits

The reporting requirements will protect the financial integrity of derivatives markets because they will support effective and timely oversight of DCOs. This will help to minimize the risk of default and the impact default would have on the markets.

3. Price Discovery

The Commission does not believe that § 39.19 will have a material impact on price discovery.

4. Sound Risk Management Practices

Costs

The Commission does not believe that the reporting requirements will adversely impact sound risk management practices.

Benefits

The reporting requirements are expected to enhance sound risk management practices because the Commission will be able to more effectively evaluate a DCO's risk management practices on an on-going basis. The Commission staff can build a knowledge base that will support prompt action if there are adverse changes in trends or financial profiles.

5. Other Public Interest Considerations

The Commission does not believe this rule will have a material impact on public interest considerations other than those discussed above. Effective oversight of DCOs will enhance the safety and efficiency of DCOs and reduce systemic risk. Safe and reliable DCOs are essential not only for the stability of the derivatives markets they serve but also the public which relies on the prices formed in these markets for all manner of commerce.

IX. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (''RFA'') requires that agencies consider whether the rules they propose will have a significant economic impact on a substantial number of small entities and, if so, provide a regulatory flexibility analysis respecting the impact.[280] The rules adopted herein will affect only DCOs). The Commission has previously established certain definitions of ''small entities'' to be used by the Commission in evaluating the impact of its regulations on small entities in accordance with the RFA.[281] The Commission has previously determined that DCOs are not small entities for the purpose of the RFA.[282] Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that these rules will not have a significant economic impact on a substantial number of small entities. The Chairman made the same certification in the proposed rulemakings, and the Commission did not receive any comments on the RFA in relation to any of those rulemakings.

B. Paperwork Reduction Act

The Commission may not conduct or sponsor, and a registered entity is not required to respond to, a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. The Commission's adoption of §§ 39.3 (DCO registration application requirements), 39.10 (annual compliance report and recordkeeping), 39.11 (financial resources quarterly report), 39.14 (settlement recordkeeping), 39.18 (system safeguards reporting and recordkeeping), 39.19 (periodic and event-specific reporting), and 39.20 (general recordkeeping), imposes new information collection requirements on registered entities within the meaning of the Paperwork Reduction Act.[283]

Accordingly, the Commission requested and OMB assigned control numbers for the required collections of information. The Commission has submitted this notice of final rulemaking along with supporting documentation for OMB's review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. The titles for these collections of information are ''Financial Resources Requirements for Derivatives Clearing Organizations, OMB control number 3038–0066,'' ''Information Management Requirements for Derivatives Clearing Organizations, OMB control number 3038–0069,'' ''General Regulations and Derivatives Clearing Organizations, OMB control number 3038–0081,'' and ''Risk Management Requirements for Derivatives Clearing Organizations, OMB control number 3038–0076.'' Many of the responses to this new collection of information are mandatory.

The Commission protects proprietary information according to the Freedom of Information Act and 17 CFR part 145, ''Commission Records and Information.'' In addition, Section 8(a)(1) of the CEA strictly prohibits the Commission, unless specifically authorized by the Act, from making public ''data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers.'' The Commission also is required to protect certain information contained in a government system of records according to the Privacy Act of 1974, 5 U.S.C. 552a.

The regulations require each respondent to file certain information with the Commission and to maintain certain records.[284] The Commission received comments from NYPC and MGEX regarding the estimated costs of preparing and submitting daily reports. It also received comments from MGEX regarding costs associated with annual reports and the proposed rules in general.

NYPC and MGEX commented that the costs associated with the rules in the Information Management proposed rulemaking would be higher than the

[280] 5 U.S.C. 601 *et seq.*

[281] 47 FR 18618 (Apr. 30, 1982).

[282] *See* 66 FR 45604, at 45609 (Aug. 29, 2001) (New Regulatory Framework for Clearing Organizations).

[283] 44 U.S.C. 3501 *et seq.*

[284] *See* 75 FR at 63119 (Oct. 14, 2010) (Financial Resources) (requirement to file quarterly reports); *see also* discussion of the financial resources reporting requirements in section IV.B.10, above.

See 75 FR at 77583–77584 (Dec. 13, 2010) (General Regulations) (proposed requirements: (i) For the CCO to submit an annual report to the Commission; (ii) to retain a copy of the policies and procedures adopted in furtherance of compliance with the CEA; (iii) to retain copies of materials, including written reports provided to the board of directors in connection with the board's review of the annual report; and (iv) to retain any records relevant to the annual report, including, but not limited to, work papers and other documents that form the basis of the report, and memoranda, correspondence, other documents, and records that are (a) created, sent or received in connection with the annual report and (b) contain conclusions, opinions, analyses, or financial data related to the annual report); *see also* discussion of § 39.10 in section IV.A, above.

See 75 FR at 78193 (Dec. 15, 2010) (Information Management) (proposed requirements to file specified information with the Commission (i) periodically, on a daily, quarterly, and annual basis; (ii) as specified events occur; and (iii) upon Commission request); *see also* discussion of reporting requirements in section IV.J, above.

See 75 FR at 78196 (Dec. 15, 2010) (Information Management) (proposed requirement to maintain records of all activities related to its business as a DCO, including all information required to be created, generated, or reported under part 39, including but not limited to the results of and methodology used for all tests, reviews, and calculations); see also discussion of recordkeeping requirements in section IV.K, above.

Commission estimated.[285] With respect to daily reporting, NYPC commented that designing, building, and testing the application necessary to automate the process of producing daily reports would require approximately 5,200 hours and cost $582,000.[286] MGEX commented that the cost to a DCO could be significantly more than the estimated cost if the Commission were to require a costly format and method of delivery.

With respect to annual reporting, MGEX commented that the Commission may have underestimated the associated costs because the Commission did not address the costs of building reporting methods, forms, programs, or the allocation of labor resources. In addition, MGEX believes that the estimated costs associated with the annual report are ''extremely excessive, particularly when most of [the annual report requirements do] not appear to be required by the Dodd-Frank Act.'' MGEX further commented that the proposed rules will not guarantee increased market participation or improve legitimate risk management and hedging activity, and the additional costs would create barriers to entry and decreased DCO competition.

Finally, with respect to the estimated costs identified in the Risk Management notice of proposed rulemaking,[287] MGEX noted that the Commission had estimated the total hours for the proposed collection of information to be 50 hours per year per respondent for the additional reporting requirements at an annual cost of $500 per respondent (50 hours × $10). MGEX stated its belief that these estimates, both in hours and cost, are extremely low, and that it did not appear that the Commission had accounted for the costs to implement a system; collect, forward and format data; monitor and enforce compliance; and document compliance with the proposed rulemaking. MGEX noted that the costs are not limited to reporting to the Commission for many of the proposed rules, and that reporting may be the least expensive facet. MGEX specifically identified reporting the gross position of each beneficial owner as a requirement for which the Commission did not provide any cost estimates.

Although MGEX commented that the costs of the proposed requirements may be greater than the costs the Commission set forth in the Information Management and Risk Management proposed rulemakings, and that the Commission did not estimate the costs of building reporting methods, forms, programs, or the allocation of labor resources, MGEX did not provide an estimate of these costs. Nor did MGEX suggest alternative reporting requirements that would achieve the purposes of the CEA with a more favorable cost-benefit ratio.

As to the estimated costs of the required format and method of delivery, the Commission notes that the estimates of these costs were based on the cost of using the SHAMIS system. There was no basis for concluding that the cost of using an alternative system would be more substantial and the Commission received no comment to that effect. Moreover, Core Principle J requires a DCO to provide reports to the Commission, and all DCOs will have to bear these costs in order to comply with Core Principle J. Core Principle J requires each DCO ''to provide to the Commission all information that the Commission determines to be necessary to conduct oversight of the [DCO].'' As discussed above and in the Information Management proposed rulemaking, the Commission believes that the daily and annual reporting requirements provide the Commission with information that is important to its oversight of a DCO to ensure the DCO is in compliance with the core principles. This can lead to increased market participation and improve legitimate risk management and hedging activity. Accordingly, the Commission believes the collection of information related to the reporting rules is necessary to achieve the purposes of the CEA, particularly in light of the Dodd-Frank Act clearing mandate for swaps.[288]

The Commission has considered the comments of NYPC and MGEX but is declining to revise the estimated costs. The Commission believes that its original estimates remain appropriate for PRA purposes.

List of Subjects

17 CFR Part 1

Brokers, Commodity futures, Consumer protection, Definitions, Swaps.

17 CFR Part 21

Brokers, Commodity futures, Reporting and recordkeeping requirements.

17 CFR Part 39

Definitions, Commodity futures, Reporting and recordkeeping requirements, Swaps, Business and industry, Participant and product eligibility, Risk management, Settlement procedures, Treatment of funds, Default rules and procedures, System safeguards, Enforcement authority, Application form.

17 CFR Part 140

Authority delegations (Government agencies), Conflict of interests, Organization and functions (Government agencies).

For the reasons stated in the preamble, amend 17 CFR parts 1, 21, 39, and 140 as follows:

PART 1—GENERAL REGULATIONS UNDER THE COMMODITY EXCHANGE ACT

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

Authority: 7 U.S.C. 1a, 2, 5, 6, 6a, 6b, 6c, 6d, 6e, 6f, 6g, 6h, 6i, 6j, 6k, 6l, 6m, 6n, 6o, 6p, 7, 7a, 7b, 8, 9, 12, 12a, 12c, 13a, 13a–1, 16, 16a, 19, 21, 23, and 24, as amended by Pub. L. 111–203, 124 Stat. 1376.

■ 2. Amend § 1.3 to revise paragraphs (c) and (d), remove and reserve paragraph (k), and add paragraphs (aaa), (bbb), (ccc), (ddd), (eee), and (fff) to read as follows:

§ 1.3 Definitions.

* * * * *

(c) *Clearing member.* This term means any person that has clearing privileges such that it can process, clear and settle trades through a derivatives clearing organization on behalf of itself or others. The derivatives clearing organization need not be organized as a membership organization.

(d) *Clearing organization or derivatives clearing organization.* This term means a clearinghouse, clearing association, clearing corporation, or similar entity, facility, system, or

[285] *See* 75 FR at 78193 (Dec. 15, 2010) (Information Management). In the Paperwork Reduction Act discussion, the Commission estimated that daily reporting would result in an aggregated cost of $8,280 initially (12 respondents × $690) and $16,800 per annum (12 respondents × $1,400). Annual reporting would result in an aggregated cost of $5,785,320 per annum (12 respondents × $482,110).

[286] In a follow-up phone conversation with representatives of NYPC, Commission staff discussed the basis for NYPC's estimate that implementing an automated system for daily reporting would cost $582,000. Commission staff was told that NYPC already provides certain daily reports to the Commission's Risk Surveillance Group, but that the additional data that it would have to report under the Information Management NPRM (not including the gross margin data or large trader data) would necessitate implementing an automated system. NYPC representatives confirmed that the estimate was for a one-time cost, not the cost of generating and transmitting the actual daily reports. NYPC also confirmed that the cost of generating and transmitting the actual daily reports would be minimal.

[287] *See* 76 FR at 3716–3717 (Jan. 20, 2011) (Risk Management).

[288] *See* further discussion of the costs and benefits associated with the reporting requirements in section VII.J, above.

organization that, with respect to an agreement, contract, or transaction—

(1) Enables each party to the agreement, contract, or transaction to substitute, through novation or otherwise, the credit of the derivatives clearing organization for the credit of the parties;

(2) Arranges or provides, on a multilateral basis, for the settlement or netting of obligations resulting from such agreements, contracts, or transactions executed by participants in the derivatives clearing organization; or

(3) Otherwise provides clearing services or arrangements that mutualize or transfer among participants in the derivatives clearing organization the credit risk arising from such agreements, contracts, or transactions executed by the participants.

(4) *Exclusions.* The terms clearing organization and derivatives clearing organization do not include an entity, facility, system, or organization solely because it arranges or provides for—

(i) Settlement, netting, or novation of obligations resulting from agreements, contracts or transactions, on a bilateral basis and without a central counterparty;

(ii) Settlement or netting of cash payments through an interbank payment system; or

(iii) Settlement, netting, or novation of obligations resulting from a sale of a commodity in a transaction in the spot market for the commodity.

* * * * *

(k) [Reserved]

* * * * *

(aaa) *Clearing initial margin.* This term means initial margin posted by a clearing member with a derivatives clearing organization.

(bbb) *Customer initial margin.* This term means initial margin posted by a customer with a futures commission merchant, or by a non-clearing member futures commission merchant with a clearing member.

(ccc) *Initial margin.* This term means money, securities, or property posted by a party to a futures, option, or swap as performance bond to cover potential future exposures arising from changes in the market value of the position.

(ddd) *Margin call.* This term means a request from a futures commission merchant to a customer to post customer initial margin; or a request by a derivatives clearing organization to a clearing member to post clearing initial margin or variation margin.

(eee) *Spread margin.* This term means reduced initial margin that takes into account correlations between certain related positions held in a single account.

(fff) *Variation margin.* This term means a payment made by a party to a futures, option, or swap to cover the current exposure arising from changes in the market value of the position since the trade was executed or the previous time the position was marked to market.

■ 3. Amend § 1.12 to remove and reserve paragraph (f)(1).

PART 21—SPECIAL CALLS

■ 4. The authority citation for part 21 is revised to read as follows:

Authority: 7 U.S.C. 1a, 2, 2a, 4, 6a, 6c, 6f, 6g, 6i, 6k, 6m, 6n, 7, 7a, 12a, 19 and 21, as amended by Pub. L. 111–203, 124 Stat. 1376; 5 U.S.C. 552 and 552(b), unless otherwise noted.

■ 5. Redesignate § 21.04 as § 21.05.

■ 6. Add a new § 21.04 to read as follows:

§ 21.04 Special calls for information on customer accounts or related cleared positions.

Upon special call by the Commission, each futures commission merchant, clearing member or foreign broker shall provide information to the Commission concerning customer accounts or related positions cleared on a derivatives clearing organization in the format and manner and within the time provided by the Commission in the special call.

■ 7. Add § 21.06 to read as follows:

§ 21.06 Delegation of authority to the Director of the Division of Clearing and Risk.

The Commission hereby delegates, until the Commission orders otherwise, the special call authority set forth in § 21.04 to the Director of the Division of Clearing and Risk to be exercised by such Director or by such other employee or employees of such Director as designated from time to time by the Director. The Director of the Division of Clearing and Risk may submit to the Commission for its consideration any matter which has been delegated in this section. Nothing in this section shall be deemed to prohibit the Commission, at its election, from exercising the authority delegated in this section to the Director.

PART 39—DERIVATIVES CLEARING ORGANIZATIONS

■ 8. Revise part 39 to read as follows:

Subpart A—General Provisions Applicable to Derivatives Clearing Organizations

Sec.
39.1 Scope.
39.2 Definitions.
39.3 Procedures for registration.
39.4 Procedures for implementing derivatives clearing organization rules and clearing new products.
39.5 Submission of swaps for Commission determination regarding clearing requirements.
39.6 [Reserved]
39.7 Enforceability.
39.8 Fraud in connection with the clearing of transactions on a derivatives clearing organization.

Subpart B—Compliance With Core Principles

39.9 Scope.
39.10 Compliance with core principles.
39.11 Financial resources.
39.12 Participant and product eligibility.
39.13 Risk management.
39.14 Settlement procedures.
39.15 Treatment of funds.
39.16 Default rules and procedures.
39.17 Rule enforcement.
39.18 System safeguards.
39.19 Reporting.
39.20 Recordkeeping.
39.21 Public information.
39.22 Information sharing.
39.23 Antitrust considerations.
39.24 [Reserved]
39.25 [Reserved]
39.26 [Reserved]
39.27 Legal risk considerations.

Appendix A to Part 39—Form DCO Derivatives Clearing Organization Application for Registrations

Authority: 7 U.S.C. 7a–1 as amended by Pub. L. 111–203, 124 Stat. 1376.

Subpart A—General Provisions Applicable to Derivatives Clearing Organizations

§ 39.1 Scope.

The provisions of this subpart A apply to any derivatives clearing organization as defined under section 1a(15) of the Act and § 1.3(d) of this chapter which is registered or deemed to be registered with the Commission as a derivatives clearing organization, is required to register as such with the Commission pursuant to section 5b(a) of the Act, or which voluntarily applies to register as such with the Commission pursuant to section 5b(b) or otherwise.

§ 39.2 Definitions.

For the purposes of this part,

Back test means a test that compares a derivatives clearing organization's initial margin requirements with historical price changes to determine the extent of actual margin coverage.

Customer means a person trading in any commodity named in the definition of commodity in section 1a(9) of the Act or in § 1.3 of this chapter, or in any swap as defined in section 1a(47) of the Act or in § 1.3 of this chapter; *Provided, however,* an owner or holder of a house

account as defined in this section shall not be deemed to be a customer within the meaning of section 4d of the Act, the regulations that implement sections 4d and 4f of the Act and § 1.35, and such an owner or holder of such a house account shall otherwise be deemed to be a customer within the meaning of the Act and §§ 1.37 and 1.46 of this chapter and all other sections of these rules, regulations, and orders which do not implement sections 4d and 4f of the Act.

Customer account or *customer origin* means a clearing member account held on behalf of customers, as that term is defined in this section, and which is subject to section 4d(a) or section 4d(f) of the Act.

House account or *house origin* means a clearing member account which is not subject to section 4d(a) or 4d(f) of the Act.

Key personnel means derivatives clearing organization personnel who play a significant role in the operations of the derivatives clearing organization, the provision of clearing and settlement services, risk management, or oversight of compliance with the Act and Commission regulations and orders. Key personnel include, but are not limited to, those persons who are or perform the functions of any of the following: chief executive officer; president; chief compliance officer; chief operating officer; chief risk officer; chief financial officer; chief technology officer; and emergency contacts or persons who are responsible for business continuity or disaster recovery planning or program execution.

Stress test means a test that compares the impact of potential extreme price moves, changes in option volatility, and/or changes in other inputs that affect the value of a position, to the financial resources of a derivatives clearing organization, clearing member, or large trader, to determine the adequacy of such financial resources.

Systemically important derivatives clearing organization means a financial market utility that is a derivatives clearing organization registered under section 5b of the Act, which has been designated by the Financial Stability Oversight Council to be systemically important and for which the Commission acts as the Supervisory Agency pursuant to section 803(8) of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

§ 39.3 Procedures for registration.

(a) *Application procedures.* (1) An organization desiring to be registered as a derivatives clearing organization shall file electronically an application for registration with the Secretary of the Commission in the format and manner specified by the Commission. The Commission will review the application for registration as a derivatives clearing organization pursuant to the 180-day timeframe and procedures specified in section 6(a) of the Act. The Commission may approve or deny the application or, if deemed appropriate, register the applicant as a derivatives clearing organization subject to conditions.

(2) *Application.* Any person seeking to register as a derivatives clearing organization, any applicant amending its pending application, or any registered derivatives clearing organization seeking to amend its order of registration (applicant), shall submit to the Commission a completed Form DCO, which shall include a cover sheet, all applicable exhibits, and any supplemental materials, including amendments thereto, as provided in the appendix to this part 39 (application). An applicant, when filing a Form DCO for purposes of amending its pending application or requesting an amendment to an existing registration, is only required to submit exhibits and updated information that are relevant to the requested amendment and are necessary to demonstrate compliance with the core principles affected by the requested amendment. The Commission will not commence processing an application unless the applicant has filed the application as required by this section. Failure to file a completed application will preclude the Commission from determining that an application is materially complete, as provided in section 6(a) of the Act. Upon its own initiative, an applicant may file with its completed application additional information that may be necessary or helpful to the Commission in processing the application.

(3) *Submission of supplemental information.* The filing of a completed application is a minimum requirement and does not create a presumption that the application is materially complete or that supplemental information will not be required. At any time during the application review process, the Commission may request that the applicant submit supplemental information in order for the Commission to process the application. The applicant shall file electronically such supplemental information with the Secretary of the Commission in the format and manner specified by the Commission.

(4) *Application amendments.* An applicant shall promptly amend its application if it discovers a material omission or error, or if there is a material change in the information provided to the Commission in the application or other information provided in connection with the application.

(5) *Public information.* The following sections of all applications to become a registered derivatives clearing organization will be public: first page of the Form DCO cover sheet, proposed rules, regulatory compliance chart, narrative summary of proposed clearing activities, documents establishing the applicant's legal status, documents setting forth the applicant's corporate and governance structure, and any other part of the application not covered by a request for confidential treatment, subject to § 145.9 of this chapter.

(b) *Stay of application review.* (1) The Commission may stay the running of the 180-day review period if an application is materially incomplete, in accordance with section 6(a) of the Act.

(2) *Delegation of authority.* (i) The Commission hereby delegates, until it orders otherwise, to the Director of the Division of Clearing and Risk or the Director's designee, with the concurrence of the General Counsel or the General Counsel's designee, the authority to notify an applicant seeking designation under section 6(a) of the Act that the application is materially incomplete and the running of the 180-day period is stayed.

(ii) The Director of the Division of Clearing and Risk may submit to the Commission for its consideration any matter which has been delegated in this paragraph.

(iii) Nothing in this paragraph prohibits the Commission, at its election, from exercising the authority delegated in paragraph (b)(2)(i) of this section.

(c) *Withdrawal of application for registration.* An applicant for registration may withdraw its application submitted pursuant to paragraph (a) of this section by filing electronically such a request with the Secretary of the Commission in the format and manner specified by the Commission. Withdrawal of an application for registration shall not affect any action taken or to be taken by the Commission based upon actions, activities, or events occurring during the time that the application for registration was pending with the Commission.

(d) *Reinstatement of dormant registration.* Before listing or relisting products for clearing, a dormant registered derivatives clearing organization as defined in § 40.1 of this chapter must reinstate its registration under the procedures of paragraph (a) of this section; provided, however, that an application for reinstatement may rely

upon previously submitted materials that still pertain to, and accurately describe, current conditions.

(e) *Request for vacation of registration.* A registered derivatives clearing organization may vacate its registration under section 7 of the Act by filing electronically such a request with the Secretary of the Commission in the format and manner specified by the Commission. Vacation of registration shall not affect any action taken or to be taken by the Commission based upon actions, activities or events occurring during the time that the entity was registered by the Commission.

(f) *Request for transfer of registration and open interest.* (1) In anticipation of a corporate change that will result in the transfer of all or substantially all of a derivatives clearing organization's assets to another legal entity, the derivatives clearing organization shall submit a request for approval to transfer the derivatives clearing organization's registration and positions comprising open interest for clearing and settlement.

(2) *Timing of submission and other procedural requirements.* (i) The request shall be submitted no later than three months prior to the anticipated corporate change, or as otherwise permitted under § 39.19(c)(4)(viii)(C) of this part.

(ii) The derivatives clearing organization shall submit a request for transfer by filing electronically such a request with the Secretary of the Commission in the format and manner specified by the Commission.

(iii) The derivatives clearing organization shall submit a confirmation of change report pursuant to § 39.19(c)(4)(viii)(D) of this part.

(3) *Required information.* The request shall include the following:

(i) The underlying agreement that governs the corporate change;

(ii) A narrative description of the corporate change, including the reason for the change and its impact on the derivatives clearing organization's financial resources, governance, and operations, and its impact on the rights and obligations of clearing members and market participants holding the positions that comprise the derivatives clearing organization's open interest;

(iii) A discussion of the transferee's ability to comply with the Act, including the core principles applicable to derivatives clearing organizations, and the Commission's regulations thereunder;

(iv) The governing documents of the transferee, including but not limited to articles of incorporation and bylaws;

(v) The transferee's rules marked to show changes from the current rules of the derivatives clearing organization;

(vi) A list of products for which the derivatives clearing organization requests transfer of open interest;

(vii) A representation by the derivatives clearing organization that it is in compliance with the Act, including the core principles applicable to derivatives clearing organizations, and the Commission's regulations thereunder; and

(viii) A representation by the transferee that it understands that the derivatives clearing organization is a regulated entity that must comply with the Act, including the core principles applicable to derivatives clearing organizations, and the Commission's regulations thereunder, in order to maintain its registration as a derivatives clearing organization; and further, that the transferee will continue to comply with all self-regulatory requirements applicable to a derivatives clearing organization under the Act and the Commission's regulations thereunder.

(4) *Commission determination.* The Commission will review a request as soon as practicable, and based on the Commission's determination as to the transferee's ability to continue to operate the derivatives clearing organization in compliance with the Act and the Commission's regulations thereunder, such request will be approved or denied pursuant to a Commission order.

§ 39.4 Procedures for implementing derivatives clearing organization rules and clearing new products.

(a) *Request for approval of rules.* An applicant for registration, or a registered derivatives clearing organization, may request, pursuant to the procedures of § 40.5 of this chapter, that the Commission approve any or all of its rules and subsequent amendments thereto, including operational rules, prior to their implementation or, notwithstanding the provisions of section 5c(c)(2) of the Act, at any time thereafter, under the procedures of § 40.5 of this chapter. A derivatives clearing organization may label as, ''Approved by the Commission,'' only those rules that have been so approved.

(b) *Self-certification of rules.* Proposed new or amended rules of a derivatives clearing organization not voluntarily submitted for prior Commission approval pursuant to paragraph (a) of this section must be submitted to the Commission with a certification that the proposed new rule or rule amendment complies with the Act and rules thereunder pursuant to the procedures of § 40.6 of this chapter.

(c) *Acceptance of new products for clearing.* (1) A dormant derivatives clearing organization within the meaning of § 40.1 of this chapter may not accept for clearing a new product until its registration as a derivatives clearing organization is reinstated under the procedures of § 39.3 of this part; provided however, that an application for reinstatement may rely upon previously submitted materials that still pertain to, and accurately describe, current conditions.

(2) A derivatives clearing organization that accepts for clearing a new product that is a swap shall comply with the requirements of § 39.5 of this part.

(d) *Orders regarding competition.* An applicant for registration or a registered derivatives clearing organization may request that the Commission issue an order concerning whether a rule or practice of the organization is the least anticompetitive means of achieving the objectives, purposes, and policies of the Act.

(e) *Holding securities in a futures portfolio margining account.* A derivatives clearing organization seeking to provide a portfolio margining program under which securities would be held in a futures account as defined in § 1.3(vv) of this chapter, shall submit rules to implement such portfolio margining program for Commission approval in accordance with § 40.5 of this chapter. Concurrent with the submission of such rules for Commission approval, the derivatives clearing organization shall petition the Commission for an order under section 4d of the Act.

§ 39.5 Review of swaps for Commission determination on clearing requirement.

(a) *Eligibility to clear swaps.* (1) A derivatives clearing organization shall be presumed eligible to accept for clearing any swap that is within a group, category, type, or class of swaps that the derivatives clearing organization already clears. Such presumption of eligibility, however, is subject to review by the Commission.

(2) A derivatives clearing organization that wishes to accept for clearing any swap that is not within a group, category, type, or class of swaps that the derivatives clearing organization already clears shall request a determination by the Commission of the derivatives clearing organization's eligibility to clear such a swap before accepting the swap for clearing. The request, which shall be filed electronically with the Secretary of the Commission, shall address the derivatives clearing

organization's ability, if it accepts the swap for clearing, to maintain compliance with section 5b(c)(2) of the Act, specifically:

(i) The sufficiency of the derivatives clearing organization's financial resources; and

(ii) The derivative clearing organization's ability to manage the risks associated with clearing the swap, especially if the Commission determines that the swap is required to be cleared.

(b) *Swap submissions.* (1) A derivatives clearing organization shall submit to the Commission each swap, or any group, category, type, or class of swaps that it plans to accept for clearing. The derivatives clearing organization making the submission must be eligible under paragraph (a) of this section to accept for clearing the submitted swap, or group, category, type, or class of swaps.

(2) A derivatives clearing organization shall submit swaps to the Commission, to the extent reasonable and practicable to do so, by group, category, type, or class of swaps. The Commission may in its reasonable discretion consolidate multiple submissions from one derivatives clearing organization or subdivide a derivatives clearing organization's submission as appropriate for review.

(3) The submission shall be filed electronically with the Secretary of the Commission and shall include:

(i) A statement that the derivatives clearing organization is eligible to accept the swap, or group, category, type, or class of swaps for clearing and describes the extent to which, if the Commission were to determine that the swap, or group, category, type, or class of swaps is required to be cleared, the derivatives clearing organization will be able to maintain compliance with section 5b(c)(2) of the Act;

(ii) A statement that includes, but is not limited to, information that will assist the Commission in making a quantitative and qualitative assessment of the following factors:

(A) The existence of significant outstanding notional exposures, trading liquidity, and adequate pricing data;

(B) The availability of rule framework, capacity, operational expertise and resources, and credit support infrastructure to clear the contract on terms that are consistent with the material terms and trading conventions on which the contract is then traded;

(C) The effect on the mitigation of systemic risk, taking into account the size of the market for such contract and the resources of the derivatives clearing organization available to clear the contract;

(D) The effect on competition, including appropriate fees and charges applied to clearing; and

(E) The existence of reasonable legal certainty in the event of the insolvency of the relevant derivatives clearing organization or one or more of its clearing members with regard to the treatment of customer and swap counterparty positions, funds, and property;

(iii) Product specifications, including copies of any standardized legal documentation, generally accepted contract terms, standard practices for managing any life cycle events associated with the swap, and the extent to which the swap is electronically confirmable;

(iv) Participant eligibility standards, if different from the derivatives clearing organization's general participant eligibility standards;

(v) Pricing sources, models, and procedures, demonstrating an ability to obtain sufficient price data to measure credit exposures in a timely and accurate manner, including any agreements with clearing members to provide price data and copies of executed agreements with third-party price vendors, and information about any price reference index used, such as the name of the index, the source that calculates it, the methodology used to calculate the price reference index and how often it is calculated, and when and where it is published publicly;

(vi) Risk management procedures, including measurement and monitoring of credit exposures, initial and variation margin methodology, methodologies for stress testing and back testing, settlement procedures, and default management procedures;

(vii) Applicable rules, manuals, policies, or procedures;

(viii) A description of the manner in which the derivatives clearing organization has provided notice of the submission to its members and a summary of any views on the submission expressed by the members (a copy of the notice to members shall be included with the submission); and

(ix) Any additional information specifically requested by the Commission.

(4) The Commission must have received the submission by the open of business on the business day preceding the acceptance of the swap, or group, category, type, or class of swaps for clearing.

(5) The submission will be made available to the public and posted on the Commission Web site for a 30-day public comment period. A derivatives clearing organization that wishes to request confidential treatment for portions of its submission may do so in accordance with the procedures set out in § 145.9(d) of this chapter.

(6) The Commission will review the submission and determine whether the swap, or group, category, type, or class of swaps described in the submission is required to be cleared. The Commission will make its determination not later than 90 days after a complete submission has been received, unless the submitting derivatives clearing organization agrees to an extension. The determination of when such submission is complete shall be at the sole discretion of the Commission. In making a determination that a clearing requirement shall apply, the Commission may impose such terms and conditions to the clearing requirement as the Commission determines to be appropriate.

(c) *Commission-initiated reviews.* (1) The Commission, on an ongoing basis, will review swaps that have not been accepted for clearing by a derivatives clearing organization to make a determination as to whether the swaps should be required to be cleared. In undertaking such reviews, the Commission will use information obtained pursuant to Commission regulations from swap data repositories, swap dealers, and major swap participants, and any other available information.

(2) Notice regarding any determination made under paragraph (c)(1) of this section will be made available to the public and posted on the Commission Web site for a 30-day public comment period.

(3) If no derivatives clearing organization has accepted for clearing a particular swap, group, category, type, or class of swaps that the Commission finds would otherwise be subject to a clearing requirement, the Commission will:

(i) Investigate the relevant facts and circumstances;

(ii) Within 30 days of the completion of its investigation, issue a public report containing the results of the investigation; and

(iii) Take such actions as the Commission determines to be necessary and in the public interest, which may include requiring the retaining of adequate margin or capital by parties to the swap, group, category, type, or class of swaps.

(d) *Stay of clearing requirement.* (1) After making a determination that a swap, or group, category, type, or class of swaps is required to be cleared, the Commission, on application of a counterparty to a swap or on its own

initiative, may stay the clearing requirement until the Commission completes a review of the terms of the swap, or group, category, type, or class of swaps and the clearing arrangement.

(2) A counterparty to a swap that wishes to apply for a stay of the clearing requirement for that swap shall submit a written request to the Secretary of the Commission that includes:

(i) The identity and contact information of the counterparty to the swap;

(ii) The terms of the swap subject to the clearing requirement;

(iii) The name of the derivatives clearing organization clearing the swap;

(iv) A description of the clearing arrangement; and

(v) A statement explaining why the swap should not be subject to a clearing requirement.

(3) A derivatives clearing organization that has accepted for clearing a swap, or group, category, type, or class of swaps that is subject to a stay of the clearing requirement shall provide any information requested by the Commission in the course of its review.

(4) The Commission will complete its review not later than 90 days after issuance of the stay, unless the derivatives clearing organization that clears the swap, or group, category, type, or class of swaps agrees to an extension.

(5) Upon completion of its review, the Commission may:

(i) Determine, subject to any terms and conditions as the Commission determines to be appropriate, that the swap, or group, category, type, or class of swaps must be cleared; or

(ii) Determine that the clearing requirement will not apply to the swap, or group, category, type, or class of swaps, but clearing may continue on a non-mandatory basis.

§ 39.6 [Reserved]

§ 39.7 Enforceability.

An agreement, contract or transaction submitted to a derivatives clearing organization for clearing shall not be void, voidable, subject to rescission, or otherwise invalidated or rendered unenforceable as a result of:

(a) A violation by the derivatives clearing organization of the provisions of the Act or of Commission regulations; or

(b) Any Commission proceeding to alter or supplement a rule under section 8a(7) of the Act, to declare an emergency under section 8a(9) of the Act, or any other proceeding the effect of which is to alter, supplement, or require a derivatives clearing organization to adopt a specific rule or procedure, or to take or refrain from taking a specific action.

§ 39.8 Fraud in connection with the clearing of transactions on a derivatives clearing organization.

It shall be unlawful for any person, directly or indirectly, in or in connection with the clearing of transactions by a derivatives clearing organization:

(a) To cheat or defraud or attempt to cheat or defraud any person;

(b) Willfully to 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

(c) Willfully to deceive or attempt to deceive any person by any means whatsoever.

Subpart B—Compliance with Core Principles

§ 39.9 Scope.

The provisions of this subpart B apply to any derivatives clearing organization, as defined under section 1a(15) of the Act and § 1.3(d) of this chapter, which is registered or deemed to be registered with the Commission as a derivatives clearing organization, is required to register as such with the Commission pursuant to section 5b(a) of the Act, or which voluntarily registers as such with the Commission pursuant to section 5b(b) or otherwise.

§ 39.10 Compliance with core principles.

(a) To be registered and to maintain registration as a derivatives clearing organization, a derivatives clearing organization shall comply with each core principle set forth in section 5b(c)(2) of the Act and any requirement that the Commission may impose by rule or regulation pursuant to section 8a(5) of the Act; and

(b) Subject to any rule or regulation prescribed by the Commission, a registered derivatives clearing organization shall have reasonable discretion in establishing the manner by which it complies with each core principle.

(c) *Chief compliance officer*—(1) *Designation.* Each derivatives clearing organization shall establish the position of chief compliance officer, designate an individual to serve as the chief compliance officer, and provide the chief compliance officer with the full responsibility and authority to develop and enforce, in consultation with the board of directors or the senior officer, appropriate compliance policies and procedures, to fulfill the duties set forth in the Act and Commission regulations.

(i) The individual designated to serve as chief compliance officer shall have the background and skills appropriate for fulfilling the responsibilities of the position. No individual who would be disqualified from registration under sections 8a(2) or 8a(3) of the Act may serve as a chief compliance officer.

(ii) The chief compliance officer shall report to the board of directors or the senior officer of the derivatives clearing organization. The board of directors or the senior officer shall approve the compensation of the chief compliance officer.

(iii) The chief compliance officer shall meet with the board of directors or the senior officer at least once a year.

(iv) A change in the designation of the individual serving as the chief compliance officer of the derivatives clearing organization shall be reported to the Commission in accordance with the requirements of § 39.19(c)(4)(ix) of this part.

(2) *Chief compliance officer duties.* The chief compliance officer's duties shall include, but are not limited to:

(i) Reviewing the derivatives clearing organization's compliance with the core principles set forth in section 5b of the Act, and the Commission's regulations thereunder;

(ii) In consultation with the board of directors or the senior officer, resolving any conflicts of interest that may arise;

(iii) Establishing and administering written policies and procedures reasonably designed to prevent violation of the Act;

(iv) Taking reasonable steps to ensure compliance with the Act and Commission regulations relating to agreements, contracts, or transactions, and with Commission regulations prescribed under section 5b of the Act;

(v) Establishing procedures for the remediation of noncompliance issues identified by the chief compliance officer through any compliance office review, look-back, internal or external audit finding, self-reported error, or validated complaint; and

(vi) Establishing and following appropriate procedures for the handling, management response, remediation, retesting, and closing of noncompliance issues.

(3) *Annual report.* The chief compliance officer shall, not less than annually, prepare and sign a written report that covers the most recently completed fiscal year of the derivatives clearing organization, and provide the annual report to the board of directors or the senior officer. The annual report shall, at a minimum:

(i) Contain a description of the derivatives clearing organization's

written policies and procedures, including the code of ethics and conflict of interest policies;

(ii) Review each core principle and applicable Commission regulation, and with respect to each:

(A) Identify the compliance policies and procedures that are designed to ensure compliance with the core principle;

(B) Provide an assessment as to the effectiveness of these policies and procedures;

(C) Discuss areas for improvement, and recommend potential or prospective changes or improvements to the derivatives clearing organization's compliance program and resources allocated to compliance;

(iii) List any material changes to compliance policies and procedures since the last annual report;

(iv) Describe the financial, managerial, and operational resources set aside for compliance with the Act and Commission regulations; and

(v) Describe any material compliance matters, including incidents of noncompliance, since the date of the last annual report and describe the corresponding action taken.

(4) *Submission of annual report to the Commission.* (i) Prior to submitting the annual report to the Commission, the chief compliance officer shall provide the annual report to the board of directors or the senior officer of the derivatives clearing organization for review. Submission of the report to the board of directors or the senior officer shall be recorded in the board minutes or otherwise, as evidence of compliance with this requirement.

(ii) The annual report shall be submitted electronically to the Secretary of the Commission in the format and manner specified by the Commission not more than 90 days after the end of the derivatives clearing organization's fiscal year, concurrently with submission of the fiscal year-end audited financial statement that is required to be furnished to the Commission pursuant to § 39.19(c)(3)(ii) of this part. The report shall include a certification by the chief compliance officer that, to the best of his or her knowledge and reasonable belief, and under penalty of law, the annual report is accurate and complete.

(iii) The derivatives clearing organization shall promptly submit an amended annual report if material errors or omissions in the report are identified after submission. An amendment must contain the certification required under paragraph (c)(4)(ii) of this section.

(iv) A derivatives clearing organization may request from the Commission an extension of time to submit its annual report in accordance with § 39.19(c)(3) of this part.

(5) *Recordkeeping.* (i) The derivatives clearing organization shall maintain:

(A) A copy of all compliance policies and procedures and all other policies and procedures adopted in furtherance of compliance with the Act and Commission regulations;

(B) Copies of materials, including written reports provided to the board of directors or the senior officer in connection with the review of the annual report under paragraph (c)(4)(i) of this section; and

(C) Any records relevant to the annual report, including, but not limited to, work papers and other documents that form the basis of the report, and memoranda, correspondence, other documents, and records that are created, sent, or received in connection with the annual report and contain conclusions, opinions, analyses, or financial data related to the annual report.

(ii) The derivatives clearing organization shall maintain records in accordance with § 1.31 of this chapter and § 39.20 of this part.

§ 39.11 Financial resources.

(a) *General.* A derivatives clearing organization shall maintain financial resources sufficient to cover its exposures with a high degree of confidence and to enable it to perform its functions in compliance with the core principles set out in section 5b of the Act. A derivatives clearing organization shall identify and adequately manage its general business risks and hold sufficient liquid resources to cover potential business losses that are not related to clearing members' defaults, so that the derivatives clearing organization can continue to provide services as an ongoing concern. Financial resources shall be considered sufficient if their value, at a minimum, exceeds the total amount that would:

(1) Enable the derivatives clearing organization to meet its financial obligations to its clearing members notwithstanding a default by the clearing member creating the largest financial exposure for the derivatives clearing organization in extreme but plausible market conditions; Provided that if a clearing member controls another clearing member or is under common control with another clearing member, the affiliated clearing members shall be deemed to be a single clearing member for purposes of this provision; and

(2) Enable the derivatives clearing organization to cover its operating costs for a period of at least one year, calculated on a rolling basis.

(b) *Types of financial resources.* (1) Financial resources available to satisfy the requirements of paragraph (a)(1) of this section may include:

(i) Margin to the extent permitted under parts 1, 22, and 190 of this chapter and under the rules of the derivatives clearing organization;

(ii) The derivatives clearing organization's own capital;

(iii) Guaranty fund deposits;

(iv) Default insurance;

(v) Potential assessments for additional guaranty fund contributions, if permitted by the derivatives clearing organization's rules; and

(vi) Any other financial resource deemed acceptable by the Commission.

(2) Financial resources available to satisfy the requirements of paragraph (a)(2) of this section may include:

(i) The derivatives clearing organization's own capital; and

(ii) Any other financial resource deemed acceptable by the Commission.

(3) A financial resource may be allocated, in whole or in part, to satisfy the requirements of either paragraph (a)(1) or paragraph (a)(2) of this section, but not both paragraphs, and only to the extent the use of such financial resource is not otherwise limited by the Act, Commission regulations, the derivatives clearing organization's rules, or any contractual arrangements to which the derivatives clearing organization is a party.

(c) *Computation of financial resources requirement.* (1) A derivatives clearing organization shall, on a monthly basis, perform stress testing that will allow it to make a reasonable calculation of the financial resources needed to meet the requirements of paragraph (a)(1) of this section. The derivatives clearing organization shall have reasonable discretion in determining the methodology used to compute such requirements, provided that the methodology must take into account both historical data and hypothetical scenarios. The Commission may review the methodology and require changes as appropriate.

(2) A derivatives clearing organization shall, on a monthly basis, make a reasonable calculation of its projected operating costs over a 12-month period in order to determine the amount needed to meet the requirements of paragraph (a)(2) of this section. The derivatives clearing organization shall have reasonable discretion in determining the methodology used to compute such projected operating costs. The Commission may review the

methodology and require changes as appropriate.

(d) *Valuation of financial resources.* (1) At appropriate intervals, but not less than monthly, a derivatives clearing organization shall compute the current market value of each financial resource used to meet its obligations under paragraph (a) of this section. Reductions in value to reflect credit, market, and liquidity risks (haircuts) shall be applied as appropriate and evaluated on a monthly basis.

(2) If assessments for additional guaranty fund contributions are permitted by the derivatives clearing organization's rules, in calculating the financial resources available to meet its obligations under paragraph (a)(1) of this section:

(i) The derivatives clearing organization shall have rules requiring that its clearing members have the ability to meet an assessment within the time frame of a normal end-of-day variation settlement cycle;

(ii) The derivatives clearing organization shall monitor the financial and operational capacity of its clearing members to meet potential assessments;

(iii) The derivatives clearing organization shall apply a 30 percent haircut to the value of potential assessments, and

(iv) The derivatives clearing organization shall only count the value of assessments, after the haircut, to meet up to 20 percent of those obligations.

(e) *Liquidity of financial resources.* (1) (i) The derivatives clearing organization shall effectively measure, monitor, and manage its liquidity risks, maintaining sufficient liquid resources such that it can, at a minimum, fulfill its cash obligations when due. The derivatives clearing organization shall hold assets in a manner where the risk of loss or of delay in its access to them is minimized.

(ii) The financial resources allocated by the derivatives clearing organization to meet the requirements of paragraph (a)(1) of this section shall be sufficiently liquid to enable the derivatives clearing organization to fulfill its obligations as a central counterparty during a one-day settlement cycle. The derivatives clearing organization shall maintain cash, U.S. Treasury obligations, or high quality, liquid, general obligations of a sovereign nation, in an amount greater than or equal to an amount calculated as follows:

(A) Calculate the average daily settlement pay for each clearing member over the last fiscal quarter;

(B) Calculate the sum of those average daily settlement pays; and

(C) Using that sum, calculate the average of its clearing members' average pays.

(iii) The derivatives clearing organization may take into account a committed line of credit or similar facility for the purpose of meeting the remainder of the requirement under paragraph (e)(1)(ii) of this section.

(2) The financial resources allocated by the derivatives clearing organization to meet the requirements of paragraph (a)(2) of this section must include unencumbered, liquid financial assets (i.e., cash and/or highly liquid securities) equal to at least six months' operating costs. If any portion of such financial resources is not sufficiently liquid, the derivatives clearing organization may take into account a committed line of credit or similar facility for the purpose of meeting this requirement.

(3)(i) Assets in a guaranty fund shall have minimal credit, market, and liquidity risks and shall be readily accessible on a same-day basis;

(ii) Cash balances shall be invested or placed in safekeeping in a manner that bears little or no principal risk; and

(iii) Letters of credit shall not be a permissible asset for a guaranty fund.

(f) *Reporting requirements.*

(1) Each fiscal quarter, or at any time upon Commission request, a derivatives clearing organization shall:

(i) Report to the Commission;

(A) The amount of financial resources necessary to meet the requirements of paragraph (a);

(B) The value of each financial resource available, computed in accordance with the requirements of paragraph (d) of this section; and

(C) The manner in which the derivatives clearing organization meets the liquidity requirements of paragraph (e) of this section;

(ii) Provide the Commission with a financial statement, including the balance sheet, income statement, and statement of cash flows, of the derivatives clearing organization or of its parent company; and

(iii) Report to the Commission the value of each individual clearing member's guaranty fund deposit, if the derivatives clearing organization reports having guaranty funds deposits as a financial resource available to satisfy the requirements of paragraph (a)(1) of this section.

(2) The calculations required by this paragraph shall be made as of the last business day of the derivatives clearing organization's fiscal quarter.

(3) The derivatives clearing organization shall provide the Commission with:

(i) Sufficient documentation explaining the methodology used to compute its financial resources requirements under paragraph (a) of this section,

(ii) Sufficient documentation explaining the basis for its determinations regarding the valuation and liquidity requirements set forth in paragraphs (d) and (e) of this section, and

(iii) Copies of any agreements establishing or amending a credit facility, insurance coverage, or other arrangement evidencing or otherwise supporting the derivatives clearing organization's conclusions.

(4) The report shall be filed not later than 17 business days after the end of the derivatives clearing organization's fiscal quarter, or at such later time as the Commission may permit, in its discretion, upon request by the derivatives clearing organization.

§ 39.12 Participant and product eligibility.

(a) *Participant eligibility.* A derivatives clearing organization shall establish appropriate admission and continuing participation requirements for clearing members of the derivatives clearing organization that are objective, publicly disclosed, and risk-based.

(1) Fair and open access for participation. The participation requirements shall permit fair and open access;

(i) A derivatives clearing organization shall not adopt restrictive clearing member standards if less restrictive requirements that achieve the same objective and that would not materially increase risk to the derivatives clearing organization or clearing members could be adopted;

(ii) A derivatives clearing organization shall allow all market participants who satisfy participation requirements to become clearing members;

(iii) A derivatives clearing organization shall not exclude or limit clearing membership of certain types of market participants unless the derivatives clearing organization can demonstrate that the restriction is necessary to address credit risk or deficiencies in the participants' operational capabilities that would prevent them from fulfilling their obligations as clearing members.

(iv) A derivatives clearing organization shall not require that clearing members be swap dealers.

(v) A derivatives clearing organization shall not require that clearing members maintain a swap portfolio of any particular size, or that clearing members meet a swap transaction volume threshold.

(2) *Financial resources.* (i) The participation requirements shall require clearing members to have access to sufficient financial resources to meet obligations arising from participation in the derivatives clearing organization in extreme but plausible market conditions. A derivatives clearing organization may permit such financial resources to include, without limitation, a clearing member's capital, a guarantee from the clearing member's parent, or a credit facility funding arrangement. For purposes of this paragraph, ''capital'' means adjusted net capital as defined in § 1.17 of this chapter, for futures commission merchants, and net capital as defined in § 240.15c3–1of this title, for broker-dealers, or any similar risk adjusted capital calculation for all other clearing members.

(ii) The participation requirements shall set forth capital requirements that are based on objective, transparent, and commonly accepted standards that appropriately match capital to risk. Capital requirements shall be scalable to the risks posed by clearing members.

(iii) A derivatives clearing organization shall not set a minimum capital requirement of more than $50 million for any person that seeks to become a clearing member in order to clear swaps.

(3) *Operational requirements.* The participation requirements shall require clearing members to have adequate operational capacity to meet obligations arising from participation in the derivatives clearing organization. The requirements shall include, but are not limited to: the ability to process expected volumes and values of transactions cleared by a clearing member within required time frames, including at peak times and on peak days; the ability to fulfill collateral, payment, and delivery obligations imposed by the derivatives clearing organization; and the ability to participate in default management activities under the rules of the derivatives clearing organization and in accordance with § 39.16 of this part.

(4) *Monitoring.* A derivatives clearing organization shall establish and implement procedures to verify, on an ongoing basis, the compliance of each clearing member with each participation requirement of the derivatives clearing organization.

(5) *Reporting.* (i) A derivatives clearing organization shall require all clearing members, including non-futures commission merchants, to provide to the derivatives clearing organization periodic financial reports that contain any financial information that the derivatives clearing organization determines is necessary to assess whether participation requirements are being met on an ongoing basis.

(A) A derivatives clearing organization shall require clearing members that are futures commission merchants to provide the financial reports that are specified in § 1.10 of this chapter to the derivatives clearing organization.

(B) A derivatives clearing organization shall require clearing members that are not futures commission merchants to make the periodic financial reports provided pursuant to paragraph (a)(5)(i) of this section available to the Commission upon the Commission's request or, in lieu of imposing this requirement, a derivatives clearing organization may provide such financial reports directly to the Commission upon the Commission's request.

(ii) A derivatives clearing organization shall adopt rules that require clearing members to provide to the derivatives clearing organization, in a timely manner, information that concerns any financial or business developments that may materially affect the clearing members' ability to continue to comply with participation requirements.

(6) *Enforcement.* A derivatives clearing organization shall have the ability to enforce compliance with its participation requirements and shall establish procedures for the suspension and orderly removal of clearing members that no longer meet the requirements.

(b) *Product eligibility.* (1) A derivatives clearing organization shall establish appropriate requirements for determining the eligibility of agreements, contracts, or transactions submitted to the derivatives clearing organization for clearing, taking into account the derivatives clearing organization's ability to manage the risks associated with such agreements, contracts, or transactions. Factors to be considered in determining product eligibility include, but are not limited to:

(i) Trading volume;

(ii) Liquidity;

(iii) Availability of reliable prices;

(iv) Ability of market participants to use portfolio compression with respect to a particular swap product;

(v) Ability of the derivatives clearing organization and clearing members to gain access to the relevant market for purposes of creating, liquidating, transferring, auctioning, and/or allocating positions;

(vi) Ability of the derivatives clearing organization to measure risk for purposes of setting margin requirements; and

(vii) Operational capacity of the derivatives clearing organization and clearing members to address any unusual risk characteristics of a product.

(2) A derivatives clearing organization shall adopt rules providing that all swaps with the same terms and conditions, as defined by product specifications established under derivatives clearing organization rules, submitted to the derivatives clearing organization for clearing are economically equivalent within the derivatives clearing organization and may be offset with each other within the derivatives clearing organization.

(3) A derivatives clearing organization shall provide for non-discriminatory clearing of a swap executed bilaterally or on or subject to the rules of an unaffiliated swap execution facility or designated contract market.

(4) A derivatives clearing organization shall not require that one of the original executing parties be a clearing member in order for a product to be eligible for clearing.

(5) A derivatives clearing organization shall select product unit sizes and other terms and conditions that maximize liquidity, facilitate transparency in pricing, promote open access, and allow for effective risk management. To the extent appropriate to further these objectives, a derivatives clearing organization shall select product units for clearing purposes that are smaller than the product units in which trades submitted for clearing were executed.

(6) A derivatives clearing organization that clears swaps shall have rules providing that, upon acceptance of a swap by the derivatives clearing organization for clearing:

(i) The original swap is extinguished;

(ii) The original swap is replaced by an equal and opposite swap between the derivatives clearing organization and each clearing member acting as principal for a house trade or acting as agent for a customer trade;

(iii) All terms of a cleared swap must conform to product specifications established under derivatives clearing organization rules; and

(iv) If a swap is cleared by a clearing member on behalf of a customer, all terms of the swap, as carried in the customer account on the books of the clearing member, must conform to the terms of the cleared swap established under the derivatives clearing organization's rules.

(7) [Reserved]

(8) *Confirmation.* A derivatives clearing organization shall provide each

clearing member carrying a cleared swap with a definitive written record of the terms of the transaction which shall legally supersede any previous agreement and serve as a confirmation of the swap. The confirmation of all terms of the transaction shall take place at the same time as the swap is accepted for clearing.

§ 39.13 Risk management.

(a) *General.* A derivatives clearing organization shall ensure that it possesses the ability to manage the risks associated with discharging the responsibilities of the derivatives clearing organization through the use of appropriate tools and procedures.

(b) *Documentation requirement.* A derivatives clearing organization shall establish and maintain written policies, procedures, and controls, approved by its board of directors, which establish an appropriate risk management framework that, at a minimum, clearly identifies and documents the range of risks to which the derivatives clearing organization is exposed, addresses the monitoring and management of the entirety of those risks, and provides a mechanism for internal audit. The risk management framework shall be regularly reviewed and updated as necessary.

(c) *Chief risk officer.* A derivatives clearing organization shall have a chief risk officer who shall be responsible for implementing the risk management framework, including the procedures, policies and controls described in paragraph (b) of this section, and for making appropriate recommendations to the derivatives clearing organization's risk management committee or board of directors, as applicable, regarding the derivatives clearing organization's risk management functions.

(d) [Reserved]

(e) *Measurement of credit exposure.* A derivatives clearing organization shall:

(1) Measure its credit exposure to each clearing member and mark to market such clearing member's open house and customer positions at least once each business day; and

(2) Monitor its credit exposure to each clearing member periodically during each business day.

(f) *Limitation of exposure to potential losses from defaults.* A derivatives clearing organization, through margin requirements and other risk control mechanisms, shall limit its exposure to potential losses from defaults by its clearing members to ensure that:

(1) The operations of the derivatives clearing organization would not be disrupted; and

(2) Non-defaulting clearing members would not be exposed to losses that non-defaulting clearing members cannot anticipate or control.

(g) *Margin requirements.* (1) *General.* Each model and parameter used in setting initial margin requirements shall be risk-based and reviewed on a regular basis.

(2) *Methodology and coverage.* (i) A derivatives clearing organization shall establish initial margin requirements that are commensurate with the risks of each product and portfolio, including any unusual characteristics of, or risks associated with, particular products or portfolios, including but not limited to jump-to-default risk or similar jump risk.

(ii) A derivatives clearing organization shall use models that generate initial margin requirements sufficient to cover the derivatives clearing organization's potential future exposures to clearing members based on price movements in the interval between the last collection of variation margin and the time within which the derivatives clearing organization estimates that it would be able to liquidate a defaulting clearing member's positions (liquidation time); *provided, however,* that a derivatives clearing organization shall use:

(A) A minimum liquidation time that is one day for futures and options;

(B) A minimum liquidation time that is one day for swaps on agricultural commodities, energy commodities, and metals;

(C) A minimum liquidation time that is five days for all other swaps; or

(D) Such longer liquidation time as is appropriate based on the specific characteristics of a particular product or portfolio; *provided further* that the Commission, by order, may establish shorter or longer liquidation times for particular products or portfolios.

(iii) The actual coverage of the initial margin requirements produced by such models, along with projected measures of the models' performance, shall meet an established confidence level of at least 99 percent, based on data from an appropriate historic time period, for:

(A) Each product for which the derivatives clearing organization uses a product-based margin methodology;

(B) Each spread within or between products for which there is a defined spread margin rate;

(C) Each account held by a clearing member at the derivatives clearing organization, by house origin and by each customer origin; and

(D) Each swap portfolio, including any portfolio containing futures and/or options and held in a commingled account pursuant to § 39.15(b)(2) of this part, by beneficial owner.

(iv) A derivatives clearing organization shall determine the appropriate historic time period based on the characteristics, including volatility patterns, as applicable, of each product, spread, account, or portfolio.

(3) *Independent validation.* A derivatives clearing organization's systems for generating initial margin requirements, including its theoretical models, must be reviewed and validated by a qualified and independent party, on a regular basis. Such qualified and independent parties may be independent contractors or employees of the derivatives clearing organization, but shall not be persons responsible for development or operation of the systems and models being tested.

(4) *Spread and portfolio margins.* (i) A derivatives clearing organization may allow reductions in initial margin requirements for related positions if the price risks with respect to such positions are significantly and reliably correlated. The price risks of different positions will only be considered to be reliably correlated if there is a theoretical basis for the correlation in addition to an exhibited statistical correlation. That theoretical basis may include, but is not limited to, the following:

(A) The products on which the positions are based are complements of, or substitutes for, each other;

(B) One product is a significant input into the other product(s);

(C) The products share a significant common input; or

(D) The prices of the products are influenced by common external factors.

(ii) A derivatives clearing organization shall regularly review its margin reductions and the correlations on which they are based.

(5) *Price data.* A derivatives clearing organization shall have a reliable source of timely price data in order to measure the derivatives clearing organization's credit exposure accurately. A derivatives clearing organization shall also have written procedures and sound valuation models for addressing circumstances where pricing data is not readily available or reliable.

(6) *Daily review.* On a daily basis, a derivatives clearing organization shall determine the adequacy of its initial margin requirements.

(7) *Back tests.* A derivatives clearing organization shall conduct back tests, as defined in § 39.2 of this part, using an appropriate time period but not less than the previous 30 days, as follows:

(i) On a daily basis, a derivatives clearing organization shall conduct back

tests with respect to products or swap portfolios that are experiencing significant market volatility, to test the adequacy of its initial margin requirements, as follows:

(A) For that product if the derivatives clearing organization uses a product-based margin methodology;

(B) For each spread involving that product if there is a defined spread margin rate;

(C) For each account held by a clearing member at the derivatives clearing organization that contains a significant position in that product, by house origin and by each customer origin; and

(D) For each such swap portfolio, including any portfolio containing futures and/or options and held in a commingled account pursuant to § 39.15(b)(2) of this part, by beneficial owner.

(ii) On at least a monthly basis, a derivatives clearing organization shall conduct back tests to test the adequacy of its initial margin requirements, as follows:

(A) For each product for which the derivatives clearing organization uses a product-based margin methodology;

(B) For each spread for which there is a defined spread margin rate;

(C) For each account held by a clearing member at the derivatives clearing organization, by house origin and by each customer origin; and

(D) For each swap portfolio, including any portfolio containing futures and/or options and held in a commingled account pursuant to § 39.15(b)(2) of this part, by beneficial owner.

(8) *Customer margin.* (i) *Gross margin.* (A) A derivatives clearing organization shall collect initial margin on a gross basis for each clearing member's customer account(s) equal to the sum of the initial margin amounts that would be required by the derivatives clearing organization for each individual customer within that account if each individual customer were a clearing member.

(B) For purposes of calculating the gross initial margin requirement for each clearing member's customer account(s), to the extent not inconsistent with other Commission regulations, a derivatives clearing organization may require its clearing members to report the gross positions of each individual customer to the derivatives clearing organization, or it may permit each clearing member to report the sum of the gross positions of its customers to the derivatives clearing organization.

(C) For purposes of this paragraph (g)(8), a derivatives clearing organization may rely, and may permit its clearing members to rely, upon the sum of the gross positions reported to the clearing members by each domestic or foreign omnibus account that they carry, without obtaining information identifying the positions of each individual customer underlying such omnibus accounts.

(D) A derivatives clearing organization may not, and may not permit its clearing members to, net positions of different customers against one another.

(E) A derivatives clearing organization may collect initial margin for its clearing members' house accounts on a net basis.

(ii) *Customer initial margin requirements.* A derivatives clearing organization shall require its clearing members to collect customer initial margin, as defined in § 1.3 of this chapter, from their customers, for non-hedge positions, at a level that is greater than 100 percent of the derivatives clearing organization's initial margin requirements with respect to each product and swap portfolio. The derivatives clearing organization shall have reasonable discretion in determining the percentage by which customer initial margins must exceed the derivatives clearing organization's initial margin requirements with respect to particular products or swap portfolios. The Commission may review such percentage levels and require different percentage levels if the Commission deems the levels insufficient to protect the financial integrity of the clearing members or the derivatives clearing organization.

(iii) *Withdrawal of customer initial margin.* A derivatives clearing organization shall require its clearing members to ensure that their customers do not withdraw funds from their accounts with such clearing members unless the net liquidating value plus the margin deposits remaining in a customer's account after such withdrawal are sufficient to meet the customer initial margin requirements with respect to all products and swap portfolios held in such customer's account which are cleared by the derivatives clearing organization.

(9) *Time deadlines.* A derivatives clearing organization shall establish and enforce time deadlines for initial and variation margin payments to the derivatives clearing organization by its clearing members.

(10) *Types of assets.* A derivatives clearing organization shall limit the assets it accepts as initial margin to those that have minimal credit, market, and liquidity risks. A derivatives clearing organization may take into account the specific risk-reducing properties that particular assets have in a particular portfolio. A derivatives clearing organization may accept letters of credit as initial margin for futures and options on futures but shall not accept letters of credit as initial margin for swaps.

(11) *Valuation.* A derivatives clearing organization shall use prudent valuation practices to value assets posted as initial margin on a daily basis.

(12) *Haircuts.* A derivatives clearing organization shall apply appropriate reductions in value to reflect credit, market, and liquidity risks (haircuts), to the assets that it accepts in satisfaction of initial margin obligations, taking into consideration stressed market conditions, and shall evaluate the appropriateness of such haircuts on at least a quarterly basis.

(13) *Concentration limits or charges.* A derivatives clearing organization shall apply appropriate limitations or charges on the concentration of assets posted as initial margin, as necessary, in order to ensure its ability to liquidate such assets quickly with minimal adverse price effects, and shall evaluate the appropriateness of any such concentration limits or charges, on at least a monthly basis.

(14) *Pledged assets.* If a derivatives clearing organization permits its clearing members to pledge assets for initial margin while retaining such assets in accounts in the names of such clearing members, the derivatives clearing organization shall ensure that such assets are unencumbered and that such a pledge has been validly created and validly perfected in the relevant jurisdiction.

(h) *Other risk control mechanisms*—(1) *Risk limits.* (i) A derivatives clearing organization shall impose risk limits on each clearing member, by house origin and by each customer origin, in order to prevent a clearing member from carrying positions for which the risk exposure exceeds a specified threshold relative to the clearing member's and/or the derivatives clearing organization's financial resources. The derivatives clearing organization shall have reasonable discretion in determining:

(A) The method of computing risk exposure;

(B) The applicable threshold(s); and

(C) The applicable financial resources under this provision; provided however, that the ratio of exposure to capital must remain the same across all capital levels. The Commission may review such methods, thresholds, and financial resources and require the application of different methods, thresholds, or financial resources, as appropriate.

(ii) A derivatives clearing organization may permit a clearing member to exceed the threshold(s) applied pursuant to paragraph (h)(1)(i) of this section provided that the derivatives clearing organization requires the clearing member to post additional initial margin that the derivatives clearing organization deems sufficient to appropriately eliminate excessive risk exposure at the clearing member. The Commission may review the amount of additional initial margin and require a different amount of additional initial margin, as appropriate.

(2) *Large trader reports.* A derivatives clearing organization shall obtain from its clearing members or from a relevant designated contract market or swap execution facility, copies of all reports that are required to be filed with the Commission by, or on behalf of, such clearing members pursuant to parts 17 and 20 of this chapter. A derivatives clearing organization shall review such reports on a daily basis to ascertain the risk of the overall portfolio of each large trader, including futures, options, and swaps cleared by the derivatives clearing organization, which are held by all clearing members carrying accounts for each such large trader, and shall take additional actions with respect to such clearing members, when appropriate, as specified in paragraph (h)(6) of this section, in order to address any risks posed by any such large trader.

(3) *Stress tests.* A derivatives clearing organization shall conduct stress tests, as defined in § 39.2 of this part, as follows:

(i) On a daily basis, a derivatives clearing organization shall conduct stress tests with respect to each large trader who poses significant risk to a clearing member or the derivatives clearing organization, including futures, options, and swaps cleared by the derivatives clearing organization, which are held by all clearing members carrying accounts for each such large trader. The derivatives clearing organization shall have reasonable discretion in determining which traders to test and the methodology used to conduct such stress tests. The Commission may review the selection of accounts and the methodology and require changes, as appropriate.

(ii) On at least a weekly basis, a derivatives clearing organization shall conduct stress tests with respect to each clearing member account, by house origin and by each customer origin, and each swap portfolio, including any portfolio containing futures and/or options and held in a commingled account pursuant to § 39.15(b)(2) of this part, by beneficial owner, under extreme but plausible market conditions. The derivatives clearing organization shall have reasonable discretion in determining the methodology used to conduct such stress tests. The Commission may review the methodology and require changes, as appropriate.

(4) *Portfolio compression.* A derivatives clearing organization shall make portfolio compression exercises available, on a regular and voluntary basis, for its clearing members that clear swaps, to the extent that such exercises are appropriate for those swaps that it clears; *provided, however,* a derivatives clearing organization is not required to develop its own portfolio compression services, and is only required to make such portfolio compression exercises available, if applicable portfolio compression services have been developed by a third party.

(5) *Clearing members' risk management policies and procedures.* (i) A derivatives clearing organization shall adopt rules that:

(A) Require its clearing members to maintain current written risk management policies and procedures, which address the risks that such clearing members may pose to the derivatives clearing organization;

(B) Ensure that it has the authority to request and obtain information and documents from its clearing members regarding their risk management policies, procedures, and practices, including, but not limited to, information and documents relating to the liquidity of their financial resources and their settlement procedures; and

(C) Require its clearing members to make information and documents regarding their risk management policies, procedures, and practices available to the Commission upon the Commission's request.

(ii) A derivatives clearing organization shall review the risk management policies, procedures, and practices of each of its clearing members, which address the risks that such clearing members may pose to the derivatives clearing organization, on a periodic basis and document such reviews.

(6) *Additional authority.* A derivatives clearing organization shall take additional actions with respect to particular clearing members, when appropriate, based on the application of objective and prudent risk management standards including, but not limited to:

(i) Imposing enhanced capital requirements;

(ii) Imposing enhanced margin requirements;

(iii) Imposing position limits;

(iv) Prohibiting an increase in positions;

(v) Requiring a reduction of positions;

(vi) Liquidating or transferring positions; and

(vii) Suspending or revoking clearing membership.

§ 39.14 Settlement procedures.

(a) *Definitions*—(1) *Settlement.* For purposes of this section, ''settlement'' means:

(i) Payment and receipt of variation margin for futures, options, and swaps;

(ii) Payment and receipt of option premiums;

(iii) Deposit and withdrawal of initial margin for futures, options, and swaps;

(iv) All payments due in final settlement of futures, options, and swaps on the final settlement date with respect to such positions; and

(v) All other cash flows collected from or paid to each clearing member, including but not limited to, payments related to swaps such as coupon amounts.

(2) *Settlement bank.* For purposes of this section, ''settlement bank'' means a bank that maintains an account either for the derivatives clearing organization or for any of its clearing members, which is used for the purpose of any settlement described in paragraph (a)(1) above.

(b) *Daily settlements.* Except as otherwise provided by Commission order, a derivatives clearing organization shall effect a settlement with each clearing member at least once each business day, and shall have the authority and operational capacity to effect a settlement with each clearing member, on an intraday basis, either routinely, when thresholds specified by the derivatives clearing organization are breached, or in times of extreme market volatility.

(c) *Settlement banks.* A derivatives clearing organization shall employ settlement arrangements that eliminate or strictly limit its exposure to settlement bank risks, including the credit and liquidity risks arising from the use of such bank(s) to effect settlements with its clearing members, as follows:

(1) A derivatives clearing organization shall have documented criteria that must be met by any settlement bank used by the derivatives clearing organization or its clearing members, including criteria addressing the capitalization, creditworthiness, access to liquidity, operational reliability, and regulation or supervision of such bank(s).

(2) A derivatives clearing organization shall monitor each approved settlement

bank on an ongoing basis to ensure that such bank continues to meet the criteria established pursuant to paragraph (c)(1) of this section.

(3) A derivatives clearing organization shall monitor the full range and concentration of its exposures to its own and its clearing members' settlement bank(s) and assess its own and its clearing members' potential losses and liquidity pressures in the event that the settlement bank with the largest share of settlement activity were to fail. A derivatives clearing organization shall take any one or more of the following actions, to the extent that any such action or actions are reasonably necessary in order to eliminate or strictly limit such exposures:

(i) Maintain settlement accounts at one or more additional settlement banks; and/or

(ii) Approve one or more additional settlement banks that its clearing members could choose to use; and/or

(iii) Impose concentration limits with respect to one or more of its own or its clearing members' settlement banks; and/or

(iv) Take any other appropriate actions.

(d) *Settlement finality.* A derivatives clearing organization shall ensure that settlements are final when effected by ensuring that it has entered into legal agreements that state that settlement fund transfers are irrevocable and unconditional no later than when the derivatives clearing organization's accounts are debited or credited; provided, however, a derivatives clearing organization's legal agreements with its settlement banks may provide for the correction of errors. A derivatives clearing organization's legal agreements with its settlement banks shall state clearly when settlement fund transfers will occur and a derivatives clearing organization shall routinely confirm that its settlement banks are effecting fund transfers as and when required by such legal agreements.

(e) *Recordkeeping.* A derivatives clearing organization shall maintain an accurate record of the flow of funds associated with each settlement.

(f) *Netting arrangements.* A derivatives clearing organization shall possess the ability to comply with each term and condition of any permitted netting or offset arrangement with any other clearing organization.

(g) *Physical delivery.* With respect to products that are settled by physical transfers of the underlying instruments or commodities, a derivatives clearing organization shall:

(1) Establish rules that clearly state each obligation that the derivatives clearing organization has assumed with respect to physical deliveries, including whether it has an obligation to make or receive delivery of a physical instrument or commodity, or whether it indemnifies clearing members for losses incurred in the delivery process; and

(2) Ensure that the risks of each such obligation are identified and managed.

§ 39.15 Treatment of funds.

(a) *Required standards and procedures.* A derivatives clearing organization shall establish standards and procedures that are designed to protect and ensure the safety of funds and assets belonging to clearing members and their customers.

(b) *Segregation of funds and assets.* (1) *Segregation.* A derivatives clearing organization shall comply with the applicable segregation requirements of section 4d of the Act and Commission regulations thereunder, or any other applicable Commission regulation or order requiring that customer funds and assets be segregated, set aside, or held in a separate account.

(2) *Commingling of futures, options, and swaps.* (i) *Cleared swaps account.* In order for a derivatives clearing organization and its clearing members to commingle customer positions in futures, options, and swaps, and any money, securities, or property received to margin, guarantee or secure such positions, in an account subject to the requirements of section 4d(f) of the Act, the derivatives clearing organization shall file rules for Commission approval pursuant to § 40.5 of this chapter. Such rule submission shall include, at a minimum, the following:

(A) Identification of the futures, options, and swaps that would be commingled, including product specifications or the criteria that would be used to define eligible futures, options, and swaps;

(B) Analysis of the risk characteristics of the eligible products;

(C) Identification of whether the swaps would be executed bilaterally and/or executed on a designated contract market and/or a swap execution facility;

(D) Analysis of the liquidity of the respective markets for the futures, options, and swaps that would be commingled, the ability of clearing members and the derivatives clearing organization to offset or mitigate the risk of such futures, options, and swaps in a timely manner, without compromising the financial integrity of the account, and, as appropriate, proposed means for addressing insufficient liquidity;

(E) Analysis of the availability of reliable prices for each of the eligible products;

(F) A description of the financial, operational, and managerial standards or requirements for clearing members that would be permitted to commingle such futures, options, and swaps;

(G) A description of the systems and procedures that would be used by the derivatives clearing organization to oversee such clearing members' risk management of any such commingled positions;

(H) A description of the financial resources of the derivatives clearing organization, including the composition and availability of a guaranty fund with respect to the futures, options, and swaps that would be commingled;

(I) A description and analysis of the margin methodology that would be applied to the commingled futures, options, and swaps, including any margin reduction applied to correlated positions, and any applicable margin rules with respect to both clearing members and customers;

(J) An analysis of the ability of the derivatives clearing organization to manage a potential default with respect to any of the futures, options, or swaps that would be commingled;

(K) A discussion of the procedures that the derivatives clearing organization would follow if a clearing member defaulted, and the procedures that a clearing member would follow if a customer defaulted, with respect to any of the commingled futures, options, or swaps in the account; and

(L) A description of the arrangements for obtaining daily position data with respect to futures, options, and swaps in the account.

(ii) *Futures account.* In order for a derivatives clearing organization and its clearing members to commingle customer positions in futures, options, and swaps, and any money, securities, or property received to margin, guarantee or secure such positions, in an account subject to the requirements of section 4d(a) of the Act, the derivatives clearing organization shall file with the Commission a petition for an order pursuant to section 4d(a) of the Act. Such petition shall include, at a minimum, the information required under paragraph (b)(2)(i) of this section.

(iii) *Commission action.* (A) The Commission may request additional information in support of a rule submission filed under paragraph (b)(2)(i) of this section, and may grant approval of such rules in accordance with § 40.5 of this chapter.

(B) The Commission may request additional information in support of a

petition filed under paragraph (b)(2)(ii) of this section, and may issue an order under section 4d of the Act in its discretion.

(c) *Holding of funds and assets.* A derivatives clearing organization shall hold funds and assets belonging to clearing members and their customers in a manner which minimizes the risk of loss or of delay in the access by the derivatives clearing organization to such funds and assets.

(d) *Transfer of customer positions.* A derivatives clearing organization shall have rules providing that the derivatives clearing organization will promptly transfer all or a portion of a customer's portfolio of positions and related funds at the same time from the carrying clearing member of the derivatives clearing organization to another clearing member of the derivatives clearing organization, without requiring the close-out and re-booking of the positions prior to the requested transfer, subject to the following conditions:

(1) The customer has instructed the carrying clearing member to make the transfer;

(2) The customer is not currently in default to the carrying clearing member;

(3) The transferred positions will have appropriate margin at the receiving clearing member;

(4) Any remaining positions will have appropriate margin at the carrying clearing member; and

(5) The receiving clearing member has consented to the transfer.

(e) *Permitted investments.* Funds and assets belonging to clearing members and their customers that are invested by a derivatives clearing organization shall be held in instruments with minimal credit, market, and liquidity risks. Any investment of customer funds or assets by a derivatives clearing organization shall comply with § 1.25 of this chapter, as if all such funds and assets comprise customer funds subject to segregation pursuant to section 4d(a) of the Act and Commission regulations thereunder.

§ 39.16 Default rules and procedures.

(a) *General.* A derivatives clearing organization shall adopt rules and procedures designed to allow for the efficient, fair, and safe management of events during which clearing members become insolvent or default on the obligations of such clearing members to the derivatives clearing organization.

(b) *Default management plan.* A derivatives clearing organization shall maintain a current written default management plan that delineates the roles and responsibilities of its board of directors, its risk management committee, any other committee that a derivatives clearing organization may have that has responsibilities for default management, and the derivatives clearing organization's management, in addressing a default, including any necessary coordination with, or notification of, other entities and regulators. Such plan shall address any differences in procedures with respect to highly liquid products and less liquid products. A derivatives clearing organization shall conduct and document a test of its default management plan at least on an annual basis.

(c) *Default procedures.* (1) A derivatives clearing organization shall adopt procedures that would permit the derivatives clearing organization to take timely action to contain losses and liquidity pressures and to continue meeting its obligations in the event of a default on the obligations of a clearing member to the derivatives clearing organization.

(2) A derivatives clearing organization shall adopt rules that set forth its default procedures, including:

(i) The derivatives clearing organization's definition of a default;

(ii) The actions that the derivatives clearing organization may take upon a default, which shall include the prompt transfer, liquidation, or hedging of the customer or house positions of the defaulting clearing member, as applicable, and which may include, in the discretion of the derivatives clearing organization, the auctioning or allocation of such positions to other clearing members;

(iii) Any obligations that the derivatives clearing organization imposes on its clearing members to participate in auctions, or to accept allocations, of the customer or house positions of the defaulting clearing member, *provided that:*

(A) The derivatives clearing organization shall permit a clearing member to outsource to a qualified third party, authority to act in the clearing member's place in any auction, subject to appropriate safeguards imposed by the derivatives clearing organization;

(B) The derivatives clearing organization shall permit a clearing member to outsource to a qualified third party, authority to act in the clearing member's place in any allocations, subject to appropriate safeguards imposed by the derivatives clearing organization; and

(C) Any allocation shall be proportional to the size of the participating or accepting clearing member's positions in the same product class at the derivatives clearing organization;

(iv) The sequence in which the funds and assets of the defaulting clearing member and its customers and the financial resources maintained by the derivatives clearing organization would be applied in the event of a default;

(v) A provision that the funds and assets of a defaulting clearing member's customers shall not be applied to cover losses with respect to a house default;

(vi) A provision that the excess house funds and assets of a defaulting clearing member shall be applied to cover losses with respect to a customer default, if the relevant customer funds and assets are insufficient to cover the shortfall; and

(3) A derivatives clearing organization shall make its default rules publicly available as provided in § 39.21 of this part.

(d) *Insolvency of a clearing member.*

(1) A derivatives clearing organization shall adopt rules that require a clearing member to provide prompt notice to the derivatives clearing organization if it becomes the subject of a bankruptcy petition, receivership proceeding, or the equivalent;

(2) No later than upon receipt of such notice, a derivatives clearing organization shall review the continuing eligibility of the clearing member for clearing membership; and

(3) No later than upon receipt of such notice, a derivatives clearing organization shall take any appropriate action, in its discretion, with respect to such clearing member or its house or customer positions, including but not limited to liquidation or transfer of positions, suspension, or revocation of clearing membership.

§ 39.17 Rule enforcement.

(a) *General.* Each derivatives clearing organization shall:

(1) Maintain adequate arrangements and resources for the effective monitoring and enforcement of compliance with the rules of the derivatives clearing organization and the resolution of disputes;

(2) Have the authority and ability to discipline, limit, suspend, or terminate the activities of a clearing member due to a violation by the clearing member of any rule of the derivatives clearing organization; and

(3) Report to the Commission regarding rule enforcement activities and sanctions imposed against clearing members as provided in paragraph (a)(2) of this section, in accordance with § 39.19(c)(4)(xi) of this part.

(b) *Authority to enforce rules.* The board of directors of the derivatives clearing organization may delegate responsibility for compliance with the requirements of paragraph (a) of this

section to the risk management committee, unless the responsibilities are otherwise required to be carried out by the chief compliance officer pursuant to the Act or this part.

§ 39.18 System safeguards.

(a) *Definitions.* For purposes of this section:

Recovery time objective means the time period within which an entity should be able to achieve recovery and resumption of clearing and settlement of existing and new products, after those capabilities become temporarily inoperable for any reason up to or including a wide-scale disruption.

Relevant area means the metropolitan or other geographic area within which a derivatives clearing organization has physical infrastructure or personnel necessary for it to conduct activities necessary to the clearing and settlement of existing and new products. The term ''relevant area'' also includes communities economically integrated with, adjacent to, or within normal commuting distance of that metropolitan or other geographic area.

Wide-scale disruption means an event that causes a severe disruption or destruction of transportation, telecommunications, power, water, or other critical infrastructure components in a relevant area, or an event that results in an evacuation or unavailability of the population in a relevant area.

(b) *General*—(1) *Program of risk analysis.* Each derivatives clearing organization shall establish and maintain a program of risk analysis and oversight with respect to its operations and automated systems to identify and minimize sources of operational risk through:

(i) The development of appropriate controls and procedures; and

(ii) The development of automated systems that are reliable, secure, and have adequate scalable capacity.

(2) *Resources.* Each derivatives clearing organization shall establish and maintain resources that allow for the fulfillment of each obligation and responsibility of the derivatives clearing organization in light of the risks identified pursuant to paragraph (b)(1) of this section.

(3) *Verification of adequacy.* Each derivatives clearing organization shall periodically verify that resources described in paragraph (b)(2) of this section are adequate to ensure daily processing, clearing, and settlement.

(c) *Elements of program.* A derivatives clearing organization's program of risk analysis and oversight with respect to its operations and automated systems, as described in paragraph (b) of this section, shall address each of the following categories of risk analysis and oversight:

(1) Information security;

(2) Business continuity and disaster recovery planning and resources;

(3) Capacity and performance planning;

(4) Systems operations;

(5) Systems development and quality assurance; and

(6) Physical security and environmental controls.

(d) *Standards for program.* In addressing the categories of risk analysis and oversight required under paragraph (c) of this section, a derivatives clearing organization shall follow generally accepted standards and industry best practices with respect to the development, operation, reliability, security, and capacity of automated systems.

(e) *Business continuity and disaster recovery.* (1) *Plan and resources.* A derivatives clearing organization shall maintain a business continuity and disaster recovery plan, emergency procedures, and physical, technological, and personnel resources sufficient to enable the timely recovery and resumption of operations and the fulfillment of each obligation and responsibility of the derivatives clearing organization following any disruption of its operations.

(2) *Responsibilities and obligations.* The responsibilities and obligations described in paragraph (e)(1) of this section shall include, without limitation, daily processing, clearing, and settlement of transactions cleared.

(3) *Recovery time objective.* The derivatives clearing organization's business continuity and disaster recovery plan described in paragraph (e)(1) of this section, shall have the objective of, and the physical, technological, and personnel resources described therein shall be sufficient to, enable the derivatives clearing organization to resume daily processing, clearing, and settlement no later than the next business day following the disruption.

(f) *Location of resources; outsourcing.* A derivatives clearing organization may maintain the resources required under paragraph (e)(1) of this section either:

(1) Using its own employees as personnel, and property that it owns, licenses, or leases (own resources); or

(2) Through written contractual arrangements with another derivatives clearing organization or other service provider (outsourcing).

(i) *Retention of responsibility.* A derivatives clearing organization that enters into such a contractual arrangement shall retain complete liability for any failure to meet the responsibilities specified in paragraph (e) of this section, although it is free to seek indemnification from the service provider. The outsourcing derivatives clearing organization must employ personnel with the expertise necessary to enable it to supervise the service provider's delivery of the services.

(ii) *Testing.* The testing referred to in paragraph (j) of this section shall include all of the derivatives clearing organization's own and outsourced resources, and shall verify that all such resources will work effectively together.

(g) *Notice of exceptional events.* A derivatives clearing organization shall notify staff of the Division of Clearing and Risk promptly of:

(1) Any hardware or software malfunction, cyber security incident, or targeted threat that materially impairs, or creates a significant likelihood of material impairment, of automated system operation, reliability, security, or capacity; or

(2) Any activation of the derivatives clearing organization's business continuity and disaster recovery plan.

(h) *Notice of planned changes.* A derivatives clearing organization shall give staff of the Division of Clearing and Risk timely advance notice of all:

(1) Planned changes to automated systems that are likely to have a significant impact on the reliability, security, or adequate scalable capacity of such systems; and

(2) Planned changes to the derivatives clearing organization's program of risk analysis and oversight.

(i) *Recordkeeping.* A derivatives clearing organization shall maintain, and provide to Commission staff promptly upon request, pursuant to § 1.31 of this chapter, current copies of its business continuity plan and other emergency procedures, its assessments of its operational risks, and records of testing protocols and results, and shall provide any other documents requested by Commission staff for the purpose of maintaining a current profile of the derivatives clearing organization's automated systems.

(j) *Testing.*—(1) *Purpose of testing.* A derivatives clearing organization shall conduct regular, periodic, and objective testing and review of:

(i) Its automated systems to ensure that they are reliable, secure, and have adequate scalable capacity; and

(ii) Its business continuity and disaster recovery capabilities, using testing protocols adequate to ensure that the derivatives clearing organization's backup resources are sufficient to meet

the requirements of paragraph (e) of this section.

(2) *Conduct of testing.* Testing shall be conducted by qualified, independent professionals. Such qualified, independent professionals may be independent contractors or employees of the derivatives clearing organization, but shall not be persons responsible for development or operation of the systems or capabilities being tested.

(3) *Reporting and review.* Reports setting forth the protocols for, and results of, such tests shall be communicated to, and reviewed by, senior management of the derivatives clearing organization. Protocols of tests which result in few or no exceptions shall be subject to more searching review.

(k) *Coordination of business continuity and disaster recovery plans.* A derivatives clearing organization shall, to the extent practicable:

(1) Coordinate its business continuity and disaster recovery plan with those of its clearing members, in a manner adequate to enable effective resumption of daily processing, clearing, and settlement following a disruption;

(2) Initiate and coordinate periodic, synchronized testing of its business continuity and disaster recovery plan and the plans of its clearing members; and

(3) Ensure that its business continuity and disaster recovery plan takes into account the plans of its providers of essential services, including telecommunications, power, and water.

§ 39.19 Reporting.

(a) *General.* Each derivatives clearing organization shall provide to the Commission the information specified in this section and any other information that the Commission deems necessary to conduct its oversight of a derivatives clearing organization.

(b) *Submission of reports.* (1) Unless otherwise specified by the Commission or its designee, each derivatives clearing organization shall submit the information required by this section to the Commission electronically and in a format and manner specified by the Commission.

(2) *Time zones.* Unless otherwise specified by the Commission or its designee, any stated time in this section is Central time for information concerning derivatives clearing organizations located in that time zone, and Eastern time for information concerning all other derivatives clearing organizations.

(3) Unless otherwise specified by the Commission or its designee, *business day* means the intraday period of time starting at the business hour of 8:15 a.m. and ending at the business hour of 4:45 p.m., on all days except Saturdays, Sundays, and Federal holidays.

(c) *Reporting requirements.* Each registered derivatives clearing organization shall provide to the Commission or other person as may be required or permitted by this paragraph the information specified below:

(1) *Daily reporting.* (i) A report containing the information specified by this paragraph (c)(1), which shall be compiled as of the end of each trading day and shall be submitted to the Commission by 10 a.m. on the following business day:

(A) Initial margin requirements and initial margin on deposit for each clearing member, by house origin and by each customer origin;

(B) Daily variation margin, separately listing the mark-to-market amount collected from or paid to each clearing member, by house origin and by each customer origin;

(C) All other daily cash flows relating to clearing and settlement including, but not limited to, option premiums and payments related to swaps such as coupon amounts, collected from or paid to each clearing member, by house origin and by each customer origin; and

(D) End-of-day positions for each clearing member, by house origin and by each customer origin.

(ii) The report shall contain the information required by paragraph (c)(1)(i) of this section for:

(A) All futures positions, and options positions, as applicable;

(B) All swaps positions; and

(C) All securities positions that are held in a customer account subject to section 4d of the Act or are subject to a cross-margining agreement.

(2) *Quarterly reporting.* A report of the derivatives clearing organization's financial resources as required by § 39.11(f) of this part; provided that, additional reports may be required by paragraph (c)(4)(i) of this section or § 39.11(f) of this part.

(3) *Annual reporting*—(i) *Annual report of chief compliance officer.* The annual report of the chief compliance officer required by § 39.10 of this part.

(ii) *Audited financial statements.* Audited year-end financial statements of the derivatives clearing organization or, if there are no financial statements available for the derivatives clearing organization itself, the consolidated audited year-end financial statements of the derivatives clearing organization's parent company.

(iii) [Reserved]

(iv) *Time of report.* The reports required by this paragraph (c)(3) shall be submitted concurrently to the Commission not more than 90 days after the end of the derivatives clearing organization's fiscal year; provided that, a derivatives clearing organization may request from the Commission an extension of time to submit a report, provided the derivatives clearing organization's failure to submit the report in a timely manner could not be avoided without unreasonable effort or expense. Extensions of the deadline will be granted at the discretion of the Commission.

(4) *Event-specific reporting*—(i) *Decrease in financial resources.* If there is a decrease of 25 percent in the total value of the financial resources available to satisfy the requirements under § 39.11(a)(1) of this part, either from the last quarterly report submitted under § 39.11(f) of this part or from the value as of the close of the previous business day, the derivatives clearing organization shall report such decrease to the Commission no later than one business day following the day the 25 percent threshold was reached. The report shall include:

(A) The total value of the financial resources:

(*1*) As of the close of business the day the 25 percent threshold was reached, and

(*2*) If reporting a decrease in value from the previous business day, the total value of the financial resources immediately prior to the 25 percent decline;

(B) A breakdown of the value of each financial resource reported in each of paragraphs (c)(4)(i)(A)(*1*) and (*2*) of this section, calculated in accordance with the requirements of § 39.11(d) of this part, including the value of each individual clearing member's guaranty fund deposit if the derivatives clearing organization reports guaranty fund deposits as a financial resource; and

(C) A detailed explanation for the decrease.

(ii) *Decrease in ownership equity.* No later than two business days prior to an event which the derivatives clearing organization knows or reasonably should know will cause a decrease of 20 percent or more in ownership equity from the last reported ownership equity balance as reported on a quarterly or audited financial statement required to be submitted by paragraph (c)(2) or (c)(3)(ii), respectively, of this section; but in any event no later than two business days after such decrease in ownership equity for events that caused the decrease about which the derivatives clearing organization did not know and reasonably could not have

known prior to the event. The report shall include:

(A) Pro forma financial statements reflecting the derivatives clearing organization's estimated future financial condition following the anticipated decrease for reports submitted prior to the anticipated decrease and current financial statements for reports submitted after such a decrease; and

(B) Details describing the reason for the anticipated decrease or decrease in the balance.

(iii) *Six-month liquid asset requirement.* Immediate notice when a derivatives clearing organization knows or reasonably should know of a deficit in the six-month liquid asset requirement of § 39.11(e)(2).

(iv) *Change in current assets.* No later than two business days after current liabilities exceed current assets; the notice shall include a balance sheet that reflects the derivatives clearing organization's current assets and current liabilities and an explanation as to the reason for the negative balance.

(v) *Request to clearing member to reduce its positions.* Immediate notice, of a derivatives clearing organization's request to a clearing member to reduce its positions because the derivatives clearing organization has determined that the clearing member has exceeded its exposure limit, has failed to meet an initial or variation margin call, or has failed to fulfill any other financial obligation to the derivatives clearing organization. The notice shall include:

(A) The name of the clearing member;

(B) The time the clearing member was contacted;

(C) The number of positions by which the derivatives clearing organization requested the reduction;

(D) All products that are the subject of the request; and

(E) The reason for the request.

(vi) *Determination to transfer or liquidate positions.* Immediate notice, of a determination that any position a derivatives clearing organization carries for one of its clearing members must be liquidated immediately or transferred immediately, or that the trading of any account of a clearing member shall be only for the purpose of liquidation because that clearing member has failed to meet an initial or variation margin call or has failed to fulfill any other financial obligation to the derivatives clearing organization. The notice shall include:

(A) The name of the clearing member;

(B) The time the clearing member was contacted;

(C) The products that are subject to the determination;

(D) The number of positions that are subject to the determination; and

(E) The reason for the determination.

(vii) *Default of a clearing member.* Immediate notice, upon the default of a clearing member. An event of default shall be determined in accordance with the rules of the derivatives clearing organization. The notice of default shall include:

(A) The name of the clearing member;

(B) The products the clearing member defaulted upon;

(C) The number of positions the clearing member defaulted upon; and

(D) The amount of the financial obligation.

(viii) *Change in ownership or corporate or organizational structure.* (A) *Reporting requirement.* Any anticipated change in the ownership or corporate or organizational structure of the derivatives clearing organization or its parent(s) that would:

(*1*) Result in at least a 10 percent change of ownership of the derivatives clearing organization,

(*2*) Create a new subsidiary or eliminate a current subsidiary of the derivatives clearing organization, or

(*3*) Result in the transfer of all or substantially all of the assets of the derivatives clearing organization, including its registration as a derivatives clearing organization to another legal entity.

(B) *Required information.* The report shall include: a chart outlining the new ownership or corporate or organizational structure; a brief description of the purpose and impact of the change; and any relevant agreements effecting the change and corporate documents such as articles of incorporation and bylaws. With respect to a corporate change for which a derivatives clearing organization submits a request for approval to transfer its derivatives clearing organization registration and open interest under § 39.3(f) of this part, the informational requirements of this paragraph (c)(4)(viii)(B) shall be satisfied by the derivatives clearing organization's compliance with § 39.3(f)(3).

(C) *Time of report.* The report shall be submitted to the Commission no later than three months prior to the anticipated change; provided that the derivatives clearing organization may report the anticipated change to the Commission later than three months prior to the anticipated change if the derivatives clearing organization does not know and reasonably could not have known of the anticipated change three months prior to the anticipated change. In such event, the derivatives clearing organization shall immediately report such change to the Commission as soon as it knows of such change.

(D) *Confirmation of change report.* The derivatives clearing organization shall report to the Commission the consummation of the change no later than two business days following the effective date of the change.

(ix) *Change in key personnel.* No later than two business days following the departure, or addition of persons who are key personnel as defined in § 39.1(b), a report that includes, as applicable, the name of the person who will assume the duties of the position on a temporary basis until a permanent replacement fills the position.

(x) *Change in credit facility funding arrangement.* No later than one business day after a derivatives clearing organization changes an existing credit facility funding arrangement it may have in place, or is notified that such arrangement has changed, including but not limited to a change in lender, change in the size of the facility, change in expiration date, or any other material changes or conditions.

(xi) *Sanctions.* Notice of action taken, no later than two business days after the derivatives clearing organization imposes sanctions against a clearing member.

(xii) *Financial condition and events.* Immediate notice after the derivatives clearing organization knows or reasonably should have known of:

(A) The institution of any legal proceedings which may have a material adverse financial impact on the derivatives clearing organization;

(B) Any event, circumstance or situation that materially impedes the derivatives clearing organization's ability to comply with this part and is not otherwise required to be reported under this section; or

(C) A material adverse change in the financial condition of any clearing member that is not otherwise required to be reported under this section.

(xiii) *Financial statements material inadequacies.* If a derivatives clearing organization discovers or is notified by an independent public accountant of the existence of any material inadequacy in a financial statement, such derivatives clearing organization shall give notice of such material inadequacy within 24 hours, and within 48 hours after giving such notice file a written report stating what steps have been and are being taken to correct the material inadequacy.

(xiv) [Reserved]

(xv) [Reserved]

(xvi) *System safeguards.* A report of:

(A) Exceptional events as required by § 39.18(g) of this part; or

(B) Planned changes as required by § 39.18(h) of this part.

(5) *Requested reporting.* (i) Upon request by the Commission, a derivatives clearing organization shall file with the Commission such information related to its business as a clearing organization, including information relating to trade and clearing details, in the format and manner specified, and within the time provided, by the Commission in the request.

(ii) Upon request by the Commission, a derivatives clearing organization shall file with the Commission a written demonstration, containing such supporting data, information and documents, that the derivatives clearing organization is in compliance with one or more core principles and relevant provisions of this part, in the format and manner specified, and within the time provided, by the Commission in the request.

(iii) Upon request by the Commission, a derivatives clearing organization shall file with the Commission, for each customer origin of each clearing member, the end-of-day gross positions of each beneficial owner, in the format and manner specified, and within the time provided, by the Commission in the request. Nothing in this paragraph shall affect the obligation of a derivatives clearing organization to comply with the daily reporting requirements of paragraph (c)(1) of this section.

§ 39.20 Recordkeeping.

(a) *Requirement to maintain information.* Each derivatives clearing organization shall maintain records of all activities related to its business as a derivatives clearing organization. Such records shall include, but are not limited to, records of:

(1) All cleared transactions, including swaps;

(2) All information necessary to record allocation of bunched orders for cleared swaps;

(3) All information required to be created, generated, or reported under this part 39, including but not limited to the results of and methodology used for all tests, reviews, and calculations in connection with setting and evaluating margin levels, determining the value and adequacy of financial resources, and establishing settlement prices;

(4) All rules and procedures required to be submitted pursuant to this part 39 and part 40 of this chapter, including all proposed changes in rules, procedures or operations subject to § 40.10 of this chapter; and

(5) Any data or documentation required by the Commission or by the derivatives clearing organization to be submitted to the derivatives clearing organization by its clearing members, or by any other person in connection with the derivatives clearing organization's clearing and settlement activities.

(b) *Form and manner of maintaining information.* (1) *General.* The records required to be maintained by this chapter shall be maintained in accordance with the provisions of § 1.31 of this chapter, for a period of not less than 5 years, except as provided in paragraph (b)(2) of this section.

(2) *Exception for swap data.* Each derivatives clearing organization that clears swaps must maintain swap data in accordance with the requirements of part 45 of this chapter.

§ 39.21 Public information.

(a) *General.* Each derivatives clearing organization shall provide to market participants sufficient information to enable the market participants to identify and evaluate accurately the risks and costs associated with using the services of the derivatives clearing organization. In furtherance of this objective, each derivatives clearing organization shall have clear and comprehensive rules and procedures.

(b) *Availability of information.* Each derivatives clearing organization shall make information concerning the rules and the operating and default procedures governing the clearing and settlement systems of the derivatives clearing organization available to market participants.

(c) *Public disclosure.* Each derivatives clearing organization shall disclose publicly and to the Commission information concerning:

(1) The terms and conditions of each contract, agreement, and transaction cleared and settled by the derivatives clearing organization;

(2) Each clearing and other fee that the derivatives clearing organization charges its clearing members;

(3) The margin-setting methodology;

(4) The size and composition of the financial resource package available in the event of a clearing member default;

(5) Daily settlement prices, volume, and open interest for each contract, agreement, or transaction cleared or settled by the derivatives clearing organization;

(6) The derivatives clearing organization's rules and procedures for defaults in accordance with § 39.16 of this part; and

(7) Any other matter that is relevant to participation in the clearing and settlement activities of the derivatives clearing organization.

(d) *Publication of information.* The derivatives clearing organization shall make its rulebook, a list of all current clearing members, and the information listed in paragraph (c) of this section readily available to the general public, in a timely manner, by posting such information on the derivatives clearing organization's Web site, unless otherwise permitted by the Commission. The information required in paragraph (c)(5) of this section shall be made available to the public no later than the business day following the day to which the information pertains.

§ 39.22 Information sharing.

Each derivatives clearing organization shall enter into, and abide by the terms of, each appropriate and applicable domestic and international information-sharing agreement, and shall use relevant information obtained from each such agreement in carrying out the risk management program of the derivatives clearing organization.

§ 39.23 Antitrust considerations.

Unless necessary or appropriate to achieve the purposes of the Act, a derivatives clearing organization shall not adopt any rule or take any action that results in any unreasonable restraint of trade, or impose any material anticompetitive burden.

§ 39.24 [Reserved]

§ 39.25 [Reserved]

§ 39.26 [Reserved]

§ 39.27 Legal risk considerations.

(a) *Legal authorization.* A derivatives clearing organization shall be duly organized, legally authorized to conduct business, and remain in good standing at all times in the relevant jurisdictions. If the derivatives clearing organization provides clearing services outside the United States, it shall be duly organized to conduct business and remain in good standing at all times in the relevant jurisdictions, and be authorized by the appropriate foreign licensing authority.

(b) *Legal framework.* A derivatives clearing organization shall operate pursuant to a well-founded, transparent, and enforceable legal framework that addresses each aspect of the activities of the derivatives clearing organization. As applicable, the framework shall provide for:

(1) The derivatives clearing organization to act as a counterparty, including novation;

(2) Netting arrangements;

(3) The derivatives clearing organization's interest in collateral;

(4) The steps that a derivatives clearing organization would take to address a default of a clearing member, including but not limited to, the unimpeded ability to liquidate collateral and close out or transfer positions in a timely manner;

(5) Finality of settlement and funds transfers that are irrevocable and unconditional when effected (no later than when a derivatives clearing organization's accounts are debited and credited); and

(6) Other significant aspects of the derivatives clearing organization's operations, risk management procedures, and related requirements.

(c) *Conflict of laws.* If a derivatives clearing organization provides clearing services outside the United States:

(1) The derivatives clearing organization shall identify and address any material conflict of law issues. The derivatives clearing organization's contractual agreements shall specify a choice of law.

(2) The derivatives clearing organization shall be able to demonstrate the enforceability of its choice of law in relevant jurisdictions and that its rules, procedures, and contracts are enforceable in all relevant jurisdictions.

Appendix to Part 39—Form DCO Derivatives Clearing Organization Application for Registrations

BILLING CODE 6351–01–P

OMB No. 3038-0076

COMMODITY FUTURES TRADING COMMISSION

FORM DCO

DERIVATIVES CLEARING ORGANIZATION
APPLICATION FOR REGISTRATION

GENERAL INSTRUCTIONS

Intentional misstatements or omissions of fact may constitute federal criminal violations (7 U.S.C. § 13 and 18 U.S.C. § 1001) or grounds for disqualification from registration.

DEFINITIONS

Unless the context requires otherwise, all terms used in this Form DCO have the same meaning as in the Commodity Exchange Act ("Act"), and in the General Rules and Regulations of the Commodity Futures Trading Commission ("Commission") thereunder. All references to Commission regulations are found at 17 CFR Ch. 1.

For the purposes of this Form DCO, the term "Applicant" shall include any applicant for registration as a derivatives clearing organization or any registered derivatives clearing organization that is applying for an amendment to its derivatives clearing organization registration.

GENERAL INSTRUCTIONS

1. This Form DCO, which includes a Cover Sheet and required Exhibits (together, "Form DCO" or "application"), is to be filed with the Commission by all applicants for registration as a derivatives clearing organization, including applicants when amending a pending application, and by any registered derivatives clearing organization applying for an amendment to its registration, pursuant to Section 5b of the Act and the Commission's regulations thereunder. Upon the filing of an application for registration, an amendment to an application, or a registration amendment in accordance with the instruction provided herein, the Commission will publish notice of the filing and afford interested persons an opportunity to submit written data, views and comments concerning such application. No application for registration or registration amendment will be effective unless the Commission, by order, grants such registration or amended registration.

2. Individuals' names, except the executing signature, shall be given in full (Last Name, First Name, Middle Name).

3. With respect to the executing signature, it must be manually signed by a duly authorized representative of the Applicant as follows: If the Form DCO is filed by a corporation, it must be signed in the name of the corporation by a principal officer duly authorized; if filed by a limited liability company, it must be signed in the name of the limited liability company by a manager or member duly authorized to sign on the limited liability company's behalf; if filed by a partnership, it must be signed in the name of the partnership by a general partner duly authorized; if filed by an unincorporated organization or association which is not a partnership, it must be signed in the name of such organization or association by the managing agent, i.e., a duly authorized person who directs or manages or who participates in the directing or managing of its affairs.

4. If this Form DCO is being filed as an application for registration, all applicable items must be answered in full. If any item or Exhibit is inapplicable, this response must be affirmatively indicated by the designation "none," "not applicable," or "N/A," as appropriate.

5. Under Section 5b of the Act and the Commission's regulations thereunder, the Commission is authorized to solicit the information required to be supplied by this Form DCO from any Applicant seeking registration as a derivatives clearing organization and from any registered derivatives clearing organization. Disclosure by the

Applicant of the information specified in this Form DCO is mandatory prior to the start of the processing of an application for, or amendment to, registration as a derivatives clearing organization. The information provided in this Form DCO will be used for the principal purpose of determining whether the Commission should grant or deny registration to an Applicant.

The Commission may determine that additional information is required from the Applicant in order to process its application. An Applicant is therefore encouraged to supplement this Form DCO with any additional information that may be significant to its operation as a derivatives clearing organization and to the Commission's review of its application. A Form DCO which is not prepared and executed in compliance with applicable requirements and instructions may be returned as not acceptable for filing. Acceptance of this Form DCO, however, shall not constitute a finding that the Form DCO has been filed as required or that the information submitted is true, current or complete.

6. Except as provided in 17 CFR 39.3(a)(5), in cases where the Applicant submits a request for confidential treatment with the Secretary of the Commission pursuant to the Freedom of Information Act and 17 CFR 145.9, information supplied in this application will be included routinely in the public files of the Commission and will be available for inspection by any interested person.

APPLICATION AMENDMENTS

1. 17 CFR 39.3(a)(4) requires an Applicant to promptly amend its application if it discovers a material omission or error in the application, or if there is a material change in the information contained in the application, including any supplement or amendment thereto.

2. Applicants, when filing this Form DCO for purposes of amending an application, must re-file a Cover Sheet, amended if necessary and including an executing signature, and attach thereto revised Exhibits or other materials marked to show changes, as applicable.

REGISTRATION AMENDMENTS

1. Applicants, when filing this Form DCO for purposes of requesting an amendment to an existing registration, are only required to submit Exhibits and updated information that are relevant to the requested amendment and are necessary to demonstrate compliance with the core principles affected by the requested amendment.
2. Applicants must file a Cover Sheet, including an executing signature, and attach thereto Exhibits or other materials, as applicable.

WHERE TO FILE

This Form DCO must be filed electronically with the Secretary of the Commission in a format specified by the Secretary of the Commission.

COMMODITY FUTURES TRADING COMMISSION

FORM DCO
DERIVATIVES CLEARING ORGANIZATION
APPLICATION FOR REGISTRATION

COVER SHEET

_____

Exact name of Applicant as specified in charter

_____

Address of principal executive offices

☐ If this is an **APPLICATION** for registration, complete in full and check here.

☐ If this is an **AMENDMENT** to an application, list below all items that are being amended and check here.

☐ If this is an **APPLICATION FOR AN AMENDMENT** to an existing registration, list below all items to be amended and check here.

_____

_____

_____

_____

GENERAL INFORMATION

- Name under which business is or will be conducted, if different than name specified above (include acronyms, if any):

_____

- If name of derivatives clearing organization is being amended, state previous derivatives clearing organization name:

_____

- Additional contact information:

_____

Website URL Main Phone Number

- List of principal office(s) and address(es) where derivatives clearing organization activities are/will be conducted:

Office Address

_____ _____

_____ _____

_____ _____

BUSINESS ORGANIZATION

- If Applicant is a successor to a previously registered derivatives clearing organization, please complete the following:

a. Date of succession _____

b. Full name and address of predecessor registrant

_____
Name

_____
Street Address

_____
City State Country Zip Code

- Applicant is a:

☐ Corporation

☐ Partnership (specify whether general or limited)

☐ Limited Liability Company

☐ Other form of organization (specify) _____

- Date of formation: _____
- Jurisdiction of organization: _____

List all other jurisdictions in which Applicant is qualified to do business (including non-US jurisdictions):

_____

_____

List all other regulatory licenses or registrations of Applicant (or exemptions from any licensing requirement) including with non-US regulators:

_____

_____

- FEIN or other Tax ID#: _____
- Fiscal Year End: _____

ADDITIONAL CONTACT INFORMATION

- Provide contact information specifying name, title, phone numbers, mailing address and e-mail address for the following individuals:

a. The primary contact for questions and correspondence regarding the application

_____
Name and Title

_____
Office Phone Number Mobile Phone Number

_____
Mailing address E-mail Address

b. The individual responsible for handling questions regarding the Applicant's financial statements

_____
Name and Title

_____
Office Phone Number Mobile Phone Number

_____
Mailing address E-mail Address

c. The individual responsible for serving as the Chief Risk Officer of the Applicant pursuant to § 39.13 of the Commission's regulations

_____
Name and Title

_____
Office Phone Number Mobile Phone Number

_____
Mailing address E-mail Address

d. The individual responsible for serving as the Chief Compliance Officer of the Applicant pursuant to § 39.10 of the Commission's regulations

_____
Name and Title

_____
Office Phone Number Mobile Phone Number

_____
Mailing address E-mail Address

e. The individual responsible for serving as the chief legal officer of the Applicant

Name and Title

Office Phone Number Mobile Phone Number

Mailing address E-mail Address

• Outside Service Providers: Provide contact information specifying name, title, phone number, mailing address and e-mail address for any outside service provider retained by the Applicant as follows:

a. Certified Public Accountant

Name and Title

Office Phone Number Mobile Phone Number

Mailing address E-mail Address

b. Legal Counsel

Name and Title

Office Phone Number Mobile Phone Number

Mailing address E-mail Address

c. Records Storage or Management

Name and Title

Office Phone Number Mobile Phone Number

Mailing address E-mail Address

d. Business Continuity/Disaster Recovery

Name and Title

Office Phone Number Mobile Phone Number

Mailing address E-mail Address

e. Professional consultants providing services related to this application.

_____

Name and Title

_____

Office Phone Number Mobile Phone Number

_____

Mailing address E-mail Address

- Applicant agrees and consents that the notice of any proceeding before the Commission in connection with this application may be given by sending such notice by certified mail to the person named below at the address given.

_____

Print Name and Title

_____

Number and Street

_____

City State Zip Code

SIGNATURE/REPRESENTATION

- Applicant has duly caused this application to be signed on its behalf by its duly authorized representative as of the _____ day of _____, 20_____. Applicant and the undersigned each represent hereby that, to the best of their knowledge, all information contained herein is true, current and complete in all material respects. It is understood that all required items and Exhibits are considered integral parts of this Form DCO. Applicant and the undersigned each further represent that, if this submission is an application for an amendment to an existing registration, Applicant has submitted those items and Exhibits that are relevant to the requested amendment and as necessary to demonstrate Applicant's compliance with the core principles affected by the requested amendment and that such items and Exhibits are, to the best of their knowledge, true, current, and complete in all material respects.

_____

Name of Applicant

By:_____

Manual Signature of Duly Authorized Person

_____

Print Name and Title of Signatory

COMMODITY FUTURES TRADING COMMISSION

FORM DCO

DERIVATIVES CLEARING ORGANIZATION
APPLICATION FOR REGISTRATION

EXHIBIT INSTRUCTIONS

1. The following Exhibits must be filed with the Commission by each Applicant seeking registration as a derivatives clearing organization or applying for an amendment to an existing derivatives clearing organization registration, pursuant to Section 5b of the Act and the Commission's regulations thereunder.

2. The application must include a Table of Contents listing each Exhibit required by this Form DCO and indicating which, if any, Exhibits are inapplicable. For any Exhibit that is inapplicable, next to the Exhibit letter specify "none," "not applicable," or "N/A," as appropriate.

3. The Exhibits must be labeled as specified in this Form DCO. If any Exhibit requires information that is related to, or may be duplicative of, information required to be included in another Exhibit, Applicant may summarize such information and provide a cross-reference to the Exhibit that contains the required information.

4. If the information required in an Exhibit involves computerized programs or systems, Applicant must submit descriptions of system test procedures, tests conducted, or test results in sufficient detail to demonstrate the Applicant's ability to comply with the core principles specified in Section 5b of the Act and the Commission's regulations thereunder (the "Core Principles"). With respect to each system test, Applicant must identify the methodology used and provide the computer software, programs, and data necessary to enable the Commission to duplicate each system test as it relates to the applicable Core Principle.

5. If Applicant seeks confidential treatment of any Exhibit or a portion of any Exhibit, Applicant must mark such Exhibit with a prominent stamp, typed legend, or other suitable form of notice on each page or segregable portion of each page stating "Confidential Treatment Requested by [Applicant]." If such marking is impractical under the circumstances, a cover sheet prominently marked "Confidential Treatment Requested by [Applicant]" should be provided for each group of records submitted for which confidential treatment is requested. Each of the records transmitted in this matter shall be individually marked with an identifying number and code so that they are separately identifiable. Applicant must also file a confidentiality request with the Secretary of the Commission in accordance with 17 CFR 145.9.

DESCRIPTION OF EXHIBITS

EXHIBIT A – GENERAL INFORMATION/COMPLIANCE

- Attach as **Exhibit A-1**, a regulatory compliance chart setting forth each Core Principle and providing citations to the Applicant's relevant rules, policies, and procedures that address each Core Principle, and a brief summary of the manner in which Applicant will comply with each Core Principle.

- Attach as **Exhibit A-2**, a current copy of Applicant's rulebook. The rulebook must consist of all the rules necessary to carry out Applicant's role as a derivatives clearing organization. Applicant must certify that its rules constitute a binding agreement between Applicant and its clearing members and, in addition to the separate clearing member agreements, establish rights and obligations between Applicant and its clearing members.

- Attach as **Exhibit A-3**, a narrative summary of Applicant's proposed clearing activities including (i) the anticipated start date of clearing products (or, if Applicant is already clearing products, the anticipated start date of activities for which Applicant is seeking an amendment to its registration) and (ii) a description of the scope of Applicant's proposed clearing activities (e.g., clearing for a designated contract market; clearing for a swap execution facility; clearing bilaterally executed products).

- Attach as **Exhibit A-4**, a detailed business plan setting forth, at a minimum, the nature of and rationale for Applicant's activities as a derivatives clearing organization, the context in which it is beginning or expanding its activities, and the nature, terms, and conditions of the products it will clear.

- Attach as **Exhibit A-5**, a list of the names of any person (i) who owns 5% or more of Applicant's stock or other ownership or equity interests; or (ii) who, either directly or indirectly, through agreement or otherwise, may control or direct the management or policies of Applicant. Provide as part of **Exhibit A-5** the full name and address of each such person, indicate the person's ownership percentage, and attach a copy of the agreement or, if there is no agreement, an explanation of the basis upon which such person exercises or may exercise such control or direction.

- Attach as **Exhibit A-6**, a list of Applicant's current officers, directors, governors, general partners, LLC managers, and members of all standing committees (including any committee referenced in Section (a)(2) of **Exhibit P** herein), as applicable, or persons performing functions similar to any of the foregoing, indicating for each:

a. Name and Title (with respect to a director, such title must include participation on any committee of Applicant);

b. Phone number (both work and mobile) and e-mail contact information;

c. Dates of commencement and, if appropriate, termination of present term of office or position;

d. Length of time each such person has held the same office or position;

e. Brief description of the business experience of each person over the last ten years;

f. Any other current business affiliations in the financial services industry;

g. If such person is not an employee of Applicant, list any compensation paid to the person as a result of his or her position at Applicant. For a director, describe any performance-based compensation;

h. A certification for each such person that the individual would not be disqualified under Section 8a(2) of the Act or §1.63; and

i. With respect to a director, whether such director is a public director or a clearing member customer, and the basis for such a determination as to the director's status.

If another entity will operate or control the day-to-day business operations of the Applicant, attach for such entity all of the items indicated in **Exhibit A-6**.

- Attach as **Exhibit A-7**, a diagram of the entire corporate organizational structure of Applicant including the legal name of all entities within the organizational structure and the applicable percentage ownership among affiliated entities. Additionally, provide (i) a list of all jurisdictions in which Applicant or its affiliated entities are doing business; (ii) the registration status of Applicant and its affiliated entities, including pending applications or exemption requests and whether any applications or exemptions have been denied (e.g., country, regulator, registration category, date of registration or request for exemption, date of denial, if applicable); and (ii) the address for legal service of process for Applicant (which cannot be a post office box) for each applicable jurisdiction.

- Attach as **Exhibit A-8**, a copy of the constituent documents, articles of incorporation or association with all amendments thereto, partnership or limited liability agreements, and existing bylaws, operating agreement, and rules or instruments corresponding thereto, of Applicant. Provide a certificate of good standing or its equivalent for Applicant for each jurisdiction in which Applicant is doing business, including any foreign jurisdiction, dated within one month of the date of the Form DCO.

- Attach as **Exhibit A-9**, a brief description of any material pending legal proceeding(s) or governmental investigation(s) to which Applicant or any of its affiliates is a party or is subject, or to which any of its or their property is at issue. Include the name of the court or agency where the proceeding(s) is pending, the date(s) instituted, the principal parties involved, a description of the factual allegations in the complaint(s), the laws that were allegedly violated, and the relief sought. Include similar information as to any such proceeding(s) or any investigation known to be contemplated by any governmental agency.

- If Applicant intends to use the services of an outside service provider (including services of its clearing members or market participants), to enable Applicant to comply with any of the Core Principles, Applicant must submit as **Exhibit A-10** all agreements entered into or to be entered into between Applicant and the outside service provider, and identify (1) the services that will be provided; (2) the staff who will provide the services; and (3) the Core Principles addressed by such arrangement. If a submitted agreement is not final and executed, the Applicant must submit evidence that constitutes reasonable assurance that such services will be provided as soon as operations require.

- Attach as Exhibit **A-11**, documentation that demonstrates compliance with the Chief Compliance Officer ("CCO") requirements set forth in § 39.10(c), including but not limited to:

a. Evidence of the designation of an individual to serve as Applicant's CCO with full responsibility and authority to develop and enforce appropriate compliance policies and procedures;

b. A description of the background and skills of the person designated as the CCO and a certification that the individual would not be disqualified under Section 8a(2) or 8a(3) of the Act or §1.63;

c. Identification of to whom the CCO reports (i.e., the senior officer or the Board of Directors);

d. Any plan of communication or regular or special meetings between the CCO and the Board of Directors or senior officer as appropriate;

e. A job description setting forth the CCO's duties;

f. Procedures for the remediation of noncompliance issues; and

g. A copy of Applicant's written compliance policies and procedures (including a code of ethics and conflict of interest policy).

EXHIBIT B — FINANCIAL RESOURCES

- Attach as **Exhibit B**, documents that demonstrate compliance with the financial resources requirements set forth in § 39.11, including but not limited to:

a. General – Provide as **Exhibit B-1**:

(1) The most recent set of audited financial statements of Applicant or of its parent company, including the balance sheet, income statement, statement of cash flows, notes to the financial statements, and accountant's opinion;

(2) If the audited financial statements are not dated within 1 month of the date of filing of the Form DCO, Applicant must provide a set of unaudited financial statements current within 1 month of the date of filing of the Form DCO;

(3) If Applicant does not have audited financial statements, Applicant must provide a balance sheet as of a date within 1 month of the date of filing of the Form DCO and an income statement and statement of cash flows reflecting the period since Applicant's formation and a date that is within 1 month of the date of filing of the Form DCO. These statements must be accompanied by an independent certified public accountant's review report.; and

(4) Evidence of ability to satisfy the requirements of **Exhibit**s **B-2** and **B-3** below which may include (i) pro forma financial statements setting forth all projections and assumptions used therein, and (ii) a narrative description of how Applicant will fund its financial resources obligations on the first day of its operation as a derivatives clearing organization.

b. Default Resources – Provide as **Exhibit B-2**:

(1) A calculation of the financial resources needed to enable Applicant to meet its requirements under § 39.11(a)(1). Applicant must provide hypothetical default scenarios designed to reflect a variety of market conditions, and the assumptions and variables underlying the scenarios must be explained. All results of the analysis must be included. This calculation requires a start-up enterprise to estimate its largest anticipated financial exposure. A start-up must be able to explain the basis for its estimate;

(2) Evidence of unencumbered assets sufficient to satisfy § 39.11(a)(1). This may be demonstrated by a copy of a bank balance statement(s) in the name of Applicant. If relying on § 39.11(b)(1)(vi), such other resources must be thoroughly explained. If relying on § 39.11(b)(1)(ii) and/or (vi), Applicant cannot also count these assets when demonstrating its compliance with its operating resources requirement under § 39.11(a)(2) and Applicant must detail the amounts or percentages of such assets that apply to each financial resource requirement;

(3) A demonstration that Applicant can perform the monthly calculations required by § 39.11(c)(1);

(4) A demonstration that Applicant's financial resources are sufficiently liquid as required by § 39.11(e)(1);

(5) A demonstration of how Applicant will be able to maintain, at all times, the level of resources required by § 39.11(a)(1); and

(6) A demonstration of how default resources financial information will be updated and reported to clearing members and the public under § 39.21, and to the Commission as required by § 39.11(f)(1) and § 39.19.

c. Operating Resources – Provide as **Exhibit B-3**:

(1) A calculation of the financial resources needed to enable Applicant to meet its requirements under § 39.11(a)(2);

(2) Evidence of assets sufficient to satisfy the amount required under § 39.11(a)(2). This may be demonstrated by a copy of a bank balance statement(s) in the name of Applicant. If relying on § 39.11(b)(2)(ii), such other resources must be thoroughly explained. If relying on § 39.11(b)(2)(i) or (ii), Applicant cannot also count these assets when demonstrating its compliance with meeting its default resources requirement under § 39.11(a)(1) and Applicant must detail the amounts or percentages of such assets that apply to each financial resource requirement;

(3) A narrative statement demonstrating the adequacy of Applicant's physical infrastructure to carry out business operations, which includes a principal executive office (separate from any personal dwelling) with a U.S. street address (not merely a post office box number). For its principal executive office and other facilities Applicant

plans to occupy in carrying out its DCO functions, a description of the space (e.g., location and square footage), use of the space (e.g., executive office, data center), and the basis for Applicant's right to occupy the space (e.g., lease, agreement with parent company to share leased space);

(4) A narrative statement demonstrating the adequacy of the technological systems necessary to carry out Applicant's business operations, including a description of Applicant's information technology and telecommunications systems and a timetable for full operability;

(5) A calculation pursuant to § 39.11(c)(2), including the total projected operating costs for Applicant's first year of operation, calculated on a monthly basis with an explanation of the basis for calculating each cost and a discussion of the type, nature, and number of the various costs included;

(6) A demonstration that Applicant's financial resources are sufficiently liquid and unencumbered, as required by § 39.11(e)(2);

(7) A demonstration of how Applicant will maintain, at all times, the level of resources required by § 39.11(a)(2) with an explanation of asset valuation methodology and calculation of projected revenue, if applicable; and

(8) A demonstration of how operating resources financial information will be updated and reported to clearing members and the public under § 39.21, and to the Commission as required by § 39.11(f)(1) and § 39.19.

d. Human Resources – Provide as **Exhibit B-4**:

(1) An organizational chart showing Applicant's current and planned staff by position and title, including key personnel (as such term is defined in § 39.2) and, if applicable, managerial staff reporting to key personnel.

(2) A discussion and description of the staffing requirements needed to fulfill all operations and associated functions, tasks, services, and areas of supervision necessary to operate Applicant on a day-to-day basis; and

(3) The names and qualifications of individuals who are key personnel or other managerial staff who will carry out the operations and associated functions, tasks, services, and supervision needed to run the Applicant on day-to-day basis. In particular, Applicant must identify such individuals who are responsible for risk management, treasury, clearing operations and compliance (and specify whether each such person is an employee or consultant/agent).

EXHIBIT C —PARTICIPANT AND PRODUCT ELIGIBILITY

- Attach as **Exhibit C**, documents that demonstrate compliance with the participant and product eligibility requirements set forth in § 39.12 of the Commission's regulations, including but not limited to:

a. Participant Eligibility – Provide as **Exhibit C-1**, an explanation of the requirements for becoming a clearing member and how those requirements satisfy § 39.12 and, where applicable, support Applicant's compliance with other Core Principles. Applicant must address how its participant eligibility requirements comply with the core principles and regulations thereunder for financial resources, risk management and operational capacity. The explanation also must include:

(1) A final version of the membership agreement between Applicant and its clearing members that sets forth the full scope of respective rights and obligations;

(2) A discussion of how Applicant will monitor for and enforce compliance with its eligibility criteria, especially minimum financial requirements;

(3) An explanation of how the eligibility criteria are objective and allow for fair and open access to Applicant. Applicant must include an explanation of the differences between various classes of membership or participation that might be based on different levels of capital and/or creditworthiness. Applicant must also include information about whether any differences exist in how Applicant will monitor and enforce the obligations of its various clearing members including any differences in access, privilege, margin levels, position limits, or other controls;

(4) If Applicant allows intermediation, Applicant must describe the requirements applicable to those who may act as intermediaries on behalf of customers or other market participants;

(5) A description of the program for monitoring the financial status of the clearing members on an ongoing basis;

(6) The procedures that Applicant will follow in the event of the bankruptcy or insolvency of a clearing member, which did not result in a default to Applicant;

(7) A description of whether and how Applicant would adjust clearing member participation under continuing eligibility criteria based on the financial, risk, or operational status of a clearing member;

(8) A discussion of whether Applicant's clearing members will be required to be registered with the Commission; and

(9) A list of current or prospective clearing members. If a current or prospective clearing member is a Commission registrant, Applicant must identify the member's designated self-regulatory organization.

b. Product Eligibility – Provide as **Exhibit C-2**, an explanation of the criteria for instruments acceptable for clearing including:

(1) The regulatory status of each market on which a contract to be cleared by Applicant is traded (e.g., DCM, SEF, not a registered market), and whether the market for which Applicant clears intends to join the Joint Audit Committee. For bilaterally executed agreements, contracts, or transactions not traded on a registered market, Applicant must describe the nature of the related market and its interest in having the particular bilaterally executed agreement, contract, or transaction cleared;

(2) The criteria, and the factors considered in establishing the criteria, for determining the types of products that will be cleared;

(3) An explanation of how the criteria for deciding what products to clear take into account the different risks inherent in clearing different agreements, contracts, or transactions and how those criteria affect maintenance of assets to support the guarantee function in varying risk environments;

(4) A precise list of all the agreements, contracts, or transactions to be covered by Applicant's registration order, including the terms and conditions of all agreements, contracts, or transactions;

(5) A forecast of expected volume and open interest at the outset of clearing operations, after six months, and after one year of operation; and

(6) The mechanics of clearing the contract, such as reliance on exchange for physical, exchange for swap, or other substitution activity; whether the contracts are matched prior to submission for clearing or after submission; and other aspects of clearing mechanics that are relevant to understanding the products that would be eligible for clearing.

EXHIBIT D —RISK MANAGEMENT

- Attach as **Exhibit D**, documents that demonstrate compliance with the risk management requirements set forth in § 39.13 of the Commission's regulations, including but not limited to:

a. Risk Management Framework - Provide as **Exhibit D-1**, a copy of Applicant's written policies, procedures, and controls, as approved by Applicant's Board of Directors, that establish Applicant's risk management framework as required by § 39.13(b). Applicant must also provide a description of the composition and responsibilities of Applicant's Risk Management Committee.

b. Measuring Risk - Provide as **Exhibit D-2**, a narrative explanation of how Applicant has projected and will continue to measure its counterparty risk exposure, including:

(1) A description of the risk-based margin calculation methodology;

(2) The assumptions upon which the methodology was designed, including the risk analysis tools and procedures employed in the design process;

(3) An explanation as to whether other margining methodologies were considered and, if so, why they were not chosen;

(4) A demonstration of the margin methodology as applied to real or hypothetical clearing scenarios;

(5) A description of the data sources for inputs used in the methodology, e.g. historical price data reflecting market volatility over various periods of time;

(6) A description of the sources of price data for the measurement of current exposures and the valuation models for addressing circumstances where pricing data is not readily available or reliable;

(7) The frequency and circumstances under which the margin methodology will be reviewed and the criteria for deciding how often to review and whether to modify a margin methodology;

(8) An independent validation of Applicant's systems for generating initial margin requirements, including its theoretical models;

(9) The frequency of measuring counterparty risk exposures (mark to market), whether counterparty risk exposures are routinely measured on an intraday basis, whether Applicant has the operational capacity to measure counterparty risk exposures on an intraday basis, and the circumstances under which Applicant would conduct a non-routine intraday measurement of counterparty risk exposures;

(10) Preliminary forecasts regarding future counterparty risk exposure and assumptions upon which such forecasts of exposure are based;

(11) A description of any systems or software that Applicant will require clearing members to use in order to margin their positions in their internal bookkeeping systems, and whether and under what terms and conditions Applicant will provide such systems or software to clearing members; and

(12) A description of the extent to which counterparty risk can be offset through the clearing process (i.e., the limitations, if any, on Applicant's duty to fulfill its obligations as the buyer to every seller and the seller to every buyer).

c. Limiting Risk - Provide as **Exhibit D-3**, a narrative discussion addressing the specifics of Applicant's clearing activities, including:

(1) How Applicant will collect financial information about its clearing members and other traders or market participants, monitor price movements, and mark to market, on a daily basis, the products and/or portfolios it clears;

(2) How Applicant will monitor accounts carried by clearing members, the accumulation of positions by clearing members and other market participants, and compliance with position limits; and how it will use large trader information;

(3) How Applicant will determine variation margin levels and outstanding initial margin due;

(4) How Applicant will identify unusually large pays on a proactive basis before they occur;

(5) Whether and how Applicant will compare price moves and position information to historical patterns and to the financial information collected from its clearing members; how it will identify unusually large pays on a daily basis;

(6) How Applicant will use various risk tools and procedures such as: (i) value-at-risk calculations; (ii) stress testing; (iii) back testing; and/or (iv) other risk management tools and procedures;

(7) How Applicant will communicate with clearing members, settlement banks, other derivatives clearing organizations, designated contract markets, swap execution facilities, major swap participants, swap data repositories, and other entities in emergency situations or circumstance that might require immediate action by the Applicant;

(8) How Applicant will monitor risk outside business hours;

(9) How Applicant will review its clearing members' risk management practices;

(10) Whether Applicant will impose credit limits and/or employ other risk filters (such as automatic system denial of entry of trades under certain conditions);

(11) Plans for handling "extreme market volatility" and how Applicant defines that term;

(12) An explanation of how Applicant will be able to offset positions in order to manage risk including: (i) ensuring both Applicant and clearing members have the operational capacity to do so; and (ii) liquidity of the relevant market, especially with regard to bilaterally executed products;

(13) Plans for managing accounts that are "too big" to liquidate and for conducting "what if" analyses on these accounts;

(14) If options are involved, how Applicant will manage the different and more complex risk presented by these products;

(15) If Applicant intends to clear swaps, whether and how often Applicant will offer multilateral portfolio compression exercises for its clearing members; and

(16) If Applicant intends to clear credit default swaps, how Applicant will manage the unique risks associated with clearing these products, such as jump-to-default risk.

d. Existence of collateral (funds and assets) to apply to losses resulting from realized risk – Provide as **Exhibit D-4**:

(1) An explanation of the factors, process, and methodology used for calculating and setting required collateral levels, the required inputs, the appropriateness of those inputs, and an illustrative example;

(2) An analysis supporting the sufficiency of Applicant's collateral levels for capturing all or most price moves that may take place in one settlement cycle;

(3) A description of how Applicant will value open positions and collateral assets;

(4) A description and explanation of the forms of assets allowed as collateral, why they are acceptable, and whether there are any haircuts or concentration limits on certain kinds of assets, including how often any such haircuts and concentration limits are reviewed;

(5) An explanation of how and when Applicant will collect collateral, whether and under what circumstances it will collect collateral on an intraday basis, and what will happen if collateral is not received in a timely manner. Include a proposed collateral collection schedule based on changes in market positions and collateral values; and

(6) If options are involved, a full explanation of how it will manage the associated risk through the use of collateral including, if applicable, a discussion of its option pricing model, how it establishes its implied volatility scan range, and other matters related to the complex matter of managing the risk associated with the clearing of option contracts.

EXHIBIT E — SETTLEMENT PROCEDURES

- Attach as **Exhibit E**, documents that demonstrate compliance with the settlement procedures requirements set forth in § 39.14 of the Commission's regulations, including but not limited to:

a. Settlement – Provide as **Exhibit E-1**, a full description of the daily process of settling financial obligations on all open positions being cleared. This must include:

(1) Procedures for completing settlements on a timely basis during normal market conditions (and no less frequently than once each business day);

(2) Procedures for completing settlements on a timely basis in varying market circumstances including in the event of a default by the clearing member creating the largest financial exposure for Applicant in extreme but plausible market conditions;

(3) A description of how contracts will be marked to market on at least a daily basis;

(4) Identification of the settlement banks used by Applicant (including identification of the lead settlement bank, if applicable) and a copy of Applicant's settlement bank agreement(s). Such settlement bank agreements must (i) outline daily cash settlement procedures, (ii) state clearly when settlement fund transfers will occur, (iii) provide procedures for settlements on bank holidays when the markets are open, and (iv) ensure that settlements are final when effected;

(5) Identification of settlement banks that Applicant will allow its clearing members to use for margin calls and variation settlements;

(6) A description of the criteria and review process used by Applicant when selecting settlement banks; procedures for monitoring the continued appropriateness of all settlement banks including a description of how Applicant monitors its concentration risk or exposure to each settlement bank;

(7) The specific means by which settlement instructions are communicated from Applicant to the settlement bank(s);

(8) A timetable showing the flow of funds associated with the settlement of products for a 24-hour period or such other settlement timeframe specified by a particular product; this may be presented in the form of a chart, as in the following example:

FORM DCO - SAMPLE SETTLEMENT CYCLE CHART [Specify U.S. Dollar or other currency as applicable]	
TRADE DATE = T [INSERT TIME ZONE] [INSERT EXACT TIMES BELOW]	**EXAMPLE OF SETTLEMENT ACTIVITY FOR WHICH TIMES SHOULD BE PROVIDED**
T: _____ pm	Last market closes (end of regular trading hours).
T: Approx. ____ pm	DCO/DCM/SEF establishes daily settlement price for each product based on information generated by its [INSERT NAME OF APPLICABLE CLEARING SYSTEM].
T: By _____ pm	Clearing members' position information for intraday settlement is obtained from DCO's clearing system.
T+1: Approx. ____ am	DCO provides daily initial margin (IM) and settlement variation/option premium (SVOP) amounts to clearing members and banks.
T+1: By ____ am	Banks commit to pay daily IM and SVOP amounts.
T+1: Approx. ____ am	Banks pay daily IM and SVOP amounts from clearing members to DCO.
T+1: Approx. __ am	Banks pay daily IM and SVOP amounts from DCO to clearing members.
T: Approx. ____ pm	DCO/DCM/SEF determines prices for intraday settlement.
T: Approx. ____ pm	Clearing members' position information for intraday settlement is obtained from DCO's clearing system.
T: By approx. ____ pm	DCO provides intraday IM and SVOP amounts to banks and clearing members.
T: By ____ pm	Banks commit to pay intraday IM and SVOP amounts.
T: Approx. ____ pm	Banks pay intraday IM and SVOP amounts from clearing members to DCO.
T: Approx. ____ pm	Banks pay intraday IM and SVOP amounts from DCO to clearing members.

(9) A description of what happens in the event that there are insufficient funds in a clearing member's settlement account;

(10) An explanation of how and when Applicant will collect variation margin, whether and under what circumstances it will collect variation margin on an intraday basis, what will happen if variation margin is not received in a timely manner, and a proposed variation margin collection schedule based on changes in market prices;

(11) All the information above, to the extent relevant, for any products cleared that may be denominated in a foreign currency; and

(12) With respect to physical settlements, identify Applicant's rules that clearly state each obligation of Applicant with respect to physical deliveries, and explain how Applicant intends to identify and manage risks arising from physical settlement.

b. Recordkeeping – Provide as **Exhibit E-2**, a full description of the following:

(1) The nature and quality of the information collected concerning the flow of funds involved in clearing and settlement; and

(2) How such information will be recorded, maintained, and accessed.

c. Interfaces with other clearing organizations – Provide as **Exhibit E-3**, a description of Applicant's relationships with other derivatives clearing organizations, clearing agencies, financial market utilities or foreign entities that perform similar functions including how compliance with the terms and conditions of agreements or arrangements with such other entities will be satisfied, e.g., any netting or offset arrangements, cross-margining, portfolio margining, linkage, common banking, common clearing programs or limited guaranty agreements or arrangements.

EXHIBIT F — TREATMENT OF FUNDS

• Attach as **Exhibit F**, documents that demonstrate compliance with the treatment of funds requirements set forth in § 39.15 of the Commission's regulations, including but not limited to:

a. Safe custody – Provide as **Exhibit F-1**, documents that demonstrate:

(1) How Applicant will ensure the safekeeping of funds and collateral in depositories and how Applicant will minimize the risk of loss or of delay in accessing such funds and collateral;

(2) The depositories that will hold the funds and collateral and any written agreements between or among such depositories, Applicant or its clearing members regarding the legal status of the funds and collateral and the specific conditions or prerequisites for movement of the funds and collateral; and

(3) How Applicant will limit the concentration of risk in depositories where funds and collateral are deposited.

b. Segregation of customer and proprietary funds – Provide as **Exhibit F-2**, documents that demonstrate:

(1) The appropriate segregation of customer funds and associated acknowledgement documentation; and

(2) Requirements or restrictions regarding commingling customer funds with proprietary funds, obligating customer funds for any purpose other than to purchase, clear, and settle the products Applicant is clearing, procedures regarding customer funds which are subject to cross-margin or similar agreements, and any other aspects of customer fund segregation.

c. Investment standards – Provide as **Exhibit F-3**, documents that demonstrate:

(1) How customer funds would be invested in instruments with minimal credit, market, and liquidity risks, and in compliance with the requirements of § 1.25; and

(2) How Applicant will obtain and keep associated records and data regarding the details of such investments.

EXHIBIT G — DEFAULT RULES AND PROCEDURES

• Attach as **Exhibit G**, documents that demonstrate compliance with the default rules and procedures requirements set forth in § 39.16 of the Commission's regulations, including but not limited to:

a. Default Management Plan – Applicant must provide a copy of its written default management plan which must contain all of the information required by § 39.16(b), along with Applicant's most recently documented results of a test of its default management plan.

b. Definition of default – Applicant must describe or otherwise document:

(1) The events (activities, lapses, or situations) that will constitute a clearing member default;

(2) What action Applicant can take upon a default and how Applicant will otherwise enforce the rules applicable in the event of default, including the steps and the sequence of the steps that will be followed. Identify whether a Default Management Committee exists and, if so, its role in the default process; and

(3) An example of a hypothetical default scenario and the results of the default management process used in the scenario.

c. Remedial action – Applicant must describe or otherwise document:

(1) The authority and methods by which Applicant may take appropriate action in the event of the default of a clearing member which may include, among other things, liquidating positions, hedging, auctioning, allocating (including any obligations of clearing members to participate in auctions or to accept allocations), and transferring of customer accounts to another clearing member (including an explanation of the movement of positions and collateral on deposit); and

(2) Actions taken by a clearing member or other events that would put a clearing member on Applicant's "watch list" or similar device.

d. Process to address shortfalls – Applicant must describe or otherwise document:

(1) Procedures for the prompt application of Applicant and/or clearing member financial resources to address monetary shortfalls resulting from a default;

(2) How Applicant will make publicly available its default rules including a description of the priority of application of financial resources in the event of default (i.e., the "waterfall"); and

(3) How Applicant will take timely action to contain losses and liquidity pressures and to continue to meet each obligation of Applicant.

e. Use of cross-margin programs – Describe or otherwise document, as applicable, how cross-margining programs will provide for fair and efficient means of covering losses in the event of a default of any clearing member participating in the program.

f. Customer priority rule – Describe or otherwise document rules and procedures regarding priority of customer accounts over proprietary accounts of defaulting clearing members and, where applicable, specifically in the context of specialized margin reduction programs such as cross-margining or common banking arrangements with other derivatives clearing organizations, clearing agencies, financial market utilities or foreign entities that perform similar functions.

EXHIBIT H — RULE ENFORCEMENT

- Attach as **Exhibit H**, documents that demonstrate compliance with the rule enforcement requirements set forth in § 39.17 of the Commission's regulations, including but not limited to:

a. Surveillance – Describe or otherwise document arrangements and resources for the effective monitoring and enforcement of compliance with Applicant's rules and the resolution of disputes.

b. Enforcement – Applicant must describe or otherwise document:

(1) Arrangements and resources for the effective enforcement of rules and authority and ability to discipline and limit or suspend a member's activities pursuant to clear and fair standards;

(2) Arrangements for enforcing compliance with its rules and addressing instances of non-compliance, including: disciplinary tools such as limiting, suspending, or terminating a clearing member's access or member privileges;

(3) How Applicant will address situations related to, but which may not constitute an event of default, such as a clearing member's failure to comply with certain rules or to maintain eligibility standards, or actions taken by other regulatory bodies;

(4) The standards and any procedural protections Applicant will follow in imposing any such enforcement measure; and

(5) Processes for reporting to the Commission Applicant's rule enforcement activities and possible sanctions that could be imposed against clearing members.

c. Dispute resolution – Describe or otherwise document arrangements and resources for resolution of disputes between customers and clearing members, and between clearing members.

EXHIBIT I — SYSTEM SAFEGUARDS

• Attach as **Exhibit I**, documents that demonstrate compliance with the system safeguards requirements set forth in § 39.18 of the Commission's regulations, including but not limited to:

a. A description of Applicant's program of risk analysis and oversight with respect to its operations and automated systems. This program must be designed to ensure daily processing, clearing, and settlement of transactions and address each of the following categories of risk:

(1) Information security;

(2) Business continuity-disaster recovery planning and resources;

(3) Capacity and performance planning;

(4) Systems operations;

(5) Systems development and quality assurance; and

(6) Physical security and environmental controls.

b. An explanation of how Applicant will establish and maintain resources that allow for the fulfillment of its program of risk analysis and oversight with respect to its operations and automated systems, and a description of such resources, including:

(1) A description of how Applicant will periodically verify that its resources are adequate to ensure daily processing, clearing, and settlement;

(2) A demonstration that Applicant's automated systems are reliable, secure, and have (and will continue to have) adequate scalable capacity;

(3) A description of the physical, technological and personnel resources and procedures used by Applicant as part of its business continuity and disaster recovery plan, and support for the conclusion that these resources are sufficient to enable the Applicant to resume daily processing, clearing and settlement no later than the next business day following a disruption; and

(4) A statement identifying which such resources are Applicant's own resources and which are provided by a service provider (outsourced). For resources that are outsourced, provide (i) all contracts governing the outsourcing arrangements, including all schedules and other supplemental materials, and (ii) a demonstration that Applicant employs personnel with the expertise necessary to enable them to supervise the service provider's delivery of the services.

c. An explanation of how Applicant will ensure the proper functioning of its systems, including its program for the periodic objective testing and review of its systems and back-up facilities (including all of its own and outsourced resources), and verification that all such resources will work effectively together;

d. Identification of the persons conducting the testing, including information as to their qualifications and independence;

e. A description of Applicant's emergency procedures, including a copy of its written plan for business continuity and disaster recovery and a description of how Applicant will coordinate its business continuity and disaster recovery plan (including testing) with those of its clearing members and providers of essential services such as telecommunications, power and water; and

f. A description of how Applicant will report exceptional events and planned changes to the Commission as required by §§ 39.18(g) and 39.18(h).

EXHIBIT J — REPORTING

• Attach as **Exhibit J**, documents that demonstrate compliance with the reporting requirements set forth in § 39.19 of the Commission's regulations including but not limited to:

a. How Applicant will make available to Commission staff all the information Commission staff need in order to carry out effective oversight. This must include a discussion of what will be made available on a routine basis, how often it will be made available, and the method of its transmission. The same items must be addressed for information it will make available on a non-routine basis and what events would precipitate the generation of such data or information. Applicant must also address the manner in which any information will be made available to clearing members, customers, market participants and/or the general public. If not part of an initial application, Applicant must provide a representation that it will provide the following when initially generated or when content changes occur:

(1) A list of current members/market participants;

(2) A list of all products currently eligible for clearing;

(3) The initial margin collection schedule;

(4) Information on any disciplinary actions (such as suspensions, etc.);

(5) Information concerning any physical or other emergencies;

(6) All information concerning any default by a member and the impact of the default on Applicant's financial resources;

(7) A copy of any examination/evaluation/compliance report of any regulatory body other than the Commission that oversees Applicant;

(8) A copy of any internal examination/evaluation/compliance reports such as, but not limited to, those related to stress testing and systems testing;

(9) Key personnel that have particular knowledge of the market(s) for which Applicant clears and any changes in those personnel, especially those to be contacted in case of market volatility or to respond to inquiries and emergencies;

(10) Copies of audited financial statements of Applicant; and

(11) Information regarding counterparties and their positions, stress test results, internal governance, legal proceedings, and other clearing activities.

b. Forms or templates to be used to satisfy the daily, quarterly, annual, and event-specific reporting requirements specified in § 39.19(c) of the Commission's regulations.

EXHIBIT K — RECORDKEEPING

- Attach as **Exhibit K**, documents that demonstrate compliance with the recordkeeping requirements set forth in § 39.20 of the Commission's regulations including but not limited to:

a. Applicant's recordkeeping and record retention policies and procedures;

b. The different activities related to the entity as a derivatives clearing organization for which it must maintain records;

c. The manner in which records relating to swaps and swap data are gathered and maintained; and

d. How Applicant will satisfy the performance standards of § 1.31 as applicable to derivatives clearing organizations, including:

(1) What "full" or "complete" will encompass with respect to each type of book or record that will be maintained;

(2) The form and manner in which books or records will be compiled and maintained with respect to each type of activity for which such books or records will be kept;

(3) Confirmation that books and records will be open to inspection by any representative of the Commission or of the U.S. Department of Justice;

(4) How long books and records will be readily available and how they will be made readily available during the first two years; and

(5) How long books and records will be maintained (and confirmation that, in any event, they will be maintained as required in § 1.31).

EXHIBIT L — PUBLIC INFORMATION

- Attach as **Exhibit L**, documents that demonstrate compliance with the public information requirements set forth in § 39.21 of the Commission's regulations including but not limited to:

a. Applicant's procedures for making its rulebook, a list of all current clearing members, and the information listed in § 39.21(c) readily available to the general public, in a timely manner, by posting such information on Applicant's website in accordance with § 39.21(d);

b. Any other information routinely made available to the public by Applicant;

c. How Applicant will make information available to clearing members and market participants in order to allow such persons to become familiar with Applicant's procedures before participating in clearing operations; and

d. How clearing members will be informed of their specific rights and obligations preceding a default and upon a default, and of the specific rights, options and obligations of Applicant preceding and upon a clearing member's default.

EXHIBIT M — INFORMATION SHARING

- Attach as **Exhibit M**, documents that demonstrate compliance with the information sharing requirements set forth in § 39.22 of the Commission's regulations, including but not limited to:

a. The appropriate and applicable information sharing agreements to which Applicant is, or intends to be, a party including any domestic or international information-sharing agreements or arrangements, whether formal or informal, which involve or relate to Applicant's operations, especially as it relates to measuring and addressing counterparty risk;

b. A description of the types of information expected to be shared and how that information will be shared;

c. An explanation as to how information obtained pursuant to any information-sharing agreements or arrangements would be used to further the objectives of Applicant's risk management program and any of its surveillance programs including financial surveillance and continuing eligibility of its clearing members; and

d. An explanation as to how Applicant expects to obtain accurate information pursuant to the information-sharing agreement or arrangement and the mechanisms or procedures which would allow for timely use and application of all information.

EXHIBIT N — ANTITRUST CONSIDERATIONS

- Attach as **Exhibit N**, documents that demonstrate compliance with the antitrust considerations requirements set forth in § 39.23 of the Commission's regulations, including but not limited to policies or procedures to ensure compliance with the antitrust considerations requirements.

EXHIBIT O — GOVERNANCE FITNESS STANDARDS

- Attach as **Exhibit O**, documents that demonstrate compliance with the governance fitness standards requirements set forth in § 39.24 of the Commission's regulations, including but not limited to:

a. The manner in which its governance arrangements permit consideration of the views of Applicant's owners, whether voting or non-voting, and its participants (clearing members and customers) including (i) the general method by which Applicant will learn of the views of Applicant's owners, other than through their exercise of voting power, or the views of participants, other than through representation on the Board of Directors or any committee of Applicant, and (ii) the manner in which Applicant will consider such views;

b. The fitness standards applicable to members of the Board of Directors, members of any disciplinary panels or disciplinary committees, clearing members, any individual or entity with direct access to settlement or clearing activities, and any party affiliated with any of the above individuals or entities, as well as natural persons who, directly or indirectly, own greater than 10 % of any one class of equity interest in Applicant; including a description or other documentation explaining how Applicant will collect and verify information that supports compliance with the fitness standards; and

c. The manner in which Applicant will condition clearing member access and other direct access to its settlement and clearing activities on agreement to be subject to the jurisdiction of Applicant.

EXHIBIT P — CONFLICTS OF INTEREST

- Attach as **Exhibit P**, documents that demonstrate compliance with the conflicts of interest requirements set forth in §§ 39.13(d), 39.25, and 40.9 of the Commission's regulations, including but not limited to:

a. A copy of:

(1) The charter (or mission statement) of Applicant (if not attached as **Exhibit A-8**).

(2) The charter (or mission statement) of Applicant's Board of Directors, each committee with a composition requirement (including any Executive Committee), as well as each other committee that has the authority to amend or constrain actions of Applicant's Board of Directors (if not attached as **Exhibit A-8**).

(3) If another entity "operates" the Applicant, the charter (or mission statement) of such entity's Board of Directors (if not attached as **Exhibit A-8**); and a description of the manner in which the Applicant will ensure that such entity's officers, directors, employees and agents and such entity's books and records shall be subject to the authority of the Commission pursuant to the Act and the Commission's regulations thereunder.

(4) An internal organizational chart showing the lines of responsibility and accountability for each operational unit.

b. Describe or otherwise document:

(1) Applicant's rules and procedures for ensuring compliance with the Commission's regulations with respect to limitations on voting equity ownership and the exercise of voting power by owners of the Applicant (and the parent company of the Applicant, if applicable) including the manner in which Applicant would remediate any breach of such limits;

(2) Applicant's nominations process for the Board of Directors and the process for assigning members of the Board of Directors or other persons to any committee referenced in item a.(2) above;

1. The manner in which the Board of Directors reviews its performance and the performance of its members on an annual basis; and

2. The procedures for removing a member of the Board of Directors, including where the conduct of such member is likely to be prejudicial to the sound and prudent management of Applicant;

(3) The composition of its nominating committee, including the number or percentage of public directors, and the identity of the Chairman of the Committee;

(4) The composition of any Executive Committee, including the number or percentage of public directors;

(5) The composition of the Risk Management Committee, including the number or percentage of public directors, the number or percentage of customer representatives, and the identity of the Chairman of the committee;

1. Whether the Risk Management Committee is an executive committee or an advisory committee; and

2. Whether the Risk Management Committee has delegated certain functions to any risk management subcommittee, including a description or other documentation of the functions so delegated;

(6) The form of report to be used in reporting to the Commission those instances in which the Board of Directors rejects a recommendation or supersedes an action of the Risk Management Committee, or the Risk Management Committee rejects a recommendation or supersedes an action of its subcommittee;

(7) The manner in which Applicant will (i) ensure decisions by the Risk Management Committee (or a subcommittee thereof) will not be restricted or limited by a body other than the Board of Directors (or the Risk Management Committee in the case of decisions by its subcommittee) with respect to decisions regarding clearing member eligibility or applications or product eligibility; (ii) prevent any undue influence on disciplinary panels or committees (including recusals by any member of a disciplinary panel or committee where such member has a financial interest in a matter before the panel); and (iii) provide that decisions by a disciplinary panel or committee may be appealed;

(8) Whether the Board of Directors has delegated the functions of the disciplinary panel to any other committee;

(9) The manner in which Applicant will record and summarize significant decisions, including decisions relating to open access, membership, and the finding of products acceptable or not acceptable for clearing;

(10) The manner in which Applicant will ensure that all information relating to transparency of governance arrangements at the Applicant is current, accurate, clear, and readily accessible to both the Commission and the public;

(11) Any written procedures that Applicant intends to adopt to identify, on an ongoing basis, existing and potential conflicts of interest;

(12) Applicant's process for making fair and non-biased decisions in the event of a conflict of interest; and

(13) Applicant's written policies or procedures on safeguarding non-public information.

EXHIBIT Q — COMPOSITION OF GOVERNING BOARDS

• Attach as **Exhibit Q**, documents that demonstrate compliance with the composition of governing boards requirements set forth in § 39.26, including but not limited to documentation describing the composition of Applicant's Board of Directors, including the number or percentage of public directors and market participants.

EXHIBIT R — LEGAL RISK CONSIDERATIONS

• Attach as **Exhibit R**, documents that demonstrate compliance with the legal risk considerations requirements set forth in § 39.27 of the Commission's regulations, including but not limited to

a. A discussion of how Applicant operates pursuant to a well-founded, transparent, and enforceable legal framework that addresses each aspect of the activities of Applicant. The framework must provide for Applicant to act as a counterparty, including, as applicable:

(1) Novation;

(2) Netting arrangements;

(3) Applicant's interest in collateral (including margin);

(4) The steps that Applicant can take to address a default of a clearing member, including but not limited to, the unimpeded ability to liquidate collateral and close out or transfer positions in a timely manner;

(5) Finality of settlement and funds transfers that are irrevocable and unconditional when effected (when Applicant's accounts are debited and credited); and

(6) Other significant aspects of Applicant's operations, risk management procedures, and related requirements.

b. If Applicant provides, or will provide, clearing services outside the United States, Applicant must (i) provide a memorandum from local counsel analyzing insolvency issues in the foreign jurisdiction where Applicant is based and (ii) describe or otherwise document:

(1) How Applicant has identified and addressed any conflict of law issues;

(2) Which jurisdiction's law is intended to apply to each aspect of Applicant's operations;

(3) The enforceability of Applicant's choice of law in relevant jurisdictions; and

(4) That its rules, procedures, and products are enforceable in all relevant jurisdictions.

BILLING CODE 6351–01–C

PART 140—ORGANIZATION, FUNCTIONS, AND PROCEDURES OF THE COMMISSION

■ 9. The authority citation for part 140 continues to read as follows:

Authority: 7 U.S.C. 2 and 12a.

■ 10. Amend § 140.94 by revising the section heading and paragraph (a)(5), redesignating paragraph (a)(6) as paragraph (a)(7), revise newly redesignated paragraph (a)(7), and add new paragraphs (a)(6) and (a)(8) through (a)(14) to read as follows:

§ 140.94 Delegation of authority to the Director of the Division of Clearing and Risk.

(a) * * *

(5) All functions reserved to the Commission in § 5.14 of this chapter;

(6) All functions reserved to the Commission in §§ 39.3(a)(2) and (a)(3) of this chapter;

(7) All functions reserved to the Commission in §§ 39.5(b)(2), (b)(3)(ix), and (d)(3) of this chapter;

(8) All functions reserved to the Commission in § 39.10(c)(4)(iv) of this chapter;

(9) All functions reserved to the Commission in §§ 39.11(b)(1)(vi), (b)(2)(ii), (c)(1), (c)(2), (f)(1) and (f)(4) of this chapter;

(10) All functions reserved to the Commission in § 39.12(a)(5)(i)(B) of this chapter;

(11) All functions reserved to the Commission in §§ 39.13(g)(8)(ii), (h)(1)(i)(C), (h)(1)(ii), (h)(3)(i), (h)(3)(ii), and (h)(5)(i)(A) of this chapter;

(12) The authority to request additional information in support of a rule submission under § 39.15(b)(2)(iii)(A) of this chapter and in support of a petition pursuant to section 4d of the Act under § 39.15(b)(2)(iii)(B) of this chapter;

(13) All functions reserved to the Commission in §§ 39.19(c)(3)(iv), (c)(5)(i), (c)(5)(ii), and (c)(5)(iii) of this chapter; and

(14) All functions reserved to the Commission in § 39.21(d) of this chapter.

Issued in Washington, DC, on October 18, 2011, by the Commission.

David A. Stawick,

Secretary of the Commission.

Appendices to Derivatives Clearing Organization General Provisions and Core Principles—Commission Voting Summary and Statements of Commissioners

Note: The following appendices will not appear in the Code of Federal Regulations

Appendix 1—Commission Voting Summary

On this matter, Chairman Gensler and Commissioners Dunn and Chilton voted in the affirmative; Commissioners Sommers and O'Malia voted in the negative.

Appendix 2—Statement of Chairman Gary Gensler

I support the final rulemaking on core principles for derivatives clearing organizations (DCOs). Centralized clearing has been a feature of the U.S. futures markets since the late-19th century. Clearinghouses have functioned both in clear skies and during stormy times—through the Great Depression, numerous bank failures, two world wars, and the 2008 financial crisis—to lower risk to the economy. Importantly, centralized clearing protects banks and their customers from the risk of either party failing.

When customers don't clear their transactions, they take on their dealer's credit risk. We have seen over many decades, however, that banks do fail. Centralized clearing protects all market participants by requiring daily mark to market valuations and requiring collateral to be posted by both parties so that both the swap dealer and its customers are protected if either fails. It lowers the interconnectedness between financial entities that helped spread risk throughout the economy when banks began to fail in 2008.

Today's rulemaking will establish certain regulatory requirements for DCOs to implement important core principles that were revised by the Dodd-Frank Act. We recognize the need for very robust risk management standards, particularly as more swaps are moved into central clearinghouses. We have incorporated the newest draft Committee on Payment and Settlement Systems (CPSS)-International Organization of Securities Commissions (IOSCO) standards for central counterparties into our final rules.

First, the financial resources and risk management requirements will strengthen financial integrity and enhance legal certainty for clearinghouses. We're adopting a requirement that DCOs collect initial margin on a gross basis for its clearing member's customer accounts For interest rates and financial index swaps, such as credit default swaps, we are maintaining, as proposed, a minimum margin for a five-day liquidation period. This is consistent with current market practice, and many commenters recommended this as a minimum. For the clearing of physical commodity swaps, such as on energy, metals and agricultural products, we are requiring margin that is risk-based but consistent with current market practice—a minimum of one day. Maintaining a minimum five day liquidation period for interest rates and credit default swaps is appropriate not only as it is consistent with current market practice, but also as these markets are the most systemically relevant for the interconnected financial system. History shows that, in 2008, it took five days after the failure of Lehman Brothers for the clearinghouse to transfer Lehman's interest rate swaps positions to other clearing members. These financial resource requirements, and particularly the margin requirements, are critical for safety and soundness as more swaps are moved into central clearing.

Second, the rulemaking implements the Dodd-Frank Act's requirement for open access to DCOs. The participant eligibility requirements promote fair and open access to clearing. Importantly, the rule addresses how a futures commission merchant can become a member of a DCO. The rule promotes more inclusiveness while allowing DCO to scale a member's participation and risk based upon its capital. This improves competition that will benefit end-users of swaps, while protecting DCOs' ability manage risk.

Third, the reporting requirements will ensure that the Commission has the information it needs to monitor DCO compliance with the Commodity Exchange Act and Commission regulations.

Fourth, the rules formalize the DCO application procedures to bring about greater uniformity and transparency in the application process and facilitate greater efficiency and consistency in processing applications.

These reforms will both lower risk in the financial system and strengthen the market by making many of the processes more efficient and consistent.

Appendix 3—Statement of Commissioner Jill Sommers

The final rules adopted by the Commission today for derivatives clearing organizations (DCOs) will implement a key component of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) to facilitate centralized clearing of both exchange-traded and over-the-counter swaps. While I fully support the centralized clearing of swaps, I reluctantly cannot support the final DCO rules.

In my opinion, the rules are needlessly prescriptive, internally inconsistent, and depart from the Commission's time-tested principles-based oversight regime, with little to no explanation of the costs and benefits of doing so, or even a rationale other than an overarching belief that prescriptive rules will increase legal certainty and prevent a race to the bottom by competing clearinghouses. A few examples will illustrate my point.

Rule 39.11(a)(1) requires a DCO to maintain sufficient financial resources to cover a default by its largest clearing member. Rule 39.11(a)(2) requires a DCO to maintain sufficient financial resources to cover its operating costs for a period of at least one year. Rules 39.11(b)(1) and (b)(2) list the types of financial resources deemed sufficiently liquid to meet the requirements of Rules 39.11(a)(1) and (a)(2). The preamble to the rules states that letters of credit are not an acceptable financial resource for purposes of Rules 39.11(a)(1) or (a)(2), but may be allowed on a case-by-case basis. Letters of credit are also banned for purposes of Rule 39.11(e)(1) (cash obligations), and Rule 39.11(e)(3) (guaranty fund obligations), neither of which allow for a case-by-case determination. When it comes to initial margin, letters of credit are allowed for futures and options without qualification, but banned for swaps.

These distinctions, in my opinion, are not legally or factually justifiable. The ability to draw on safe, liquid assets is critical in all of the situations described above. We should treat letters of credit the same way unless there is a compelling reason not to. This is especially true given the fact that banning their use as initial margin for swaps will have the perverse, unintended consequence of disincentivizing voluntary clearing by commercial end-users who support their swaps positions using letters of credit—a result that is directly at odds with the goals of Dodd-Frank.

Another example can be found in Rule 39.13(g)(2)(ii), which establishes a one-day minimum liquidation time for calculating initial margin for futures and options, a one-day minimum liquidation time for swaps on agricultural, metal, and energy commodities, and a five-day minimum liquidation time for all other swaps. In the cost-benefit analysis, the Commission states that ''using only one criterion—i.e., the characteristic of the commodity underlying a swap—to determine liquidation time could result in less-than-optimal margin calculations.'' The Commission goes on to describe the complex nature of calculating appropriate margin levels, which includes the ability to assess quantitative factors such as the risk characteristics of the instrument traded,

its historical price volatility and liquidity in the relevant market, as well as ''expert judgment as to the extent to which such characteristics and data may be an accurate predictor of future market behavior with respect to such instruments, and [the application of] such judgment to the quantitative results.'' We then explain that the Commission is not capable of determining the risk characteristics, price volatility and market liquidity of even a sample of swaps for purposes of determining an appropriate liquidation time for specific swaps.

In the face of our admitted inability to determine appropriate liquidation times for particular swaps, we are picking a one-day time for some, based on the underlying commodity, and a five-day time for all others, even though this ''could result in less-than-optimal margin calculations.'' This defies common sense.

The only reason we give for eliminating the long-standing discretion of the acknowledged experts, i.e., the DCOs, to determine the appropriate liquidation times for the transactions they clear is to prevent a feared race to the bottom by DCOs who will compete to clear swaps in the future. We acknowledge, however, that DCOs have used reasonable and prudent judgment in establishing liquidation times in the past, including DCOs that currently compete in the swaps clearing space. The Commission gives no reason for its belief that there may be a race to the bottom if we do not establish this less than ideal methodology. Nor does the Commission acknowledge the existence of other safeguards in the rules that give us strong tools for policing a potential race to the bottom.

With the passage of Dodd-Frank, Congress gave the Commission broad authority to regulate swap transactions, swap markets and swap market participants. I do not believe, however, that Congress intended for the Commission to strip DCOs of the flexibility to determine the manner in which they comply with core principles, as we have done with these rules. Our registered DCOs have a strong track record of prudent risk management, including during the financial crisis, and there is no reason to believe they will not continue to use their expert judgment in a responsible fashion. Moreover, unnecessary and inflexible rules, such as these, will prevent DCOs from quickly adapting to changing market conditions for no apparent benefit. I therefore dissent.

Appendix 4—Statement of Commissioner Scott O'Malia

Today, the Commission approved a final rulemaking on the operation of derivatives clearing organizations (each, a ''DCO'').[289] Of the Dodd-Frank rulemakings that the Commission has so far undertaken, this rulemaking is among the most important. I have been a strong proponent of clearing. In the aftermath of the Enron crisis, I witnessed first-hand how the creation of ClearPort ameliorated counterparty credit fears in the energy merchant markets and restored liquidity to those markets. I am certain that clearing will similarly benefit the swaps market,[290] particularly by significantly expanding execution on electronic platforms, thereby increasing price transparency and discovery. Moreover, as we have seen in the 2008 financial crisis, clearing has the potential to mitigate systemic risk, by ensuring that swap counterparties—not hardworking American taxpayers—post collateral to support their exposures.

The main goal of this final rulemaking is to ensure that clearing contributes to the integrity of the United States financial system by, among other things, allowing entities other than the largest dealer banks to offer clearing services to commercial and financial end-users. I fully support this goal. However, in an attempt to achieve this goal, this rulemaking abandons the principles-based regulatory regime which permitted DCOs to perform so admirably in the 2008 financial crisis. Instead, the final rulemaking sets forth a series of prescriptive requirements. I disagree with this approach. DCO risk management poses complex and multidimensional challenges. One DCO may have a significantly different risk profile than another. Consequently, each DCO must have sufficient discretion to match requirements to risks. The role of the Commission is to oversee the exercise of such discretion, not to prevent such exercise.[291]

Additionally, I am mindful of the cost of clearing and want to ensure that such cost does not constitute a barrier to entry. Certain provisions in this final rulemaking may impose substantial costs without corresponding benefits. Such provisions may discourage market participants from executing transactions subject to mandatory clearing, even if they need such transactions to prudently hedge risks, or from clearing on a voluntary basis. By creating perverse incentives to keep risk outside of the regulatory framework, and to leave it within our commercial and financial enterprises, the DCO rules undermine a fundamental purpose of the Dodd-Frank Act—namely, the expansion of clearing.

I will elaborate on each concern in turn.

Participant Eligibility: One-Size Does Not Fit All

This final rulemaking prohibits a DCO from requiring more than $50 million in capital from any entity seeking to become a swaps clearing member. This number makes a great headline, mainly because it is so low. It also sends an unequivocal message to DCOs that have clearing members that are primarily dealer banks. However, in adopting and interpreting this requirement, the Commission may unwisely limit the range of legitimate actions that DCOs can take to manage their counterparty risks. By imposing such limitations, the Commission is introducing costs to clearing that it fails to detail and explore.

Let me be plain. I oppose anticompetitive behavior. However, an entity with $50 million in capitalization may not be an appropriate clearing member for every DCO. The $50 million threshold prevents DCOs from engaging in anticompetitive behavior but also prohibits DCOs from taking legitimate, risk-reducing actions. Instead of adopting this prescriptive requirement, the Commission should have provided principles-based guidance to DCOs on the other components of fair and open access, such as the standard for less restrictive participation requirements.[292] By taking a more principles-based approach, the Commission could have been in greater accord with international regulators, one of which explicitly cautioned against the $50 million threshold.[293]

[289] Derivatives Clearing Organizations (to be codified at 17 CFR pts. 1, 21, 39, and 140), available at: *http://www.cftc.gov/PressRoom/Events/opaevent_cftcdoddfrank101811* (the ''DCO Final Rule'').

[290] *See* Kathryn Chen et al., An Analysis of CDS Transactions: Implications for Public Reporting, Federal Reserve Bank of New York Staff Report no. 517 (September 2011), available at: *http://www.newyorkfed.org/research/staff_reports/sr517.pdf* (stating that ''[c]learing-eligible products within our sample traded on more days and had more intraday transactions than non-clearing eligible products'').

[291] *See* section 3(b) of the Commodity Exchange Act (CEA), 7 U.S.C. 5(b) (stating that ''[i]t is the purpose of this Act to serve the public interests * * * through a system of effective self-regulation of trading facilities, clearing systems, market participants and market professionals under the oversight of the Commission.'').

[292] The DCO Final Rule, *supra* note 289, at 387–388 (to be codified at 17 CFR 39.12(a)(1)).

[293] *See* letter, dated March 21, 2011, from the United Kingdom Financial Services Authority (''FSA''), available at *http://comments.cftc.gov/*

Basis for the $50 Million?

How did the Commission determine that the $50 million threshold is appropriate? It is not really evident from the notice of proposed rulemaking.[294] In the final rulemaking, the Commission states that the $50 million threshold was derived from the fact that most registered futures commission merchants (''FCMs'') that are currently DCO clearing members have at least $50 million in capital.[295]

The final rulemaking, however, does not answer a number of questions that are crucial to determining whether the $50 million threshold is appropriate for all swap transactions. These questions include, without limitation: What types of products do the referenced FCMs currently clear? Are there differences between the capital distributions of FCMs that clear different products? If so, what are such differences?

The answers to these questions are important because FCMs may need different amounts of capital to support their exposures to different products. Assume, for example, that the average capitalization of FCMs clearing agricultural futures is $50 million. Further assume that an FCM has $50 million in capital, and is seeking to become a clearing member. The Commission may reasonably conclude that such FCM would have the resources to clear agricultural futures. It may also reasonably conclude that such FCM would have the resources to clear agricultural swaps that have the same terms and conditions as agricultural futures. The Commission cannot reasonably conclude, however, that such FCM would have the resources to clear credit default swaps.

By not setting forth the answers to questions such as these, the final rulemaking creates the impression that the $50 million threshold is arbitrary, and renders vulnerable its conclusion that the threshold ''captures firms that the Commission believes have the financial, operational, and staffing resources to participate in clearing swaps without posing an unacceptable level of risk to a DCO.''[296]

Anticompetitive behavior? Or legitimate, risk-reducing action?

The final rulemaking recognizes that DCOs may increase capital requirements for legitimate, risk-reducing reasons. In fact, the final rulemaking requires a DCO to ''set forth capital requirements that * * * appropriately match capital to risk.''[297] Further, the final rulemaking mandates DCOs to ''require clearing members to have access to sufficient financial resources to meet obligations arising from participation in the [DCO] in extreme but plausible market conditions.''[298] The final rulemaking states that a DCO ''may permit such financial resources to include, without limitation, a clearing member's capital.''[299]

The final rulemaking, however, provides little insight on how the Commission intends to differentiate between (i) a required risk-based increase in capital requirements and (ii) an illegitimate attempt to circumvent the $50 million threshold to squash competition. To use an example grounded in reality—ICE Clear Credit recently lowered its minimum capital requirement for clearing members to $100 million. However, it added a requirement that clearing members hold excess net capital equal to 5 percent of their segregated customer funds. Upon learning about the additional requirement, at least two existing FCMs complained that it violates fair and open access.[300] The final rulemaking gives very little guidance on the criteria that the Commission will apply in adjudicating a dispute such as this. The preamble to the final rulemaking simply states: ''A DCO may not * * * [enact] some additional financial requirement that effectively renders the $50 million threshold meaningless for some potential clearing members.'' It further states that such a requirement *would* violate the other components of fair and open access, such as ''§ 39.12(a)(1)(i) (less restrictive alternatives), or § 39.12(a)(1)(iii) (exclusion of certain types of firms).''[301] This vague statement provides no legal certainty or bright lines for DCOs and potential clearing members to follow.

If I were running a DCO, I would be extremely confused. On the one hand, the final rulemaking requires me to match capital requirements to risk. On the other hand, the preamble suggests that I cannot increase capital requirements (or any other financial requirement), if that would prohibit some entities with $50 million in capitalization from becoming clearing members. How should I resolve this conundrum?

Hidden Costs

If a DCO took a narrow interpretation of the reference to *financial requirements* in the preamble, then it has only one alternative: (i) Admit any entity with $50 million in capital as a clearing member and (ii) impose strict risk limits.[302] How strict could such limits be? To lend some context to this $50 million threshold, a recent report from the staff of the Federal Reserve Bank of New York observed that $50 million tended to be the notional value of one single transaction in a credit default swap index with relatively high liquidity.[303]

Assuming that the Commission does not require the DCO to increase its risk limits,[304] where does this situation leave the DCO? The DCO would need to incur the cost of (i) evaluating applications from all entities with $50 million in capital, (ii) operationally connecting to such entities, and (iii) potentially defending itself against claims from such entities that the risk limits or financial requirements are too stringent. The DCO may pass on such costs to clearing members, which may pass on such costs to commercial and financial end-users. In the meantime, such entities, when admitted, may be unable to clear any significant volume

PublicComments/CommentList.aspx?id=957 (stating that ''whilst capital thresholds or other participation eligibility threshold limitations may be a potential tool to help ensure fair and open access to [central counterparties (''CCPs'')], to impose them on clearing arrangements for products that have complex or unique characteristics could lead to increased risk to the system in the short to medium term.'')

[294] *See* Risk Management Requirements for Derivatives Clearing Organizations, 76 FR 3698, 3791 (Jan. 20, 2011).

[295] *See* the DCO Final Rule, *supra* note 289, at 83 to 84 (further stating that ''of 126 FCMs, 63 currently have capital above $50 million and most FCMs with capital below that amount are not clearing members.'').

[296] *Id.* at 83.

[297] *Id.* at 388 (to be codified at 17 CFR 39.12(a)(2)(ii)) (further stating that ''[c]apital requirements shall be scalable to risks posed by clearing members''.).

[298] *Id.* (to be codified at 17 CFR 39.12(a)(2)(i)).

[299] *Id.* Additionally, the notice of proposed rulemaking states: ''Proposed §§ 39.12(a)(2)(ii) and 39.12(a)(2)(iii), considered together, would require a DCO to admit any person to clearing membership for the purpose of clearing swaps, if the person had $50 million in capital, but would permit a DCO to require each clearing member to hold capital proportional to its risk exposure. Thus, if a clearing member's risk exposure were to increase in a non-linear manner, the DCO could increase the clearing member's corresponding scalable capital requirement in a non-linear manner.'' 76 FR at 3701.

[300] *See* Matthew Leising, ''ICE Clear Credit's Member Rules Too Exclusive, Small Firms Say,'' Bloomberg, Aug. 9, 2011, available at: *http://www.bloomberg.com/news/2011-08-09/ice-clear-credit-s-member-rules-too-exclusive-small-firms-say.html.*

[301] The DCO Final Rule, supra note 289, at 85–86.

[302] The final rulemaking requires DCOs to impose risk limits on clearing members. *See id.* at 399 to 400 (to be codified at 17 CFR 39.13(h)(1)).

[303] *See supra* note.

[304] *See* the DCO Final Rule, supra note 289, at 399 to 400 (to be codified at 17 CFR 39.13(h)(1)(i)(C)) (stating that ''[t]he Commission may review such methods, thresholds, and financial resources and require the application of different methods, thresholds, or financial resources, as appropriate.'').

of transactions, for themselves or for customers, especially in asset classes such as credit default swaps. Under this scenario, rather than leading to fair and open access, the $50 million threshold may actually impede access to clearing by commercial and financial end-users, because the threshold would increase their costs without introducing meaningful competition among FCMs offering clearing services.

If, on the other hand, a DCO took a more aggressive interpretation of the reference to *financial requirements* in the preamble, then it may have other alternatives to mitigate risks that admitting an entity with $50 million in capital may introduce. For example, it may increase margin requirements. It may also increase guaranty fund contributions for all clearing members, in proportion to their clearing activity. In other words, a DCO may increase the overall cost of clearing in order to compensate for the risks of having lesser capitalized new clearing members.

What are the potential effects of such increases? It is difficult to determine from our cost-benefit analysis. The analysis does not identify increases in margin or guaranty fund contributions as potential costs, much less attempt to quantify such costs.[305] However, if the increases in costs are significant, and if such increases apply to a wide range of clearing members (because the DCO fears being accused of unjustified discrimination),[306] then such increases would most definitely influence whether commercial and financial entities voluntarily clear or even enter into hedges in the first place.

Principles-Based Regulation Is a Better Solution

I propose a simple solution that would have addressed the confusion and hidden costs resulting from the $50 million threshold. The Commission should have eliminated the threshold. The threshold adds no value to the other components of fair and open access.[307] Given that the final rulemaking rightfully requires a DCO to properly manage its risks, one or more DCOs would inevitably impose some sort of financial requirement that would prevent entities with $50 million (or more) in capital from directly participating in clearing. At that point, the Commission would not be able to opine on such a requirement without looking to the other components of fair and open access. As a result, it would have served the Commission well to have focused in the first instance on setting forth principles-based guidance on such components.[308] Moreover, principles-based guidance would have brought the Commission into greater accord with certain international regulators,[309] current international standards on CCP regulation,[310] as well as the proposed revisions to such standards.[311]

Costs Without Benefits: Minimum Liquidation Time Requirements

I have consistently highlighted that our rulemakings are interconnected and that the Commission has an obligation to analyze the cost impact across rulemakings. In this instance, I am concerned about the relationship between this final rulemaking and our proposal interpreting core principle 9 for designated contract markets (DCMs), which may be finalized in the future.[312] Although this relationship may result in significant costs for the market, this final rulemaking fails to disclose such costs.

Specifically, this final rulemaking requires a DCO to calculate margin using different minimum liquidation times for different products. A DCO must calculate margin for (i) futures based on a one-day minimum liquidation time, (ii) agricultural, energy, and metals swaps based on a one-day minimum liquidation time, and (iii) all other swaps based on a five-day minimum liquidation time.[313]

No Policy Basis for Minimum Liquidation Times

As a preliminary matter, this final rulemaking creates the impression that these requirements are arbitrary, like the $50 million threshold. Although the final rulemaking characterizes these requirements as ''prudent,'' it sets forth

[305] Interestingly, the preamble notes that at least two commenters agreed that a DCO may legitimately use such increases to moderate the risk of a member with only $50 million in capital. Specifically, the preamble states: ''Newedge commented that the proposed rule should not increase risk to a DCO because a DCO can mitigate risk by, among other things, imposing position limits, stricter margin requirements, or stricter default deposit requirements on lesser capitalized clearing members.'' The preamble also states: ''J.P. Morgan, however, commented that a cap on a member's minimum capital requirement would not impact the systemic stability of a DCO as long as * * * DCOs hold a sufficient amount of margin and funded default guarantee funds.'' *Id.* at 80 to 82. It is therefore unclear why the cost-benefit analysis did not address the potential for such increases.

[306] *See id.* at 387 (to be codified at 17 CFR 39.12(a)(1)(iii)) (stating that ''[a] derivatives clearing organization shall not exclude or limit clearing membership of certain types of market participants unless the derivatives clearing organization can demonstrate that the restriction is necessary to address credit risk or deficiencies in the participants' operational capabilities that would prevent them from fulfilling their obligations as clearing members.'' The regulation contains no further detail regarding what type of demonstration would be sufficient.).

[307] In legal parlance, the $50 million threshold is neither necessary nor sufficient to determining whether a DCO has violated fair and open access. The threshold is not necessary because a DCO can set an even lower minimum capital requirement and still violate fair and open access if another requirement ''excludes or limits clearing membership of certain types of market participants.'' *Id.* (to be codified at 17 CFR 39.12(a)(1)(iii)). The threshold is not sufficient because, even if the DCO accepts all entities with $50 million in capital as clearing members, the Commission may still hold that DCO violated fair and open access if it imposes ''some additional financial requirement that effectively renders the $50 million threshold meaningless.'' *Id.* at 85–86.

[308] In such guidance, the Commission could have detailed the information that a DCO would need to provide in order to demonstrate that it could not adopt a less restrictive participation requirement without materially increasing its own risk. The Commission could have also discussed the weight that DCOs should accord to a particular level of capitalization, depending on whether the relevant clearing member (i) engages in businesses other than the intermediation of futures or swaps, or (ii) participates at multiple DCOs rather than one DCO.

[309] *See supra* note. I note that the Commission and FSA share jurisdiction over three DCOs clearing swaps—namely, LCH.Clearnet Limited, ICE Clear Europe Limited, and CME Clearing Europe. How the Commission and FSA will resolve conflicting regulation remains to be seen.

[310] *See* Bank for International Settlements' Committee on Payment and Settlement Systems and Technical Committee of the International Organization of Securities Commissions (''CPSS–IOSCO''), ''Recommendations for Central Counterparties,'' CPSS Publ'n No. 64 (November 2004), available at: *http://www.bis.org/publ/cpss64.pdf* (the ''CPSS–IOSCO Recommendations''). Section 4.2.2 of the CPSS–IOSCO Recommendations state: ''To reduce the likelihood of a participant's default and to ensure timely performance by the participant, a CCP should establish rigorous financial requirements for participation. Participants are typically required to meet minimum capital standards. Some CCPs impose more stringent capital requirements if exposures of or carried by a participant are large or if the participant is a clearing participant. Capital requirements for participation may also take account of the types of products cleared by a CCP. In addition to capital requirements, some CCPs impose standards such as a minimum credit rating or parental guarantees.''

[311] *See* CPSS–IOSCO, ''Principles for financial market infrastructures: Consultative report,'' CPSS Publ'n No. 94 (March 2011), available at: *http://www.bis.org/publ/cpss94.pdf* (the ''CPSS–IOSCO Consultation''). The CPSS–IOSCO Consultation, which CPSS–IOSCO has not adopted as final, does not set forth any requirement or suggestion that resembles the $50 million threshold. Instead, the Consultation, like the Recommendations, emphasizes the importance of ''risk-based'' CCP participation criteria that are not unduly discriminatory. Specifically, Section 3.16.6 of the CPSS–IOSCO Consultation states: ''Participation requirements based solely on a participant's size are typically insufficiently related to risk and deserve careful scrutiny.'' Whereas the Consultation may have intended to comment on restrictively high CCP participation requirements, the same logic applies to restrictively low CCP participation requirements. Neither are risk-based.

[312] *See* Core Principles and Other Requirements for Designated Contract Markets, 75 FR 80572 (Dec. 22, 2010).

[313] *See* the DCO Core Principles, *supra* note 289, at 393–394 (to be codified at 17 CFR 39.13(g)(2)(ii)).

no justification for this characterization.[314] According to the final rulemaking, DCOs should consider at least five factors in establishing minimum liquidation times for its products, including trading volume, open interest, and predictable relationships with highly liquid products.[315] In setting forth such factors, the Commission is holding DCOs to a higher standard than it holds itself. The final rulemaking presents no evidence that the Commission considered any of the five factors in determining minimum liquidation times.[316]

Negative Implications for Competition

More importantly, when these requirements are juxtaposed against our proposal interpreting DCM core principle 9, the potential of these requirements to disrupt already established futures markets becomes apparent. In the proposal, which is entitled *Core Principles and Other Requirements for Designated Contract Markets,* the Commission proposed, in a departure from previous interpretations of DCM core principle 9, to prohibit a DCM from listing any contract for trading unless an average of 85 percent or greater of the total volume of such contract is traded on the centralized market, as calculated over a twelve (12) month period.[317] If the Commission finalizes such proposal, then DCMs may need to delist hundreds of futures contracts.[318] Financial contracts may be affected, along with contracts in agricultural commodities, energy commodities, and metals.

According to the proposal, DCMs may convert delisted futures contracts to swap contracts.[319] However, if the futures contracts reference financial commodities, then this final rulemaking would require that a DCO margin such swap contracts using a minimum liquidation time of five days instead of one day for futures. If nothing substantive about the contracts change other than their characterization (*i.e.,* futures to swaps), then how can the Commission justify such a substantial increase in minimum liquidation time and margin? An increase of this magnitude may well result in a chilling of activity in the affected contracts. Such chilling would be an example of the type of market disruption that the CEA was intended to avoid.

I believe this has severe implications for competition. As commenters to the DCM proposal noted, market participants generally execute new futures contracts outside the DCM centralized market until the contracts attract sufficient liquidity. Attracting such liquidity may take years.[320] Let us assume that an established DCM already lists a commercially viable futures contract on a financial commodity that meets the 85 percent threshold. Even without the DCM proposal and this final rulemaking, a DCM seeking to compete by listing a futures contract with the same terms and conditions already faces an uphill battle. Now with the DCM proposal, the competitor DCM would have to also face the constant threat of being required to convert the futures contract into a swap contract.

With this final rulemaking, the competitor DCM (or a competitor swap execution facility (SEF)) faces the additional threat that, by virtue of such conversion, the contract would be margined using a five-day minimum liquidation time. In contrast, the incumbent futures contract—which may have the same terms and conditions as the new ''swap'' contract—would still be margined using a one-day minimum liquidation time. It is difficult to imagine a DCM (or a competitor SEF) willing to compete given the twin Swords of Damocles that it would need to confront. By dissuading such competition, this final rulemaking and the DCM proposal undermine the ''responsible innovation and fair competition among boards of trade'' that the CEA was intended to promote.[321]

Some may argue that this final rulemaking would not have the negative effects that I articulated because it explicitly permits the Commission to establish, either sua sponte or upon DCO petition, longer or shorter liquidation times for particular products or portfolios.[322] I would argue that requiring market participants, during the pendency of such a petition, to pay margin calculated using a five-day minimum liquidation time would likely cause a substantial number of market participants to withdraw from the market, thereby chilling activity—perhaps irrevocably—in the contract. I would further argue that the additional cost that (i) a DCM would incur to persuade a DCO to file a petition with the Commission and (ii) a DCM or DCO would incur to prepare such a petition, when coupled with the possibility that the Commission may deny such petition, would likely deter a DCM from seeking to compete with an incumbent futures contract. After all, the Commission may take a long time to consider any DCO petition. For example, the Commission took approximately two years to approve a petition to reduce the minimum liquidation time for certain contracts on the Dubai Mercantile Exchange from two days to one day.[323] Thus, this power to petition the Commission for relief may be of little value to offset the likely stifling of competition.

Return to Principles-Based Regulation

What should the Commission have done to avoid market disruption and a curtailment in competition? Again, the Commission should have retained a principles-based regime, and should have permitted each DCO to determine the appropriate minimum liquidation time for its products, using the five factors articulated above. Determining

[314] *See id.* at 126–127.

[315] According to the final rulemaking, such factors are: ''(i) Average daily trading volume in a product; (ii) average daily open interest in a product; (iii) concentration of open interest; (iv) availability of a predictable basis relationship with a highly liquid product; and (v) availability of multiple market participants in related markets to take on positions in the market in question.'' *Id.* at 129.

[316] Instead of considering the five factors, the Commission appears to have simply codified the minimum liquidations times that certain DCOs currently use for swaps. For example, the Commission justifies setting a minimum liquidation time of five days for swaps referencing non-physical commodities as follows: ''The longer liquidation time, currently five days for credit default swaps at ICE Clear Credit LLC and CME, and for interest rate swaps at LCH and CME, is based on their assessment of the higher risk associated with these products.'' *Id.* at 127–128. Given that this justification appears to focus on credit default swaps and interest rate swaps, it is unclear how the Commission concluded that a five-day minimum liquidation time is appropriate for swaps that reference financial commodities but are neither credit default swaps nor interest rate swaps.

[317] 75 FR at 80616.

[318] According to information that I have received from one DCM, the proposal would force conversion of 628 futures and options contracts to swap contracts. Moreover, according to the Off-Market Volume Study (May-2010 through July-2010) prepared by Commission staff, the proposal would force conversion of approximately 493 futures and options contracts. *See* Off-Market Volume Study, available at: *http://www.cftc.gov/LawRegulation/DoddFrankAct/Rulemakings/DF_12_DCMRules/index.htm.*

[319] *See* 75 FR at 80589–90.

[320] *See* letter, dated February 22, 2011, from NYSE Liffe U.S., available at: *http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=27910&SearchText=. See also* letter, dated February 22, 2011, from ELX Futures, L.P., available at: *http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=27873&SearchText=. See further* letter, dated February 22, 2011, from Eris Exchange, LLC, available at: *http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=27853&SearchText=.*

[321] *See* section 3(b) of the CEA, 7 U.S.C. 5(b).

[322] *See* the DCO Final Rule, *supra* note 289, at 394 (to be codified at 17 CFR 39.13(g)(2)(ii)(D)).

[323] The petition is available at: *http://www.cftc.gov/PressRoom/PressReleases/pr5724-09.* The petition was filed on July 28, 2009. The Commission issued an order granting the petition on September 16, 2011. The order does not appear on the Commission Web site.

appropriate margin requirements involves quantitative and qualitative expertise. Such expertise resides in the DCOs and not in the Commission. In its cost-benefit analysis, the final rulemaking admits as much.[324] Returning to a principles-based regime would have also better aligned with current international standards on CCP regulation,[325] as well as the revisions to such standards.[326]

The ''Race to the Bottom'' Argument Simply Cannot Withstand Scrutiny

Some may argue that, by not imposing minimum liquidation times, the Commission may enable a ''race to the bottom,'' where DCOs would compete by offering the lowest margin. As a conceptual matter, given that the Commission has not demonstrated that the minimum liquidation times that it has decided to mandate are ''prudent,'' it cannot demonstrate that the one-day or five-day period would prevent a ''race to the bottom.''[327] As an empirical matter, the Commission must have decided that DCOs currently competing to clear interest rate swaps and credit default swaps have not entered into a ''race to the bottom,'' because the final rulemaking codifies the existing five-day minimum liquidation time that such competing DCOs voluntarily adopted.[328]

Finally, the Commission has more effective tools to prevent any ''race to the bottom.'' First, this final rulemaking requires a DCO to determine the adequacy of its initial margin requirements on a daily basis.[329] Second, this final rulemaking requires a DCO to conduct back testing of its initial margin requirements on a daily or monthly basis.[330] Third, this final rulemaking requires a DCO to stress test its default resources at least once a month, and to report to the Commission the results of such stress testing at least once every fiscal quarter.[331] Fourth, the Commission has the ability to independently back test and stress test DCO initial margin requirements.[332] Consequently, the Commission would be able to detect any ''race to the bottom'' that would cause any DCO to have insufficient initial margin to cover its risks.

Cost-Benefit Analysis: We Can Do Better

I have always emphasized that the Commission must engage in more rigorous cost-benefit analyses of its rulemakings. At various points in my speeches and writings, I have urged the Commission to (i) focus on the economic effects of its rulemakings, both cumulative and incremental, (ii) quantify the costs and benefits of its rulemakings, both cumulative and incremental, and (iii) better justify the choice of a prescriptive requirement when a less-costly and equally effective principles-based alternative is available. Only by engaging in more rigorous cost-benefit analyses would the Commission fulfill the mandates of two Executive Orders[333] and render our rulemakings less vulnerable to legal challenge.[334]

I have read the cost-benefit analysis in this final rulemaking with great interest. I can confirm that such analysis is longer than previous analyses. Unfortunately, increased length does not ensure an improvement in analysis and content.

[324] *See* the DCO Final Rule, supra note 289, at 315–316 (stating that ''[i]n addition to the liquidation time frame, the margin requirements for a particular instrument depend upon a variety of characteristics of the instrument and the markets in which it is traded, including the risk characteristics of the instrument, its historical price volatility, and liquidity in the relevant market. Determining such margin requirements does not solely depend upon such quantitative factors, but also requires expert judgment as to the extent to which such characteristics and data may be an accurate predictor of future market behavior with respect to such instruments, and applying such judgment to the quantitative results * * * Determining the risk characteristics, price volatility, and market liquidity of even a sample for purposes of determining a liquidation time specifically for such instrument would be a formidable task for the Commission to undertake and any results would be subject to a range of uncertainty.'').

[325] *See supra* note 310. With respect to minimum liquidation times, Section 4.4.3 of the CPSS–IOSCO Recommendations simply state: ''Margin requirements impose opportunity costs on CCP participants. So, a CCP needs to strike a balance between greater protection for itself and higher opportunity costs for its participants. For this reason, margin requirements are not designed to cover price risk in all market conditions. Nonetheless, a CCP should estimate the interval between the last margin collection before default and the liquidation of positions in a particular product, and hold sufficient margin to cover potential losses over that interval in normal market conditions.''

[326] *See also supra note 311.* Like the CPSS–IOSCO Recommendations, the CPSS–IOSCO Consultation also advocates a principles-based model for estimating minimum liquidation times. Section 3.6.7 of the CPSS–IOSCO Consultation states: ''A CCP should select an appropriate close-out period for each product cleared by the CCP, and document the close-out periods and related analysis for each product type. A CCP should base its close-out period upon historical price and liquidity data when developing its initial margin methodology. Historical data should include the worst events that occurred in the selected time period for the product cleared as well as simulated data projections that would capture potential events outside of the historical data. In certain instances, a CCP may need to determine margin levels using a shorter historical period to reflect better new or current volatility in the market. Conversely, a CCP may need to determine margin levels based on a longer period in order to reflect past volatility. The close-out period should be set based on anticipated close-out times in stressed market conditions. Close-out periods should be set on a product-specific basis, as less-liquid products might require significantly longer close-out periods. A CCP should also consider and address position concentrations, which can lengthen close-out timeframes and add to price volatility during close outs.''

[327] The Commission acknowledged as much in its cost-benefit analysis. The analysis states: ''The Commission anticipates that using only one criterion—*i.e.,* the characteristic of the commodity underlying a swap—to determine liquidation time could result in less-than-optimal margin calculations. For some products, a five-day minimum may prove to be excessive and tie up more funds than are strictly necessary for risk management purposes. For other products, a one-day or even a five-day period may be insufficient and expose a DCO and market participants to additional risk.'' The DCO Final Rule, *supra* note 289, at 315.

[328] *Id.* at 127 to 128 (stating '' * * * the final rule provides that the minimum liquidation time for swaps based on certain physical commodities, *i.e.,* agricultural commodities, energy, and metals, is one day. For all other swaps, the minimum liquidation time is five days. This distinction is based on the differing risk characteristics of these product groups and is consistent with existing requirements that reflect the risk assessments DCOs have made over the course of their experience clearing these types of swaps. The longer liquidation time, currently five days for credit default swaps at ICE Clear Credit, LLC, and CME, and for interest rate swaps at LCH and CME, is based on their assessment of the higher risk associated with these products.'').

[329] *Id.* at 396 (to be codified at 17 CFR 39.13(g)(6)).

[330] *Id.* at 396–397 (to be codified at 17 CFR 39.13(g)(7)).

[331] *Id.* at 383–387 (to be codified at 17 CFR 39.11(c)(1) and (f)).

[332] *See* United States Commodity Futures Trading Commission, International Monetary Fund—Financial Sector Assessment Program: Self-Assessment of IOSCO Objectives and Principles of Securities Regulation, August 2009, available at: *http://www.treasury.gov/resource-center/international/standards-codes/Documents/Securities%20CFTC%20Self%20Assessment%208–28–09.pdf* (the ''FSAP Assessment'') (describing the capabilities of the Risk Surveillance Group within the Division of Clearing and Risk (formerly known as the Division of Clearing and Intermediary Oversight): ''After identifying traders or FCMs at risk, the RSG estimates the magnitude of the risk. The SRM system enables RSG staff to calculate the current performance bond requirement for any trader or FCM. This amount is generally designed to cover approximately 99% of potential one-day moves * * * SRM also enables RSG staff to conduct stress tests. RSG staff can determine how much a position would lose in a variety of circumstances such as extreme market moves. This is a particularly important tool with respect to option positions. As noted, the non-linear nature of options means that the loss resulting from a given price change may be many multiples greater for an option position than for a futures position in the same market. Moreover, the complexity of option positions can result in situations where the greatest loss does not correspond to the most extreme price move.'').

The FSAP Assessment also describes the ability of the RSG to check DCO stress testing of its default resources: ''The RSG compares the risk posed by the largest clearing member to a DCO's financial resource package. The RSG analyzes not only the size of the DCO package but also its composition. In the event of a default, a DCO must have access to sufficient liquidity to meet its obligations as a central counterparty on very short notice.''

[333] *See* Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011); Exec. Order No. 13,579, 76 Fed. Reg. 41,587 (July 14, 2011).

[334] *See, e.g., Business Roundtable and the United States Chamber of Commerce vs. SEC,* No. 10–1305, 2011 U.S. App. LEXIS 14988 (July 22, 2011).

Although I have numerous concerns with the cost-benefit analysis, my primary concern relates to its failure to attempt meaningful quantification. In multiple places in the cost-benefit analysis, the Commission concludes that the costs of a particular requirement are difficult or impossible to estimate. In certain instances, the statement may be accurate. If the Commission truly cannot quantify the costs in those instances, then that fact alone should cause the Commission to proceed with caution if it is going to abandon the existing principles-based regime. In other instances, however, I find the statement to be puzzling, given the capabilities and expertise of the Risk Surveillance Group (''RSG'') and the DCO Review Group (''DRG'') in our Division of Clearing and Risk (formerly known as the Division of Clearing and Intermediary Oversight).

I would like to highlight two such instances where the Commission has not utilized its own data to quantify the costs associated with its policy decisions. First, with respect to the minimum liquidation time requirements, the Commission states that ''it is not feasible to estimate or quantify these costs reliably.'' The Commission justifies such conclusion by stating that (i) ''reliable data is not available for many swaps that prior to the Dodd-Frank Act were executed in unregulated markets,'' and (ii) it would be too difficult for the Commission to estimate margin using either a one-day or five-day minimum liquidation time for any particular product.[335] Whereas these statements may be accurate for certain swaps, they are not accurate for futures contracts currently listed on a DCM that will be converted to swap contracts under the pending DCM proposal. However potentially incomplete, the Off-Market Volume Study (May 2010 through July 2010) accompanying the DCM proposal entitled *Core Principles and Other Requirements for Designated Contract Markets*[336] demonstrates that the Commission has the ability to identify at least a sample of the futures contracts that may be potentially converted to swap contracts. It is true that the DCO usually impounds the minimum liquidation time in the risk arrays that it uses to calculate margin, and the RSG cannot change such risk arrays easily. However, the RSG can ask the DCO to provide the assumptions underlying the risk arrays, including the minimum liquidation time (usually one day). Then the RSG can modify such assumptions to estimate margin calculations using a five-day minimum liquidation time.[337] Would these calculations be imperfect? Yes. However, any attempt, even an imperfect one, undertaken by the Commission to understand the cost of our rulemakings or to justify our policy decisions is better than no attempt at all.

Another instance that I would like to highlight pertains to letters of credit. This final rulemaking prohibits DCOs from accepting letters of credit as (i) initial margin for swaps contracts (but not futures contracts) or (ii) as guarantee fund contributions. In the cost-benefit analysis, the Commission states that, ''it is not possible to estimate or quantify [the] cost'' of the prohibition.[338] In response to questions from me and certain of my colleagues, however, the DRG prepared a memorandum on the use of letters of credit as initial margin. Although this memorandum is non-public, it is part of the administrative record for this final rulemaking. This memorandum details, among other things: (i) the number and identity of certain DCOs accepting and/or holding letters of credit as initial margin; (ii) the percentage of total initial margin on deposit across all DCOs that letters of credit constitute; and (iii) the potential disproportionate impact on energy and agricultural end-users of disallowing letters of credit. Whereas the memorandum may focus on the use of letters of credit as initial margin for futures contracts, the Commission proposal for DCM core principle 9 may force conversion of numerous energy and agricultural futures contracts into swaps contracts. Yet, the cost-benefit analysis contains none of the information in the memorandum, even in aggregate and anonymous form. In the interests of transparency, the Commission should have found a way to share this information with the public.

The Commission (or its predecessor) has regulated the futures markets since the 1930s. The Commission has overseen DCOs clearing swaps since at least 2001. We can do better than this. If the Commission needs to re-propose a rulemaking to provide quantitative estimates of its costs and benefits, so be it. Given the foundational nature of this rulemaking, as well as other rulemakings that are forthcoming, it is more important for the Commission to achieve the most reasonable balance between costs and benefits, rather than to finish the rulemaking fast.

International Coordination: We Must Do Better.

In closing, I would mention my strong desire for the Commission to ensure that its policies do not create disadvantages for United States businesses and that our rules comport with international standards. It is becoming increasingly clear that the schedule for financial reform is converging among the G–20 nations. It is less clear that the substantive policies underlying financial reform are experiencing the same convergence. We must be more cognizant of the effects of such lack of convergence on dually-registered entities, and the incentives created by such divergence for regulatory arbitrage.

This final rulemaking illustrates the inconsistent approach that the Commission has taken towards international coordination to date. First, although the final rulemaking notes that the CPSS–IOSCO Recommendations embody the current international standards on CCP regulation, the final rulemaking does not attempt to comport with the CPSS–IOSCO Recommendations.[339] Instead, the final rulemaking attempts to comport with the CPSS–IOSCO Consultation, which has not been finalized.[340] In general, both the CPSS–IOSCO Recommendations and the CPSS–IOSCO Consultation are less prescriptive than the final rulemaking.

Second, while the final rulemaking does note the rare instance where its prescriptive requirements comport with the CPSS–IOSCO Consultation,[341] it does not reveal where its prescriptive requirements depart from the CPSS–IOSCO Consultation. For example, as I stated above, the CPSS–IOSCO Consultation actually sets forth principles-based considerations for participant eligibility and margin calculation.

Finally, the final rulemaking states that the Commission will review a number of its provisions after CPSS and IOSCO finish their work, which is likely to occur in 2012. Whereas I support such a review, the statement begs the following questions: What legal certainty are these regulations offering

[335] *See* the DCO Final Rule, *supra* note 289, at 315–316.

[336] *See supra* note 318. The Off-Market Volume Survey does not include contracts listed on new DCMs, such as NYSE Liffe U.S., ELX Futures, L.P., or Eris Exchange, LLC. However, the existence of such survey is proof that the Commission has the ability to identify contracts that DCM core principle 9 may affect.

[337] *See supra* note 332. *See* pages 252 to 268 of the FSAP Assessment for a full description of the capabilities of the RSG.

[338] The DCO Final Rule, *supra* note 289, at 344.

[339] *See supra* note 310.

[340] *See supra* note 311.

[341] *See, e.g., id.* at 132 (stating that requiring DCOs to calibrate margin to cover price movements at a 99 percent confidence interval accords with Principle 6 of the CPSS–IOSCO Consultation).

DCOs, clearing members, and market participants if the Commission changes such regulations in 2012? Also, what are the implications of requiring DCOs to incur costs to comport with prescriptive requirements now when the Commission might change such requirements next year? If changes are foreseeable, shouldn't the Commission adopt a phasing or delayed implementation plan to allow the international coordination process to reach completion before our rules and their costs become effective? If, in the alternative, the Commission will not be influenced by international standards, what are the costs of such non-convergence?

As we are finalizing foundational rulemakings, we can no longer rely on an inconsistent approach. We need to produce a more coherent plan for international coordination.

Conclusion

Due to the above concerns, I respectfully dissent from the decision of the Commission to approve this final rulemaking for publication in the **Federal Register.**

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Part III

Consumer Product Safety Commission

16 CFR Part 1107

Testing and Labeling Pertaining to Product Certification; Final Rule

CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Part 1107

[CPSC Docket No. CPSC–2010–0038]

Testing and Labeling Pertaining to Product Certification

AGENCY: Consumer Product Safety Commission.

ACTION: Final rule.

SUMMARY: The Consumer Product Safety Commission (''CPSC,'' ''Commission,'' or ''we'') is issuing a final rule that establishes protocols and standards with respect to certification and continued testing for children's products. The final rule also establishes requirements for labeling of consumer products to show that the product complies with the certification requirements under section 14(a) of the Consumer Product Safety Act (''CPSA''). The final rule implements section 14(a)(2) and (i) of the CPSA, as amended by section 102(b) of the Consumer Product Safety Improvement Act of 2008 (''CPSIA'').

DATES: The rule will become effective on February 8, 2013 and applies to products manufactured after that date. The incorporation by reference of the publications listed in this rule is approved by the Director of the Federal Register as of February 8, 2013.[1]

FOR FURTHER INFORMATION CONTACT: Randy Butturini, Project Manager, Office of Hazard Identification and Reduction, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, Maryland 20814; (301) 504–7562; email: *RButturini@cpsc.gov.*

SUPPLEMENTARY INFORMATION:

I. Purpose of the Final Rule

The purpose of this final rule is to reduce the incidents of deaths and injuries associated with children's products. This will be accomplished by increasing the safety of children's products. The likelihood of a noncompliant product being detected before it is introduced to the public will be increased. Consequently, consumer confidence in children's products certified to comply with the applicable product safety rules may be increased. Potentially, the number of recalls for children's products could be reduced, and, with continued assessment of compliance, the scope of necessary recalls could be reduced. Further, third party testing during continuing production or importation can serve as an objective assessment of the effectiveness of a manufacturer's or importer's internal processes to ensure compliance, which would also serve to enhance the safety of children's products in the market.

II. Statutory Authority

A. The Consumer Product Safety Act, as Amended by the Consumer Product Safety Improvement Act of 2008

Section 14(a)(1) of the CPSA, (15 U.S.C. 2063(a)(1)), as amended by section 102 of the CPSIA, establishes requirements for the testing and certification of products subject to a consumer product safety rule under the CPSA or similar rule, ban, standard, or regulation under any other act enforced by the Commission and which are imported for consumption or warehousing or distributed in commerce. Under section 14(a)(1)(A) of the CPSA, manufacturers and private labelers must issue a certificate, which ''shall certify, based on a test of each product or upon a reasonable testing program, that such product complies with all rules, bans, standards, or regulations applicable to the product under the CPSA or any other Act enforced by the Commission.'' CPSC regulations, at 16 CFR part 1110, limit the certificate requirement to importers and domestic manufacturers. Section 14(a)(1)(B) of the CPSA further requires that the certificate provided by the importer or domestic manufacturer ''specify each such rule, ban, standard, or regulation applicable to the product.'' The certificate described in section 14(a)(1) of the CPSA is known as a General Conformity Certification (GCC).

Section 14(a)(2) of the CPSA (15 U.S.C. 2063(a)(2)) establishes testing requirements for children's products that are subject to a children's product safety rule. (Section 3(a)(2) of the CPSA (15 U.S.C. 2052(a)(2)) defines a children's product, in part, as a consumer product designed or intended primarily for children 12 years of age or younger.) Section 14(a)(2)(A) of the CPSA also states that, before a children's product subject to a children's product safety rule is imported for consumption or warehousing or distributed in commerce, the manufacturer or private labeler of such children's product must submit sufficient samples of the children's product ''or samples that are identical in all material respects to the product'' to an accredited ''third party conformity assessment body'' to be tested for compliance with the children's product safety rule. Based on such testing, the manufacturer or private labeler, under section 14(a)(2)(B) of the CPSA, must issue a certificate that certifies that such children's product complies with the children's product safety rule based on the assessment of a third party conformity assessment body accredited to perform such tests.

Section 14(i)(2)(A) of the CPSA requires the Commission to initiate a program by which a manufacturer or private labeler may label a consumer product as complying with the certification requirements. This provision applies to all consumer products that are subject to a product safety rule administered by the Commission. (On August 12, 2011, the President signed into law H.R. 2715, which amended both the CPSA and the CPSIA. Section 10(a) of H.R. 2715 redesignates what was identified as section 14(d) of the CPSA in the preamble of the proposed rule as section 14(i) of the CPSA; consequently, except where we are citing language from the proposed rule, the remainder of this document will refer to section 14(i) of the CPSA.)

Section 14(i)(2)(B) of the CPSA requires the Commission to establish protocols and standards for:

- Ensuring that a children's product tested for compliance with a children's product safety rule is subject to testing periodically and when there has been a material change in the product's design or manufacturing process, including the sourcing of component parts;
- Testing of representative samples;
- Verifying that a children's product tested by a conformity assessment body complies with applicable children's product safety rules; and
- Safeguarding against the exercise of undue influence on a third party conformity assessment body by a manufacturer or private labeler.

Section 14(i)(2)(B)(iii) of the CPSA provides for verification that a children's product tested by a conformity assessment body complies with applicable children's product safety rules. At this time, we are not imposing any verification obligations on manufacturers because we intend to conduct the verification ourselves under our inherent authorities while we gain more experience with the testing and certification requirements. When we find that a children's product

[1] The Commission voted 3–2 to publish this final rule, with changes, in the **Federal Register**. Chairman Inez M. Tenenbaum, Commissioners Robert S. Adler and Thomas H. Moore voted to publish the final rule with changes. Commissioners Nancy A. Nord and Anne M. Northup voted against publication of the final rule. Chairman Tenenbaum, Commissioner Adler, and Commissioner Moore issued a joint statement. Commissioner Nord and Commissioner Northrup issued statements. The statements can be found at *http://www.cpsc.gov/pr/statements.html.*

accompanied by a certificate of conformity does not pass the tests upon which the certification was based, we may initiate an investigation of the manufacturer, third party conformity assessment body, and any other relevant party in the supply chain, to determine the cause of the discrepancy.

To implement sections 14(a) and (d) (now renumbered by H.R. 2715 as section 14(i)) of the CPSA, as amended by section 102 of the CPSIA, we published a proposed rule in the **Federal Register** on May 20, 2010 (75 FR 28336). The proposed rule would:

- Define the elements of a ''reasonable testing program'' for purposes of section 14(a)(1)(A) of the CPSA;
- Establish the protocols and standards for continuing testing of children's products under section 14(d)(2)(B)(i), (ii), and (iv) (renumbered as sections 14(i)(2)(B)(i), (ii), and (iv)) of the CPSA; and
- Describe the label that manufacturers may place on a consumer product to show that the product complies with the certification requirements for purposes of what was numbered previously as section 14(d)(2)(A) of the CPSA (now renumbered by H.R. 2715 as section 14(i)(2)(A) of the CPSA).

B. H.R. 2715 and Its Impact on This Rulemaking

On August 12, 2011, the President signed into law H.R. 2715. H.R. 2715 amended the CPSA and the CPSIA in several ways. For example, section 2, ''Application of Third Party Testing Requirements,'' of H.R. 2715, revised section 14(d) of the CPSA, in part, by:

- Renumbering the second paragraph of section 14(d) of the CPSA as section 14(i) of the CPSA. (When the CPSIA was enacted, it created, mistakenly, two paragraph (d)s in section 14 of the CPSA. The paragraph at issue in the proposed rule was the second of the two paragraphs numbered (d); H.R. 2715 contained a technical amendment to renumber the second paragraph (d) as a new paragraph (i) of section 14 of the CPSA);
- Revising section 14(i)(2)(B)(ii) of the CPSA to require the testing of ''representative samples,'' rather than the testing of ''random samples'';
- Creating a new section 14(i)(3)(A) of the CPSA requiring, no later than 60 days after the date of enactment, that we ''seek public comment on opportunities to reduce the cost of third party testing requirements consistent with assuring compliance with any applicable consumer product safety rule, ban, standard, or regulation.'' H.R. 2715 lists seven topics for public comment:
  - The extent to which the use of materials subject to regulations of another government agency that requires third party testing of those materials may provide sufficient assurance of conformity with an applicable consumer product safety rule, ban, standard, or regulation without further third party testing;
  - The extent to which modification of the certification requirements may have the effect of reducing redundant third party testing by or on behalf of 2 or more importers of a product that is substantially similar or identical in all material respects;
  - The extent to which products with a substantial number of different components subject to third party testing may be evaluated to show compliance with an applicable rule, ban, standard, or regulation by third party testing of a subset of such components selected by a third party conformity assessment body;
  - The extent to which manufacturers with a substantial number of substantially similar products subject to third party testing may reasonably make use of sampling procedures that reduce the overall test burden without compromising the benefits of third party testing;
  - The extent to which evidence of conformity with other national or international governmental standards may provide assurance of conformity to consumer product safety rules, bans, standards, or regulations applicable under the CPSA;
  - The extent to which technology, other than the technology already approved by the Commission, exists for third party conformity assessment bodies to test or to screen for testing consumer products subject to a third party testing requirement; and
  - Other techniques for lowering the cost of third party testing consistent with assuring compliance with the applicable consumer product safety rules, bans, standards, and regulations.
- Creating a new section 14(i)(3)(B) of the CPSA, requiring us to review the public comments and stating that we ''may prescribe new or revised third party testing regulations if [we determine] that such regulations will reduce third party testing costs consistent with assuring compliance with the applicable consumer product safety rules, bans, standards, and regulations; and
- Creating a new section 14(i)(4) of the CPSA, titled, ''Special rules for small batch manufacturers,'' to provide ''alternative testing requirements'' for ''covered products'' manufactured by small batch manufacturers or to exempt small batch manufacturers from third party testing requirements. H.R. 2715 defines a ''covered product'' as ''a consumer product manufactured by a small batch manufacturer where no more than 7,500 units of the same product were manufactured in the previous calendar year.'' It defines a ''small batch manufacturer,'' in part, as ''a manufacturer that had no more than $1,000,000 in total gross revenue from sales of all consumer products in the previous calendar year.''

H.R. 2715 also contains (among other things) provisions on registration of small batch manufacturers and exclusions of certain materials from third party testing. For example, H.R. 2715 created a new section 14(i)(5)(A)(i) of the CPSA, which states that the third party testing requirements do not apply to ''ordinary books or ordinary paper-based printed materials.''

The Commission has chosen to finalize those parts of the proposed rule that were not affected directly or significantly by H.R. 2715, and we will reserve other subparts or provisions in the final rule, pending our consideration and implementation of H.R. 2715. For example, because section 14(i)(2)(B)(ii) of the CPSA, as amended by H.R. 2715, now refers to the testing of ''representative samples,'' we have decided to remove § 1107.22 from subpart C of the final rule, which would have pertained to ''Random Samples.''

III. Comments on the Proposed Rule and Our Responses

Below, we describe and explain each subpart and section of the final rule, as well as describe and respond to the comments on the proposed rule. A summary of each of the commenters' topics is presented, and each topic is followed by our response. For ease of reading, each comment will be prefaced by a numbered ''Comment''; and each response will be prefaced by a corresponding numbered ''Response.'' Each ''Comment'' is numbered to help distinguish between different topics. The number assigned to each comment is for organizational purposes only and does not signify the comment's value or importance or the order in which it was received. Comments on similar topics are grouped together.

A. General Comments

Several commenters addressed issues regarding testing and costs, generally.

(Comment 1)—One commenter warned that because the overwhelming majority of consumer products sold in the United States are produced overseas,

nearly all of the work necessary to ensure compliance with the regulations will be performed overseas. The commenter stated that because the cost of compliance for foreign manufacturers can be relatively high—while the risks associated with noncompliance can be relatively low—it is important that our regulation balance the need for a high degree of assurance of compliance against the need to develop a practical regulatory structure that foreign manufacturers can and will implement.

(Response 1)—The final rule is designed not to be overly prescriptive, thereby giving manufacturers some flexibility in designing their testing and certification programs to be consistent with the statutory requirements. For example, the final rule allows the manufacturer to determine the number of samples that are tested, as long as the manufacturer has a high degree of assurance that the products represented by the samples are in compliance with all applicable children's product safety rules. Further, while the final rule requires that manufacturers document their compliance, it gives manufacturers the flexibility to determine how to maintain this information. In addition, the final rule does not require any documentation to be maintained in English or kept in the United States, except the certificate.

We also note that, on August 12, 2011, the President signed into law H.R. 2715, which amended the CPSIA in several respects. One provision in H.R. 2715 requires us to seek public comment on opportunities to reduce the cost of third party testing requirements consistent with assuring compliance with any applicable consumer product safety rule, ban, standard, or regulation. H.R. 2715 directs us to seek public comment on seven specific issues, including the extent to which modification of the certification requirements may have the effect of reducing redundant third party testing by or on behalf of two or more importers of a product that is substantially similar or identical in all material respects, and other techniques for lowering the cost of third party testing consistent with assuring compliance with the applicable consumer product safety rules, bans, standards, and regulations. Elsewhere in this issue of the **Federal Register**, we have published a notice seeking public comment on the issues in H.R. 2715. H.R. 2715 further requires us to review the public comments and states that we may prescribe new or revised third party testing regulations if we determine that such regulations will reduce third party testing costs consistent with assuring compliance with the applicable consumer product safety rules, bans, standards, and regulations.

(Comment 2)—Two commenters stated that we should conduct a full cost-benefit analysis of the rule. One commenter added that costs of complying with the testing and certification rule, in combination with other requirements under the CPSIA and other rules administered by the CPSC, will result in a major rule with major implications to consumer product manufacturers, particularly children's product manufacturers, as well as to the entire supply chain. The commenter urged us to examine in greater detail, and to quantify, the full cost and burden of these rules. A third commenter implored us to consider the reduction in risk, if any, associated with each regulatory requirement and impose only those requirements that meaningfully enhance consumer safety in a way that makes increased costs and use of resources worthwhile.

(Response 2)—This rule is being promulgated under the Administrative Procedure Act and also section 3 of the CPSIA; neither authority requires us to conduct a cost-benefit analysis. Moreover, by allowing in CPSIA expedited rulemaking, Congress made it clear that it did not want the Commission engaging in any unnecessary delay in promulgating this rule. However, we agree that the final rule constitutes a major rule, as defined by the Congressional Review Act of 1996. While, in recognition of Congress's view as reflected in CPSIA, we decline to conduct a cost-benefit analysis for the final rule, we have changed the final rule to address some of the economic burden on manufacturers. Among the changes made to the final rule to reduce the burden are: (1) Reserving the subpart B requirements regarding a reasonable testing program; [2] (2) eliminating certain requirements of the proposed rule for children's products such as the remedial action plan; (3) reducing the recordkeeping requirements in several respects; and (4) allowing the use of in-house ISO/IEC 17025:2005 laboratories to reduce the frequency of third party periodic testing. By way of further example, with regard to the reduction in the recordkeeping requirements, the final rule does not require records to be kept in the United States, nor does it require records to be translated into English, unless requested.

Additionally, we note that a cost-benefit analysis would not necessarily be confined to manufacturers or those in a supply chain (as implied by one commenter). We expect, for instance, that consumers will benefit from the testing and certification of consumer products, particularly if such testing revealed potential problems associated with a product or its components, or if such testing prompted a manufacturer to redesign or remanufacture the product to make it safer.

(Comment 3)—One commenter stated that some retailers are requiring many manufacturers to submit their products to as many as four different laboratories because the retailers want to see test results from specific laboratories. The commenter stated that we should clarify to retailers that this redundant testing is not necessary.

(Response 3)—The preamble to the proposed rule stated that retailers and sellers of children's products can rely on certificates provided by finished product certifiers—without conducting additional testing themselves—if those certificates are based on testing conducted by a CPSC-accepted third party conformity assessment body (75 FR at 28337).

B. Proposed Subpart A—General Provisions

1. Proposed § 1107.1—Purpose

Proposed § 1107.1 would state that part 1107 establishes the requirements for a reasonable testing program for non-children's products; third party conformity assessment body testing to support certification and continuing testing of children's products; and labeling of consumer products to indicate that the certification requirements have been met pursuant to sections 14(a)(1), and (a)(2), (d)(2)(B) of the CPSA (15 U.S.C. 2063(a)(1), (a)(2), (d)(2)(B)).

We did not receive any comments on this section. However, because we have decided to reserve subpart B, which would pertain to the reasonable testing program for non-children's products, we have removed the reference to the ''reasonable testing program for non-children's products.'' (We explain our decision to reserve subpart B of the proposed rule in part B.2 of this preamble below.)

Additionally, because H.R. 2715 revised section 14(i)(2)(B)(ii) of the CPSA to refer to testing of ''representative'' rather than ''random'' samples, we have, on our own initiative,

[2] It should be noted, however, that although we are not finalizing subpart B at this time, manufacturers of non-children's products that are subject to a product safety rule, ban, standard, or regulation are still obligated by the CPSA, as amended by the CPSIA, to certify that their products comply with all applicable safety rule[s] based on a test of each product or a reasonable testing program.

elected to simplify § 1107.1 to reflect the final rule's narrower purpose and have made minor, non-substantive changes to follow the language of the statute. This helps clarify which requirements in the statute this final rule is intended to address and which have been reserved for a later date. Additionally, proposed § 1107.1 was silent regarding procedures to safeguard against the exercise of undue influence by a manufacturer on a third party conformity assessment body, even though proposed § 1107.24, ''Undue influence,'' would contain such safeguards. Consequently, the final rule now mentions the establishment of procedures to safeguard against the exercise of undue influence by a manufacturer on a third party conformity assessment body. Thus, § 1107.1 now states that the part establishes the protocols and standards for ensuring continued testing of children's products periodically and when there has been a material change in the product's design or manufacturing process and safeguarding against the exercise of undue influence by a manufacturer on a third party conformity assessment body. It also establishes a program for labeling of consumer products to indicate that the certification requirements have been met pursuant to sections 14(a)(2) and (i)(2)(B) of the Consumer Product Safety Act (CPSA) (15 U.S.C. 2063(a)(2) and (i)(2)(B)).

2. Proposed § 1107.2—Definitions

Proposed § 1107.2 would define various terms used in the rule.

a. CPSA

Proposed § 1107.2 would define ''CPSA'' to mean the Consumer Product Safety Act.

We received no comments on this definition and have finalized it without change.

b. CPSC

Proposed § 1107.2 would define ''CPSC'' to mean the Consumer Product Safety Commission.

We received no comments on this definition and have finalized it without change.

c. CPSIA

Proposed § 1107.2 would define ''CPSIA'' to mean the Consumer Product Safety Improvement Act of 2008.

We received no comments on this definition and have finalized it without change.

d. Detailed Bill of Materials

Proposed § 1107.2 would define ''detailed bill of materials'' to mean a list of the raw materials, subassemblies, intermediate assemblies, subcomponent parts, component parts, and the quantities of each needed to manufacture a finished product.

We received no comments on this definition. However, because the term ''detailed bill of materials'' appeared only in proposed § 1107.10(b)(1) (which would require a product specification as part of the reasonable testing program), and because the final rule now reserves subpart B, we have removed the definition of ''detailed bill of materials'' from the final rule.

e. Due Care

Proposed § 1107.2 would define ''due care'' to mean the degree of care that a prudent and competent person engaged in the same line of business or endeavor would exercise under similar circumstances.

(Comment 4)—One commenter noted that the due care requirement only applies to a few specific provisions of the proposed rule, such as proposed § 1107.23(a) regarding ''material change'' in the product's design, manufacturing process, or sourcing of component parts. In some instances, this defined duty of ''due care'' would be coupled with a CPSC-created standard of ''high degree of assurance.'' The commenter appreciated our recognition that both the ''due care'' standard of conduct and the ''high degree of assurance'' standard for compliance are anchored in the judgment and knowledge of the manufacturer. For that reason, the commenter felt that the due care requirement should have general applicability to all elements of compliance for implementation of the CPSIA's testing and certification requirements. The commenter stated that manufacturers should not have to wonder whether more than their exercise of reasonable judgment and practice, based on their manufacturing experience and sound knowledge of the product, is required for aspects of the rules that do not explicitly reference these standards.

(Response 4)—The definition of ''due care'' in § 1107.2 refers to the actions of a prudent and competent person. We expect that all parties will exercise prudence and competence in the testing and certification of products. The final rule emphasizes due care in particular sections, as noted by the commenter, because these are areas that require additional care in order to prevent noncompliant products from being produced and certified.

We recognize that manufacturers' knowledge of their products and their manufacture can serve as a basis for determining what steps are necessary to achieve a high degree of assurance that their products comply with the applicable product safety rules. Based on that knowledge, manufacturers are uniquely situated to know what actions are necessary to exercise due care and demonstrate a high degree of assurance regarding their specific circumstances.

On our own initiative, we have revised the definition of ''due care'' in the final rule. The final rule's definition of ''due care'' includes a sentence stating that ''Due care does not permit willful ignorance.'' This is not intended to be a substantive change because any party who is willfully ignorant of material facts, by definition, would not be exercising due care. However, the Commission wants to emphasize in the final rule that a party cannot purposely avoid knowing their business partner's testing and certification practices to avoid violating section 19 of the CPSA. A party will not be shielded from violating section 19 of the CPSA when that party knows or should know about testing and/or certification problems which may affect the ability of a consumer product to be compliant with all rules, bans, standards, or regulations. Certifiers and testing parties have an obligation to resolve known or knowable problems with testing and/or certification before relying upon or passing on test reports or certifications.

f. High Degree of Assurance

Proposed § 1107.2 would define ''high degree of assurance'' as ''an evidence-based demonstration of consistent performance of a product regarding compliance based on knowledge of a product and its manufacture.''

(Comment 5)—Multiple commenters questioned the definition of a ''high degree of assurance.'' One commenter would like the rule to define the term ''high degree of assurance'' in a more understandable or quantitative way. The commenter considered the term to be confusing and misleading and believed this could lead to unnecessary conflicts between manufacturers and conformity assessment bodies when a judgment has to be made in certain cases. The commenter wondered if this requirement is targeting the design area, manufacturing process control, quality control, or testing procedures.

Another commenter said that manufacturers would benefit from additional guidance on how to achieve a ''high degree of assurance'' through their testing programs. The preamble to the proposed rule referred to a 95 percent statistical significance level as constituting a ''high degree'' of

assurance, but the proposed rule would not mandate a 95 percent confidence threshold. The commenter asked what factors would permit a manufacturer to satisfy the ''high degree of assurance'' requirement with a statistical significance level below 95 percent and asked us to provide an example of a situation where a manufacturer could still achieve a high degree of assurance with less than 95 percent assurance.

Another commenter argued that the term ''high degree of assurance'' is subjective and subject to varied interpretations. The commenter suggested that a statistical confidence limit would help remove the subjectivity and set a specific threshold by which we can enforce our rules better. The commenter also was concerned that the wording may lead some manufacturers to believe that they do not have to test to the standard in all cases, as long as they foresee little risk of noncompliance, or assume that the risk is low of being discovered having noncompliant products in the marketplace. The commenter said the final rule should clarify that testing to applicable standards is required.

(Response 5)—The determination of a ''high degree of assurance'' for a given product will vary by industry, product, component part, and by manufacturer. Therefore, selecting an example using a hypothetical certifier would be of little value to manufacturers. We have intentionally defined the term in a manner that allows the manufacturer the flexibility to develop a testing program to ensure their product complies with all applicable children's product safety rules. This rule provides broad protocols and standards for regulated firms to follow and adapt to their particularized needs given their products and processes. The use of quantitative values for the definition of ''high degree of assurance'' could lead to difficulties for some manufacturers. The preamble to the proposed rule stated: ''We decided against defining 'high degree of assurance' with respect to a 95 percent probability or confidence level because there may be difficulty in applying the statistical methods to all manufacturing processes'' (75 FR 28344). The intent of the definition is to enable a manufacturer to have a degree of confidence, based on evidence (rather than only on a belief) that all of the products manufactured are compliant with the applicable product safety rules. Knowledge of a product's design and how it is manufactured, control over component parts, and measurements showing consistent performance, are some elements that can be used to demonstrate a ''high degree of assurance.''

As for the commenter asking us to clarify that testing to applicable standards is required, § 1107.20 (a) of the final rule states that manufacturers must submit samples of a children's product to a third party conformity assessment body for testing. We believe these statements are clear enough to convey that certification testing involves tests.

(Comment 6)—Two commenters agreed that a numerical target for defining what constitutes a high degree of assurance—in the context of programs based on good manufacturing practices (GMP)—is misplaced. One commenter noted that the explanation of the definition of ''high degree of assurance'' provided in the preamble to the proposed rule (75 FR at 28344) implies that we prefer the 95 percent statistical level of confidence for a high-degree-of-assurance approach and consider it the default. The commenter is concerned that the 95-percent-confidence-level language may prompt third party conformity assessment bodies and retailers to adopt standardized testing protocols that demand large sample sizes, which will be a particular burden for the initial certification and may not be warranted in many cases. The commenter expressed the belief that the goal, across a broad range of different products that are subject to different manufacturing requirements and material sourcing, must be a standard that correlates ''a high degree of assurance'' with an ''evidence-based demonstration of consistent performance'' that relies more appropriately upon process controls to assure conformance. The commenter indicated that, while generally accepted process controls may include statistical sampling as part of process control programs, in and of themselves, they are not preferable to good manufacturing practices. The commenter said that the final rule must be clear in this regard.

(Response 6)—Standards for GMPs are generally industry-specific in areas such as: Cosmetics, pharmaceutical operations, food handling, and medical devices. It is unlikely that any GMP-based program would be deemed workable or acceptable for all children's product manufacturing methods.

A certifier's determination that a product complies—with a high degree of assurance—with the applicable children's product safety rules, may derive from statistically based testing, the application of good manufacturing practices, or other knowledge of the product and its manufacture. Because GMP-based programs are industry-specific, we disagree with the commenter's assertion that the programs are preferable to other accepted process controls in all manufacturing situations.

The final rule defines a ''high degree of assurance'' in general terms because the definition is intended to be applied to a wide variety of products that use many different manufacturing processes. Customizing the definition of ''high degree of assurance'' to fit one type of product or GMP-based program will necessarily increase the difficulty of manufacturers applying the definition to dissimilar products or manufacturing processes. Further, because GMP-based programs vary across industries—and the comments were not specific about which aspect(s) of a GMP program we should adopt, or which GMPs we should adopt—we cannot revise the definition, as requested by the commenter.

As for the commenter who interpreted the preamble to the proposed rule as expressing a preference for a 95 percent confidence level, we do not consider a numerically based definition of a ''high degree of assurance'' to be the default position. Defining a ''high degree of assurance'' with respect to a 95 percent probability or confidence level would be difficult to apply to all manufacturing processes for children's products. Defining a ''high degree of assurance'' as a 95 percent, or higher, probability or confidence level could result in greater testing demands on small manufacturers. As discussed in the preamble of the proposed rule (75 FR at 28344), a statistical definition is not needed in order to provide an evidence-based high degree of assurance.

Regarding the concern that conformity assessment bodies and retailers may require large numbers of samples for certification testing, the children's product certifier (not the conformity assessment body or retailer) specifies the number of samples to be tested. The final rule requires the number of samples to be sufficient to give the certifier a high degree of assurance that the tests conducted demonstrate accurately the ability of the product to comply with the applicable children's product safety rules. As we previously stated in the preamble to the proposed rule:

> The Commission wants to emphasize to retailers and sellers of children's products that they can rely on certificates provided by product suppliers if those certificates are based on testing conducted by a third party conformity assessment body.

75 FR at 28337.

(Comment 7)—Two commenters contended that the proposed definition of a ''high degree of assurance'' lacks clarity. Both commenters said that the rule should have additional examples of what constitutes ''a high degree of assurance.'' One commenter acknowledged that the discussion in the preamble to the proposed rule makes clear that the definition mandates no specific formula (75 FR at 28344). However, the commenter noted that the preamble to the proposed rule gave no specific examples, other than the use of statistical methods. The commenter argued that the final rule should recognize other means of achieving this confidence level, including ways that do not rely solely on product testing or statistical methods. These methods include appropriate quality assurance processes and risk management. Quality assurance processes can include: Factory/supplier evaluations, design reviews, manufacturing process controls, process auditing, or similar controls or reviews. Risk management includes: Analysis of a given possible failure, the likelihood of the failure, and the potential consequences associated with the failure. The commenter argued that importers can use these activities to boost desired outcomes and reduce unexpected outcomes; and the commenter further maintained that the activities can be performed in a feedback loop that facilitates true root-cause analysis and correction, if there is a failure.

The commenters suggested substitute definitions for ''a high degree of assurance'' that are practically identical. One suggested definition reads: ''A high degree of assurance means an evidence-based determination of consistent performance of a product regarding compliance based on knowledge of a product and its manufacture.'' Acceptable evidence-based determinations may be based on evidence derived through any appropriate process or control or combination of processes and/or controls, such as (but not limited to):

- Design validation;
- Manufacturing process control audits;
- In-process manufacturing controls, measurements, and tests;
- Component and material testing, as defined in 16 CFR part 1109;
- Finished product testing;
- Raw materials certification; and
- Other controls or processes that provide information about the safety or compliance of a product.

The other commenter's suggested definition reads: ''*High degree of assurance* means an evidence-based determination of consistent performance of a product regarding compliance based on knowledge of a product and its manufacture. Acceptable determinations may be based on evidence derived through any appropriate tool or control methodology (or combination of tools and/or control methodologies), such as but not limited to:

- Design Validation
- Process Validation
- Manufacturing Process Control Audits
- Raw material validation and controls
- In-process manufacturing controls, measurements, and tests
- Component and material testing as defined at 16 CFR part 1109
- Finished Product Testing''

(Response 7)—The commenters are correct that certifiers can use process controls, mathematical techniques, simulations, and other aspects of a product and its manufacture, as part of the basis for determining whether a particular product complies with the applicable product safety rules with a high degree of assurance. The commenters also are correct that the preamble to the proposed rule (75 FR at 28344) provided statistically based examples in the definition of a ''high degree of assurance.'' However, a method on the commenters' list may be adequate for one rule, but inadequate for another. As an example, *Design Validation* may be a good technique to ensure that a toy does not have a hole large enough to allow access to a sharp edge or point. However, *Design Validation* may be inadequate for controlling lead content because its techniques are ill-suited for controlling continuing production of component parts. As another example, component part testing is a useful technique for determining the chemical content of lead and the prohibited phthalates, but it is inadequate for determining compliance to the pacifier pull tests because the entire product is required to conduct the test. ''A high degree of assurance'' is defined in general terms because it is intended to be applied to a wide variety of products that use many different manufacturing processes. Providing a list of the intended applications as part of the definition would introduce the risk of a manufacturer applying techniques that are inappropriate for evaluating the applicable children's product safety rule.

Therefore, we decline to amend the definition of ''a high degree of assurance,'' as suggested by the commenters. Specific examples are not universally applicable; and therefore, they should not be included in the definition of ''a high degree of assurance.'' Any such list necessarily would be underinclusive or possibly confusing or misleading. Additionally, certification and periodic testing of children's products must be based on tests of the finished product, or its component parts, sufficient to show compliance (or continuing compliance, in the case of periodic testing) with all applicable children's product safety rules. A definition of a ''high degree of assurance,'' that includes methods other than testing, might lead some certifiers to conclude mistakenly that certification or periodic test requirements might be met by means other than testing.

(Comment 8)—One commenter suggested that the final rule allow a company's prior safety record to replace product safety testing as evidence that a company has met the requirement for a high degree of assurance (''HDA''). The commenter wrote:

> The ''high degree of assurance'' should be based on an overall assessment of the safety record of the company. It should NOT be based on the results of an individual product, even if recalled or deemed dangerous.

The commenter pointed out that its company had a very good safety record. The commenter added:

> With this record over so many years, our company should be deemed to have satisfied this HDA requirement and be endorsed as having a reasonable testing program without further inquiry.

(Response 8)—Section 14(a)(2) of the CPSA makes clear that children's product certification is based upon third party testing of the product and not a company's safety record. For this reason, the final rule does not provide relief from the testing requirements in the statute. In addition, the commenter's suggestion that a manufacturer should be allowed to rely upon its prior safety record to demonstrate a high degree of assurance would be a difficult concept to apply in practice because of the likely changes in any given manufacturer's safety record over time and potential disagreements as to whether a product caused a safety problem, whether the safety problem resulted from product misuse, and whether safety issues had to occur at a particular rate of frequency before testing was warranted.

(Comment 9)—One commenter stated that a ''high degree of assurance'' could be provided best by using an accredited product certification program that meets the requirements of the International Standards Organization/International Electrotechnical Commission (ISO/IEC) Guide 65, *General requirements for bodies operating product certification*

systems, and the fundamentals of System 5 product certification requirements of ISO/IEC Guide 67, *Conformity assessment—Fundamentals of product certification.*

(Response 9)—The various activities a certification body undertakes, such as testing, conformity assessment, and surveillance can be used to demonstrate a high degree of assurance that a product complies with the applicable product safety rules. However, the techniques used by certification bodies are not the only means a manufacturer could use. Process control techniques, failure modes and effects analyses, and other quality assurance methods, depending upon the product under consideration, could be as effective as certification body methods. Because we want to give certifiers the flexibility to decide which methods apply best to their particular products, we decline to define a ''high degree of assurance'' using ISO/IEC Guide 65 and Guide 67 requirements. A manufacturer who wishes to use those requirements to ensure a high degree of assurance of compliance may do so. However, we reiterate that testing in support of certification of a children's product must be performed by a CPSC-accepted third party conformity assessment body whose scope of accreditation includes the tests required for certification, and certification of a product cannot be delegated to another party, such as a certification body.

(Comment 10)—A commenter suggested that the language related to periodic testing intervals and sample sizes is inconsistent in the preamble to the proposed rule. The commenter conceded that it is difficult to specify the exact number of products that must be tested in order to reach a high degree of assurance that a product is compliant. The commenter noted that the response to comments section of the preamble to the proposed rule titled, *Additional Third Party Testing Requirements for Children's Products,* stated that ''the sample size for periodic testing will depend upon the number of samples that need to be tested to provide that statistical assurance'' (75 FR at 28342). The commenter agreed with this statement but noted the inconsistency between the language used in that section and the language found in the response to comments section titled, *The Reasonable Testing Program,* which specifies that the testing intervals must provide ''reasonable assurance'' that the product meets the requirements of the applicable product safety rules (75 FR at 28338). The commenter noted that there is a difference between a ''high degree of assurance'' and ''reasonable assurance.'' The commenter expressed the belief that the testing program should be statistically based, such that a confidence level of 95 percent must be achieved to indicate compliance. This requirement would eliminate the possibility of testing only a single sample to indicate compliance, the commenter asserted.

(Response 10)—In the preamble to the proposed rule, under the response to comments section, *Additional Third Party Testing Requirements for Children's Products* (75 FR at 28342), we stated the following:

> If a high degree of assurance is interpreted to be a statistical likelihood of not producing noncompliant products, the sample size for periodic testing will depend upon the number of samples that need to be tested to provide *that* statistical assurance (italics added) * * *

The word ''that'' refers to ''a high degree of assurance,'' which appears at the beginning of the sentence. With respect to the other alleged inconsistencies mentioned in the comment, it is worth noting that the preamble to the proposed rule uses the phrase ''high degree of assurance'' 20 times; whereas, the codified text of the proposed rule does not use the term ''reasonable assurance'' at all. The term ''reasonable assurance'' appears only once in the preamble to the proposed rule, in the introduction to the response to comments section titled, *The Reasonable Testing Program,* where it is listed as one of the previous questions that we asked in the **Federal Register** notice announcing the December 2009 public workshop.

We also do not agree with the commenter that there should be a specific probability level (*i.e.,* 95 percent) in the definition of ''a high degree of assurance.'' As previously noted in the preamble to the proposed rule (75 FR at 28344), ''we decided against defining 'high degree of assurance' with respect to a 95 percent probability or confidence level because there may be difficulty in applying the statistical methods to all manufacturing processes.'' Many manufacturing processes, such as low-volume and continuous manufacturing, are ill-suited to use a sampling technique for quality control purposes. In addition, for small-volume manufacturers, the number of samples required to achieve 95 percent confidence could be excessive, even to the point of requiring all of the products manufactured to be tested. Because the final rule's testing requirements apply to a wide variety of products, manufacturers, and manufacturing processes, the rule must give manufacturers the flexibility to determine the best way to comply with the testing requirements.

The intent of the definition is for a manufacturer to have a high degree of assurance based upon evidence (rather than only a belief) that all of the products manufactured are compliant with the applicable safety rules. Knowledge of the product's design and how the product is manufactured, control over component parts, measurements showing consistent or inconsistent performance, the associated hazard, and many other elements such as these, can be used to determine the number of samples required for certification and for the periodic testing intervals, as noted in the final rule.

g. Identical in All Material Respects

Proposed § 1107.2 would define ''identical in all material respects'' to mean that there is no difference with respect to compliance to the applicable rules between the samples and the finished product.

(Comment 11)—Several commenters asked us to clarify the definition of ''identical in all material respects.'' One commenter said that the definition appears absolute in that it does not allow any ''difference with respect to compliance.'' The commenter indicated that such a definition would make testing requirements unnecessarily rigid and costly.

Another commenter contended that the definition of ''identical in all material respects'' cannot be absolute. One commenter would revise the definition to read: '' '*Identical in all material respects'* means there is no difference between the sample and the finished product that could affect compliance to the applicable rules.'' Another commenter suggested revising the definition of ''identical in all material respects'' to mean ''to a high degree of assurance, there is no difference between the samples and the finished product that is material to compliance of the applicable rule.'' One commenter suggested that the definition of ''identical in all material respects'' should mean ''a manufacturer possess [sic] a reasonable belief that, there is no difference between the samples and the finished product is not materially compliant.''

(Response 11)—We do not regard the definitions suggested by the commenters to be improvements of the existing definition of ''identical in all material respects.'' For example, defining ''identical in all material respects'' to mean ''there is no difference between the sample and the finished product that could affect compliance to the applicable rules''

appears to be so similar to the proposed definition that adopting the commenter's suggested definition would not alter the rule. Samples used for certification testing and the finished product may be different—just not different in any way that would affect the sample's ability to demonstrate compliance of the finished product. The definition of ''identical in all material respects'' is intended to emphasize that if anything other than the finished product is subjected to testing, then the characteristics of that sample must be identical to the testing of the finished product, insofar as complying with the applicable product safety rule. Otherwise, the test may not indicate that the finished product, in fact, complies with the applicable product safety rule.

The second definition suggested for ''identical in all material respects'' (''To a high degree of assurance, there is no difference between the samples and the finished product that is material to compliance of the applicable rule'') also does not emphasize adequately that the finished product is what must comply with the applicable rules. In addition, using the phrase ''to a high degree of assurance'' in describing the similarity (with respect to conformance to the applicable rules), results in some doubt that the samples, in fact, are ''identical in all material respects.'' Further, § 1107.20(a) of the final rule states that manufacturers must submit a sufficient number of samples of a children's product, or samples that are identical in all material respects to the children's product, to a third party conformity assessment body for testing to support certification. The number of samples selected must provide a high degree of assurance that the tests conducted for certification purposes accurately demonstrate the ability of the children's product to meet all applicable children's product safety rules. Using a ''high degree of assurance'' in the definition of ''samples'' would involve a double use of the term with no corresponding increase in clarity.

In a similar manner, the third definition suggested for ''identical in all material respects,'' which uses the phrase ''a reasonable belief,'' introduces doubt that the samples are identical to the finished product with respect to compliance. Additionally, ''a reasonable belief'' standard in the definition would result in an inquiry into the state of mind of a particular manufacturer and could lead to disagreements between the CPSC and manufacturers over whether a manufacturer's belief was ''reasonable'' in a specific instance. Further, the commenter did not explain or clarify their interpretation of the phrase ''materially compliant''; the absence of such an explanation or interpretation would result in additional uncertainty in the definition.

Nevertheless, on our own initiative, we have revised the definition of ''identical in all material respects'' to make minor clarifications to improve the definition's accuracy and consistency with the statute. For example, the proposed definition would refer to ''compliance to the applicable rules;'' the final definition now adds: ''bans, standards, or regulations'' after ''rules,'' to be more consistent with section 14(f)(1) of the CPSA. We also have revised the phrase ''between the samples and the finished product'' to read: ''between the samples to be tested for compliance and the finished product distributed in commerce,'' to reflect that, under the final rule, the items that must be ''identical in all material respects'' are the samples that are to be tested for compliance (as opposed to samples that are tested for any other purpose) and the product that is actually distributed in commerce.

(Comment 12)—One commenter urged us to state that the phrase ''identical in all material respects'' is intended to be consistent with the ''objectively reasonable basis'' standard from 16 CFR part 1633, and that we would consider individual subordinate mattresses that meet the requirements of 16 CFR 1633 to be ''identical in all material respects'' to the qualified prototype to which a specific mattress is subordinate.

(Response 12)—We agree with the commenter that ''identical in all material respects'' is consistent with a demonstration on an ''objectively reasonable basis,'' as stated in 16 CFR §thnsp;1633.4(b)(3). We consider individual subordinate mattresses that meet the requirements of 16 CFR part 1633 to be ''identical in all material respects'' to the qualified prototype to which a specific mattress is subordinate.

h. Manufacturer

Proposed § 1107.2 would define ''manufacturer'' as ''the parties responsible for certification of a consumer product pursuant to 16 CFR part 1110.''

We received no comments on this definition and have finalized it without change.

i. Manufacturing Process

Proposed § 1107.2 would define ''manufacturing process'' as ''the techniques, fixtures, tools, materials, and personnel used to create the component parts and assemble a finished product.''

(Comment 13)—Two commenters noted that the proposed definition includes ''personnel used to create the component parts and assemble a finished product.'' The commenters argued that this should not be construed to mean that any change in the employees who are involved in the production of a part or product is equivalent to a change in the manufacturing process.

(Response 13)—Regarding the commenters' suggestion on the definition of ''manufacturing process,'' the commenters may be confusing a change in the manufacturing process with a material change that could affect compliance to an applicable product safety rule. The commenters are partly correct that any change in personnel involved with a manufacturing process does not necessarily constitute a material change with respect to the product's compliance. However, for manufacturing processes that rely on high levels of craftsmanship or technical expertise, such a personnel change could affect compliance and, therefore, might be considered a material change to the manufacturing process.

Therefore, we have finalized the definition of ''manufacturing process'' without change.

j. Production Testing Plan

Proposed § 1107.2 would define ''production testing plan'' as ''a document that shows what tests must be performed and the frequency at which those tests must be performed to provide a high degree of assurance that the products manufactured after certification continue to meet all the applicable safety rules.''

We received no comments on this definition, but, on our own initiative, we have chosen to remove it from the final rule. We have removed the definition because it is duplicative of the description and requirements of ''a production testing plan'' in § 1107.21(c)(2) of the final rule.

k. Third Party Conformity Assessment Body

Proposed § 1107.2 would define ''third party conformity assessment body'' to mean a third party conformity assessment body recognized by the CPSC to conduct certification testing on children's products.

We received no comments on this definition. However, on our own initiative, we have revised the definition by making editorial changes to describe more accurately our accreditation process and to indicate that the third party conformity assessment body's scope of accreditation must include the

applicable CPSC-required tests. Thus, the final rule now defines ''third party conformity assessment body'' as ''a testing laboratory whose accreditation has been accepted by the CPSC to conduct certification testing on children's products. Only third party conformity assessment bodies whose scope of accreditation includes the applicable required tests can be used for children's product certification or periodic testing purposes.''

C. Proposed Subpart B—Reasonable Testing Program for Non-Children's Products

Proposed subpart B would consist of one provision and would describe the ''reasonable testing program'' for non-children's products. For example, proposed § 1107.10(a) would explain that, except as otherwise provided by a specific CPSC regulation or a specific standard prescribed by law, a manufacturer certifying a product pursuant to a reasonable testing program must ensure that the program ''provides a high degree of assurance that the consumer products covered by the program will comply with all applicable rules, bans, standards, or regulations.'' Proposed § 1107.10(b) would state that a reasonable testing program must consist of five elements: (1) Product specification; (2) certification tests; (3) a production testing plan; (4) a remedial action plan; and (5) recordkeeping. The proposal would describe, in greater detail, the requirements for each element of the reasonable testing program.

We received many comments on proposed subpart B. The comments addressed issues regarding the proposed provisions of a reasonable testing program on topics such as: product specifications, certification tests, samples for certification testing, production testing, remedial action, and recordkeeping. The commenters raised many concerns about the cost and burden of the proposal as well as practical issues, which illustrates the difficulty of drafting a regulation that can apply to many different types of products and manufacturing processes, yet still provide sufficient guidance to enable manufacturers to implement the requirements of a reasonable testing program effectively. Consequently, we are deferring action with respect to finalizing subpart B. We will reserve subpart B in the final rule and, except as stated otherwise in this preamble, continue evaluating the issues raised in the comments regarding a reasonable testing program. We note, however, that our deferral of action does not remove the responsibility of manufacturers, under section 14(a)(1) of the CPSA to certify based on tests of their products or based on reasonable testing programs that their products comply with all rules, bans, standards, or regulations applicable to such products.

D. Proposed Subpart C—Certification of Children's Products

Proposed subpart C would contain the requirements for the certification of children's products. The proposed subpart C would consist of seven sections and would implement most requirements in section 14(i)(2)(B) of the CPSA.

1. General Comments

Several commenters raised issues with respect to proposed subpart C generally, or on general concepts, such as testing.

(Comment 14)—One commenter argued that the terms ''reasonable assurance'' and ''sufficient number of samples'' are likely to result in widely disparate interpretations. The commenter urged that ''reasonable assurance'' should be defined as a statistically significant number with a confidence level of 95 percent, based on testing enough samples to provide statistical validity. The commenter said that setting a specific confidence limit would enable us to enforce this section by avoiding subjectivity and by creating uniformity and consistency among manufacturers and conformity assessment bodies.

The commenter noted that ''upstream'' controls (*i.e.,* processes, inspections, and tests conducted prior to or during product assembly intended to assure product quality), product risk assessments, and design analyses are reasonable tools for manufacturers to use but currently are not rigorous or specific enough to ensure ''downstream'' compliance. Until they are, compliance must be determined by final product testing, the commenter asserted.

(Response 14)—We decline to adopt the suggestion to set a 95 percent confidence level based on testing enough samples to provide statistical validity. Many manufacturing processes, such as those using continuous flow processes, are ill-suited to use a sampling technique for quality control purposes. In addition, for small-volume manufacturers, the number of samples required to achieve 95 percent confidence could be excessive, even to the point of requiring all of the products manufactured to be tested.

Because the final rule's testing requirements apply to a wide variety of children's products, as well as to manufacturers of various sizes and different manufacturing processes, the rule must be flexible enough to allow the manufacturer to determine the best way to comply with the rule's requirements. We are aware of numerous ''upstream'' quality assurance tools and processes that are widely used to ensure high levels of product performance. For example, techniques such as component part testing are particularly well-suited for determining compliance with the lead content limits for accessible parts on children's products. Numerous international standards address quality control and assurance processes applied ''upstream'' in the product production process and can be used to extend the maximum periodic testing interval. Thus, we disagree with the commenter that none of these quality assurance tools and processes is rigorous or specific enough to ensure compliance.

(Comment 15)—One commenter recommended a system of product risk assessment that would tailor the third party certification schedule for low-volume firms, as follows:

> Children's products: High-risk children's products would require third party certification annually. Low-risk children's products would require third party certification every three years.

The commenter said that any test failure automatically would move the product into the next most stringent category. This system would focus the inspection of products on products that are the most dangerous to public safety. The commenter stated that an unintended consequence of this strategy would be to reward firms that make the safest products.

(Response 15)—The commenter appears to be applying the proposed low-volume exception to periodic testing (stated in proposed § 1107.21(d)) to certification testing. The low-volume exception did not apply to certification testing. There is no schedule for any manufacturer for when a product is subject to certification testing, regardless of production volume. Instead, periodic testing is required for children's products to ensure continued compliance with a high degree of assurance.

Section 14(a)(2) of the CPSA requires certification testing for children's products before they may be imported for consumption or warehousing or distributed in commerce. This initial testing of children's products does not depend on product risk. Continuing compliance is demonstrated through periodic testing for children's products, which specifies a maximum testing

interval, based on the implementation of a periodic testing plan by the manufacturer. The final rule allows a manufacturer to consider risk to the extent it permits consideration of ''the potential for serious injury or death resulting from a noncompliant product'' as a factor in determining the appropriate periodic testing interval under a periodic testing plan.

Regarding the commenter's suggestion of devising a system of categorizing all children's and non-children's products subject to an applicable rule into risk categories, such a system would require a separate rulemaking effort and is beyond the scope of this rule.

(Comment 16)—One commenter noted that the proposed rule did not use recognized industry terminology consistently. The commenter noted that the proposed rule relies on the terms ''test'' or ''testing,'' as if all consumer product safety requirements could be evaluated by performing tests to ensure ongoing compliance. The commenter noted that, while full product testing is appropriate in some cases, current consumer product safety regulations imply or specify evaluation activities, not considered to be actual testing (*e.g.,* inspections, reviews, audits), may be appropriate.

The commenter noted that it recommended previously that we refer to Annex A of ISO/IEC 17000, *Conformity assessment—Vocabulary and general principles,* which provides a general description of the functional approach to activities that constitute conformity assessment, to address the question of the interpretation of the use of the terms ''test'' or ''testing.''

(Response 16)—The word ''test'' was chosen because of its use in section 14(a) of the CPSA. ''Certification tests'' are tests on samples of the product that are identical in all material respects to the finished product. Section 14(i)(2)(B)(i) of the CPSA states that children's products are subject to testing periodically and after a material change.

The words ''test'' and ''testing'' are used throughout the final rule to mean a process used to determine whether a product is compliant with the applicable product safety rules. The process is geared to the particular product and specific safety rule. As such, testing may include inspection of labels and manuals, audits, and measurements to determine compliance with the applicable product safety rules. We believe that the definition of ''test'' and ''testing'' are clear.

(Comment 17)—One commenter noted that we are not allowing the use of existing federally registered certification marks of third party conformity assessment bodies as an acceptable substitute for a certificate of conformity. The commenter added that introducing the new certificate of conformity will cause immediate confusion in the marketplace. The commenter suggested that we should have to justify, through a comprehensive and independent study, why we are departing from the existing system and why our proposed system would be better and more reliable.

Another commenter stated that we should recognize certification marks issued by established third party certification programs as a substitute for the certificates of conformity described in the proposed rule when the product has been certified as compliant with associated product standards through a program that reflects CPSA requirements by an ISO/IEC Guide 65-accredited certification body.

(Response 17)—Certification marks are symbols that a manufacturer is authorized to affix to their product to indicate that the product has been certified by a certification body. Third party certification involves testing, declarations of conformance, factory inspections, and continuing surveillance activities. The certification body attests that the product complies with the specified product safety rules that were evaluated.

A certification mark does not contain the information required on a certificate by section 14(g) of the CPSA and cannot be used as a substitute for a Children's Product Certificate. Section 14(a)(2) of the CPSA requires manufacturers of a consumer product that is subject to an applicable children's product safety rule to issue a certificate certifying conformance of the children's product to the applicable children's product safety rules. Section 14(a)(2) of the CPSA does not allow a party other than the manufacturer, importer, or private labeler to issue a Children's Product Certificate.

Since the CPSIA was enacted in 2008, we have not observed immediate confusion in the marketplace regarding certificates. As noted above, certification marks cannot be used as a substitute for certificates if there is confusion in the marketplace. Thus, because section 14(a) of the CPSA requires the manufacturer to issue a certificate of conformity, an independent study is not warranted.

Furthermore, on August 12, 2011, the President signed into law H.R. 2715, which amended the CPSIA in several respects. One provision in H.R. 2715 requires us to seek public comment on opportunities to reduce the cost of third party testing requirements consistent with assuring compliance with any applicable consumer product safety rule, ban, standard, or regulation. Elsewhere in this issue of the **Federal Register**, we have published a notice seeking public comment on the issues in H.R. 2715. H.R. 2715 further requires us to review the public comments and states that we may prescribe new or revised third party testing regulations if we determine that such regulations will reduce third party testing costs consistent with assuring compliance with the applicable consumer product safety rules, bans, standards, and regulations.

(Comment 18)—One commenter noted that a publisher of ordinary books may have varying titles and content, but all of the books are made of the same materials in the same manner. The commenter asserted that the differences between ordinary books are not material to compliance with the applicable rules. Accordingly, the commenter said that having accredited third party conformity assessment body testing for a finished book would constitute finished product testing for all other books (International Standard Book Numbers, or ISBNs) that do not materially differ from the tested book with respect to compliance with CPSC safety standards. The commenter said a publisher with a reasonable testing program and a product without material changes could rely on the component part certifications for all materials published within a 2-year period.

(Response 18)—Section 14(i)(5)(A)(i) of the CPSA, as amended by H.R. 2715, excludes ordinary books and ordinary paper-based printed materials from the third party testing requirements in 14(a)(2) of the CPSA. Additionally, the final rule reserves subpart B, which would pertain to a reasonable testing program for non-children's products. Therefore, it is unnecessary for us to consider how third party testing results for a book might be extended to all other books.

(Comment 19)—One commenter asserted that only good design and comprehensive design review by qualified individuals will improve the safety of products. Therefore, the commenter suggested that we require ''design hazard analysis'' in the certification of children's products section of the final rule. ''Design hazard analysis,'' according to the commenter, identifies potential safety hazards in a consumer product that result from the design of the product. It involves determinations made by skilled professionals including engineers, chemists, and biologists about the features of a product that might result in

safety hazards. The commenter asserted that the CPSC has the legal authority to require design hazard analysis of consumer products.

The commenter suggested the following changes:

• In Subpart C, *Certification of Children's Products,* insert a new subsection 1107.20(a), *Children's Product Certification.* (**Note:** The commenter may have meant to create a new subsection (a) and renumber the remaining subsections accordingly.) The new subsection would state:

> Prior to submitting samples of a children's product for testing by a third party conformity assessment body, manufacturers must conduct a design hazard analysis and produce a design appraisal of the product that identifies and characterizes the potential hazards associated with that consumer product that are related to the design of a product. The design appraisal should include, at a minimum, an engineering, chemical, and biological analysis of the product, as appropriate to the type of product and the materials contained in the product.

• Insert in § 1107.26(c), Remedial Action, after ''* * * children's product safety rules'':

> If the manufacturer knows or reasonably should know that the failure of the product is related to the product's design, the manufacturer shall conduct a revised design hazard review and produce a new design appraisal.

(Response 19)—We agree that designing safety into a children's product is an important part of a comprehensive quality control program. We decline, however, the commenter's suggestion to include in the final rule requirements mandating design hazard analyses for children's products. The current rulemaking is intended to implement the testing and certification requirements of section 14(a) and section 14(i)(2)(B) of the CPSA. Requiring a design hazard analysis goes beyond the statutory requirements because such an analysis would consider factors other than the factors required to demonstrate compliance with the applicable product safety rules. This action would extend the final rule to address activities that would occur before a product is manufactured.

Currently, given the range of products that are subject to section 14 of the CPSA, we have no practical means of identifying or evaluating individuals whose credentials and experience, under the commenter's suggested changes, would render them qualified to conduct design hazard analyses on products. Although the final rule does not require manufacturers to conduct a design hazard analysis on their products, manufacturers are free to engage in such analyses when developing or manufacturing a product.

Further, as explained the section on remedial action in part III.D.7. below, we have removed from the final rule, the requirement for a remedial action plan for children's products.

(Comment 20)—One commenter suggested that final testing and certification should defer to the Occupational Safety and Health Administration (OSHA)-designated Nationally Recognized Testing Laboratory (NRTL) certification program by determining that such products, as they are manufactured and distributed for consumer use, are *per se* compliant with the proposed testing and certification rules. The commenter said we would still maintain our authority to recall products, seek civil penalties, and other remedies available to the Commission, if violations are found.

(Response 20)—Pursuant to section 14(a)(3)(C) of the CPSA, we have chosen to designate accrediting bodies that are full-member signatories to the International Laboratory Accreditation Cooperation—Mutual Recognition Arrangement (ILAC–MRA) to conduct third party testing. Given that children's products intended for the U.S. market are manufactured in nations throughout the world, we decided to avoid designating accreditation programs or entities that are recognized only in a specific region, nation, or locality. The reasons for this are: (1) To keep the program as simple as possible for use by manufacturers, private labelers, importers, testing laboratories, and other interested parties; (2) to establish uniform requirements regardless of location; (3) to establish a program that is manageable within agency resources; and (4) to maintain a degree of consistency in the procedures used by the designated accrediting bodies.

Moreover, the commenter appears to misstate testing requirements. Consumer products are not tested for whether they are compliant with the testing and certification rules (*i.e.,* parts 1107 and 1109), rather, consumer products are tested for compliance with the applicable rules, bans, standards, and regulations which the CPSC enforces. Moreover, section 14(i)(2)(B)(i) of the CPSA requires such testing periodically and when there has been a material change. Therefore, continued testing is required by the statute and ''*per se* conformance'' with the applicable product safety rules is not allowed. Additionally, section 14(a) of the CPSA requires manufacturers (including importers) to certify that their products comply with the applicable product safety rules. This responsibility cannot be delegated to another party, such as a certification body.

The qualifications of testing laboratories performing certification tests are outside the scope of this final rule. Such qualifications are addressed in the various notices of requirements that we have published pursuant to section 14(a)(3) of the CPSA.

Finally, we acknowledge that the recently–enacted H.R. 2715 requires us to seek public comment on ''opportunities to reduce the cost of third part testing requirements consistent with assuring compliance with any applicable consumer product safety rule, ban, standard, or regulation.'' One topic which H.R. 2715 requires us to address pertains to ''the extent to which evidence of conformity with other national or international governmental standards may provide assurance of conformity to consumer product safety rules, bans, standards, or regulations applicable under [the Consumer Product Safety Act].'' Elsewhere in this issue of the **Federal Register**, we have published a notice inviting public comment on the issues identified in H.R. 2715, so the commenter's argument would be more appropriately raised and addressed in that proceeding. We note, however, that very few products covered under the OSHA–designated Nationally Recognized Testing Laboratory certification program would be children's products for which third party testing would be required. Moreover, those products that are subject to the OSHA certification program would likely be covered by CPSC regulations, if at all, for which the only requirement is a General Conformity Certificate based on a reasonable testing program. OSHA certification testing may be a sufficient basis for such certifications depending on the product and the type of testing involved. Given that CPSC does not have jurisdiction over products when the risks of injury associated with the consumer product could be eliminated or reduced to a sufficient extent by the actions of OSHA, there may be very little overlap between a particular product's results under OSHA's testing program and any CPSC required testing.

(Comment 21)—One commenter suggested an evidenced-based approach to certification, based on historical performance and risk for the product type and manufacturing process. The commenter suggested that an importer/retailer may implement a program requiring:

• Sample testing using materially identical components to be completed before production begins;

• Certification from samples selected during the start of production; and

• Periodic testing as the item remains in production.

At each of these stages, a representative set of samples would be pulled to cover all tests related to the applicable rules, bans, standards, and regulations.

The commenter suggested the following example:

> For a child's solid rubber ball, more than 10,000 finished products that are materially identical could be made in less than one manufacturing shift. In this scenario, it would be appropriate to select samples when material changes occur and or meet historically defined frequency intervals in order to maintain and validate that products meet all rules, bans, standards, and regulations.

The commenter would like the CPSC to acknowledge that for children's products, samples selected from a lot of finished product over 10,000 pieces, but produced in a short time period, may be used to satisfy certification testing and periodic testing requirements.

(Response 21)—Section 14(a)(2) of the CPSA requires a manufacturer or importer of a children's product subject to a children's product safety rule to submit sufficient samples of the children's product, or samples that are identical in all material respects to the product, to a third party conformity assessment body whose accreditation has been accepted by us to be tested for compliance with the applicable children's product safety rules. This requirement is also set forth in § 1107.20(a) of the final rule. Thus, the commenter's first two suggestions—to choose samples for testing using materially identical components, and to select samples during the start of production, would likely fulfill the statutory requirement to submit samples that are identical in all material respects to the product, for purposes of certification testing.

Section 14(i)(2)(B)(i) of the CPSA requires, in part, that we establish protocols and standards to ensure that a certified children's product is tested for compliance periodically. Section 1107.21 of the final rule details periodic testing requirements for children's products. Accordingly, the commenter's suggestion regarding periodic testing is required by the statute, and our expectation with regard to periodic testing is articulated in the final rule.

Regarding the commenter's suggestion regarding short-period production runs of children's products, the same samples may be used for certification and periodic tests. If a testing plan is designed and implemented to meet the requirements of §§ 1107.20 and 1107.21, then the requirements to demonstrate the product's ability to meet all applicable children's product safety rules and ensure that continuing production is compliant may be met in this manner. If the manufacturer has a high degree of assurance of the children's product compliance, and the production run does not extend beyond the maximum periodic testing interval, then no third party periodic tests may be required. However, no children's product may enter into commerce without a Children's Product Certificate based on passing test results from a CPSC-accepted third party conformity assessment body certification.

(Comment 22)—Some commenters stated that the safety performance of a finished product may not be able to be based solely on the compliance of its component parts. The commenters asserted that some requirements can be evaluated only with finished product samples. The commenters asked us to clarify which products and which regulations would be amenable to component part testing. One commenter suggested that electrical safety standards and regulations (*i.e.,* fire and shock hazard testing) should not be allowed to rely solely on component part testing.

(Response 22)—The commenters are correct that some requirements can be evaluated only with finished product samples, and not with tests on component parts. However, both this final rule and the final rule on *Conditions and Requirements for Relying on Component Part Testing or Certification, or Another Party's Finished Product Testing or Certification, to Meet Requirements in Sections 14(a) and 14(i) of the Consumer Product Safety Act* (16 CFR part 1109) contain restrictions on the use of component part testing. For example, § 1107.20(c) of the final rule states that except where otherwise specified by a children's product safety rule, component part testing pursuant to 16 CFR part 1109 may be used to support the certification testing requirements of this section. The final rule for 16 CFR part 1109 states that if a certifier has doubts about whether component part testing is sufficient to demonstrate compliance with all the applicable rules, bans, standards, or regulations, those doubts should be resolved in favor of testing the finished product.

Therefore, the commenters' concerns are addressed by the requirements of the two rules.

(Comment 23)—One commenter expressed concern about the final rule's effect on laboratory testing capacity and suggested removing references to statistical sampling and the use of ANSI/ASQ Z1.4, *Sampling Procedures and Tables for Inspection by Attributes* and Z1.9, *Sampling Procedures and Tables for Inspection by Variables for Percent Nonconforming,* for determining the number of samples required for certification testing, production testing, and periodic testing. The commenter said the frequency of testing and the number of samples tested should be set or determined by retailers and manufacturers to assure compliance with all applicable rules, bans, standards and regulations. The commenter stated that referencing the use of statistical sampling, confidence levels, and ANSI/ASQ Z1.4 & Z1.9 implies a very significant increase in the number of samples required for product testing.

(Response 23)—For manufacturers or importers using tests on samples of a product to ensure continued compliance to the applicable product safety rules, the rule permits manufacturers or importers to determine the frequency of testing and the number of samples tested to ensure compliance. Retailers only have testing or certification obligations if they are importers. The commenter did not explain how removing references to quality management and control standards and sampling procedures, which are not required, but may be used voluntarily by certifiers, would address the issue of third party conformity assessment body testing capacity. However, the proposed rule's reference to ASNI/ASQ Z1.4 and Z1.9 had the potential to mislead manufacturers because it would use the term ''Acceptable Quality Level (AQL).'' An AQL can be interpreted as an acceptable percentage of nonconforming products, which is not appropriate when applied to the case of compliance of products to health and safety standards. Therefore, we have deleted references to these standards in the final rule.

(Comment 24)—One commenter noted that the Labeling of Hazardous Art Materials Act (LHAMA) established the requirements for the labeling of art materials in ASTM D–4236, which is referenced in 16 CFR 1500.14(b)(8). The commenter asked that we: (1) Clarify the meaning of this provision with respect to the certification of art materials under section 14 of the CPSA; and (2) state whether LHAMA is a labeling rule under the Federal Hazardous Substances Act (FHSA) that would not require testing and certification to LHAMA under the CPSA. The commenter further proposed the use of existing facilities and procedures

allowed for LHAMA to certify compliance with the CPSIA.

(Response 24)—LHAMA requires that the manufacturer, importer, or repackager of art materials have a product's formulation reviewed by a toxicologist for its potential to cause chronic adverse health effects. A conformance statement on the product is used to certify that the product has been so reviewed. However, section 101 of the CPSIA introduces additional testing requirements for lead in children's products beyond what is required under LHAMA, so certification of art materials under LHAMA is not necessarily equivalent to testing for lead pursuant to section 101 of the CPSIA and section 14 of the CPSA.

Regarding whether LHAMA is a labeling requirement under the FHSA that would not require testing and certification, we note that LHAMA does not contain a performance standard similar to those in consumer product safety rules but rather, requires labeling in the form of a conformance statement that the product formulation has been reviewed by a toxicologist. The requirements of LHAMA are similar to the labeling requirements of the FHSA, of which LHAMA is a part. Therefore, third party testing for conformance to LHAMA is not required. Art materials designed or intended primarily for children 12 years of age or younger would have to be tested by a CPSC-accepted third party conformity assessment body to demonstrate compliance with the lead content limits, but they would not require third party testing and certification to the LHAMA requirements.

Regarding using facilities for LHAMA to certify to CPSIA requirements, section 14(f)(2)(C) of the CPSA states that a certifying organization, as defined in appendix A to 16 CFR 1500.14(b)(8), ''meets the requirements'' for consideration as a third party conformity assessment body ''with respect to the certification of art materials and art products required under this section or by regulations prescribed under the Federal Hazardous Substances Act.'' Thus, an organization that is a certifying organization with respect to LHAMA is a third party conformity assessment body and may test children's art materials and art products for compliance with LHAMA. Thus, insofar as certifying organizations and LHAMA are concerned, no changes to the proposed rule are necessary. Accreditation requirements for testing for compliance with the CPSIA, other than LHAMA, are beyond the scope of this rulemaking and may be addressed in a separate rulemaking.

(Comment 25)—Multiple commenters noted that manufacturers have established first party testing laboratories that are accredited to ISO/IEC 17025:2005(E) (more commonly known as ISO/IEC 17025:2005 and how it will be referred to in the preamble), *General requirements for the competence of testing and calibration laboratories.* The commenters suggested that for manufacturers with such laboratories, we should allow test results from those facilities to be used for children's product certification purposes. Many commenters suggested that one half of the testing for certification should be allowed at in-house testing facilities; others recommended that the number of samples sent to third party conformity assessment bodies for certification purposes be reduced ''to a minimum.'' Some commenters stated that we should recognize internal laboratories as a way to reduce dependence on third party conformity assessment bodies. The reasons for the suggestions include: A desire to reduce testing costs, to encourage other manufacturers to develop their own internal testing facilities, and to promote continuous product improvements.

(Response 25)—Section 14(a)(2) of the CPSA explicitly requires that testing of children's products be conducted by a third party conformity assessment body as a condition of certification. Further, third party conformity assessment bodies must have a CPSC-accepted accreditation for the scope of the testing undertaken in support of product certification. Unless the manufacturer's laboratory is a CPSC-accepted firewalled conformity assessment body, first party testing facilities, regardless of ISO/IEC 17025:2005 accreditation status, cannot be used for children's product certification purposes.

We note that, in response to these comments and concerns raised about cost, § 1107.21(d) of the final rule allows manufacturers using in-house testing laboratories accredited to ISO/IEC 17025:2005 to ensure continued compliance, to conduct periodic testing at a maximum testing interval of three years.

We further note that on August 12, 2011, the President signed into law H.R. 2715, which amended the CPSIA in several respects. One provision in H.R. 2715 requires us to seek public comment on opportunities to reduce the cost of third party testing requirements, consistent with assuring compliance with any applicable consumer product safety rule, ban, standard, or regulation. Elsewhere in this issue of the **Federal Register**, we have published a notice seeking public comment on the issues in H.R. 2715. H.R. 2715 further requires us to review the public comments and states that we may prescribe new or revised third party testing regulations if we determine that such regulations will reduce third party testing costs, consistent with assuring compliance with the applicable consumer product safety rules, bans, standards, and regulations.

(Comment 26)—One commenter noted that carpets and rugs currently require flammability testing in accordance with 16 CFR parts 1630 and 1631 and suggested that there is no need for an additional flammability testing procedure for youth carpets and rugs.

(Response 26)—Section 14(a)(2) of the CPSA requires third party conformity assessment body testing of children's products (or samples that are identical in all material respects) subject to a children's product safety rule for initial certification purposes. Further, section 14(f)(1) of the CPSA defines a ''children's product safety rule'' as a consumer product safety rule enforced by the Commission. Section 3(a)(2) of the CPSA defines a ''children's product'' as a consumer product designed or intended primarily for children 12 years of age or younger. Thus, because youth carpets and rugs are children's products and are subject to the consumer product safety rules 16 CFR parts 1630 and 1631, third party testing is required.

For these reasons, initial certification testing for youth carpets and rugs must be performed by a CPSC-accepted third party conformity assessment body whose accreditation includes the scope of the tests. Second, children's products are subject to requirements for periodic testing, material changes, undue influence, and recordkeeping in subpart C of the final rule. The test methods in 16 CFR parts 1630 and 1631 are still applicable.

(Comment 27)—One commenter stated that the statutory requirements for certificates in section 14(a) of the CPSA impose strict and detailed requirements for the contents and availability of certificates of conformity that document compliance of a children's product as demonstrated through test results. A certificate based on accredited third party conformity assessment body testing must be issued by the manufacturer and private labeler of any children's product that is subject to a CPSC rule, and it must comply not only with the requirements of section 14(g) of CPSA, but also with the requirements of a finished product certifier's reliance on component materials testing certification. Thus, a finished product certifier could rely on

a test report showing passing test results for one or more component materials used in the product, based upon accredited third party conformity assessment body testing conducted by another person.

The commenter stated that including this information in the certificate accompanying the finished children's product would create logistical nightmares for the manufacturers and private labelers of children's products. The commenter did not object to the ''recordkeeping'' requirements in proposed § 1107.26; however, the commenter urged us to note that compliance with these requirements should make it unnecessary for the manufacturer or private labeler of the finished children's product, to ensure that every certificate required under section 14 of the CPSA accompanies the product or shipment of products, is furnished to each distributor or retailer of the product.

The commenter also urged us to adopt certificate requirements that reflect the key concept in the tracking label provisions, which require that the manufacturer (as well as the ''ultimate purchaser'') of the finished children's product be able to ''ascertain'' certain information similar to what is required for certificates of conformity. The commenter suggested that certificates, like ''tracking labels,'' for children's products under section 103 of CPSIA, could be mandated to use codes or other means to point all interested parties to a source where such information readily can be found. This code could be contact information, where the manufacturer or private labeler could include an Internet URL for the manufacturer's Web site, where the information could be accessed.

(Response 27)—Section 14(g)(1) of the CPSA and 16 CFR 1110.11 require specific information on each certificate. In addition, section 14(g)(3) of the CPSA states that the required certificate shall accompany the applicable product or shipment of products covered by the same certificate and a copy of the certificate shall be furnished to each distributor or retailer of the product. However, 16 CFR 1110.9 allows a manufacturer to file certificates electronically by providing an Internet URL for the manufacturer's Web site, where the information could be accessed, as the commenter suggested. We note that the listing of component parts or component part test results does not have to be included on the finished product certificate.

(Comment 28)—Multiple commenters mentioned the high costs associated with third party testing and noted that the proposed rule under-recognizes the in-house quality assurance and testing capabilities of manufacturers.

(Response 28)—We are aware of many effective quality assurance techniques that are widely used to control quality in product manufacturing. However, section 14(a)(2) of the CPSA requires third party conformity assessment body testing of children's products for initial certification. Unless the manufacturer's in-house testing facility is a CPSC-accepted firewalled conformity assessment body, data from those facilities cannot be used for children's product certification purposes. No exclusion is included in the statute for first party certification or periodic testing of children's products based on the costs of testing.

In response to these comments, and in response to concerns about the cost of third party testing, § 1107.21(d) of the final rule allows manufacturers who are implementing a production testing plan to ensure the compliance of continuing production, to conduct third party periodic testing at a maximum testing interval of two years. Further, the final rule allows manufacturers using in-house testing laboratories accredited to ISO/IEC 17025:2005 to ensure continued compliance by conducting third party periodic testing at a maximum testing interval of three years. We believe this balances the desire for unbiased objective test results with the cost concerns expressed in the comments.

Additionally, on August 12, 2011, the President signed into law H.R. 2715, which amended the CPSIA in several respects. One provision in H.R. 2715 requires the CPSC to seek public comment on opportunities to reduce the cost of third party testing requirements consistent with assuring compliance with any applicable consumer product safety rule, ban, standard, or regulation. Elsewhere in this issue of the **Federal Register**, we have published a notice seeking public comment on the issues in H.R. 2715. H.R. 2715 further requires us to review the public comments and states that we may prescribe new or revised third party testing regulations if we determine that such regulations will reduce third party testing costs consistent with assuring compliance with the applicable consumer product safety rules, bans, standards, and regulations.

2. Proposed § 1107.20—General Requirements

a. The Number of Samples

Proposed § 1107.20(a) would require manufacturers to submit a sufficient number of samples of a children's product, or samples that are identical in all material respects to the children's product, to a third party conformity assessment body for testing to support certification. The proposal would require that the number of samples selected provide a high degree of assurance that the tests conducted for certification purposes accurately demonstrate the ability of the children's product to meet all applicable children's product safety rules.

(Comment 29)—Two commenters wanted more detail on what is meant by ''a sufficient number of samples.'' The commenters expressed concern that, if the number is left to conformity assessment bodies, there will be too much variability among conformity assessment bodies about what is a sufficient number.

(Response 29)—A ''sufficient number of samples'' are the number of samples necessary to give the manufacturer or importer a high degree of assurance of the product's compliance with the applicable rules when tested. Because a high degree of assurance is based upon the manufacturer's or importer's knowledge of the product and its manufacture, a sufficient number of samples will vary based on those factors. For example, for products with highly consistent part-to-part manufacturing processes (*e.g.,* die casting), fewer samples may be necessary to give the manufacturer/importer a high degree of assurance of compliance. For processes with more variability (such as hand assembly), it is likely that more samples will be necessary to achieve the same high degree of assurance.

The commenters also may have misunderstood the role of conformity assessment bodies in the testing and certification requirements of the rule. The conformity assessment body does not specify the number of samples to be tested. The manufacturer or importer specifies to the conformity assessment body the number of samples to be tested.

Finally, on our own initiative, we revised the second sentence to say that the number of samples selected must ''be sufficient to'' provide a high degree of assurance. We added this language to be consistent with the requirement to ''submit a sufficient number of samples'' language in the first sentence of the section. This change is also consistent with section 14(a)(2)(A) of the CPSA, which requires a manufacturer to ''submit sufficient samples of the children's product'' for testing.

(Comment 30)—One commenter stated that the language covering

samples needs to be clarified. The commenter stated that the proposal would require testing with a ''sufficient number of samples'' to provide a ''high degree of assurance'' (for minimum certification testing), while maintaining that the sampling does not have to meet minimum standards of statistical confidence. However, the commenter noted that the comments accompanying the proposed rule recognize that ''there may be difficulty in applying statistical methods to all manufacturing processes.''

The commenter further stated that if testing a ''sufficient number of samples to provide a high degree of assurance'' is required when applying a reasonable testing program to children's products, then we should provide guidance on alternatives that certifiers may use to fulfill the duty to justify their plan, were they to choose anything less than a random statistical sample. The commenter noted that historically, we have relied on a sample of 12 or fewer units, without regard to the size of the production run and that certain statistical models used by auditors impose a maximum sample of 25 units, no matter the size of the cohort from which the samples are selected.

Based on these points, the commenter recommended that we delete the requirement to test a ''sufficient number of samples to provide a high degree of assurance'' under a reasonable testing program. The commenter said that the premise of a ''reasonable testing program''—in order to differentiate it from the mandatory periodic testing required for children's products not relying upon a reasonable testing program—must be that, for some specific products, testing will not be the basis for certifying to the applicable rule. The commenter stated that we appropriately acknowledged the implications of differences between product categories and industries attempting to develop programs when, in the preamble to the proposed rule, we observed: ''A manufacturer may develop the scope and details of each element of a reasonable testing program based on knowledge and expertise regarding the product and its manufacturing processes'' (75 FR at 28345). The commenter stated that this discretion also must extend to the sample selection method of test programs, provided that all population elements have a chance of selection and due care is exercised to avoid selection bias through documented procedures.

The commenter also stated that we should suggest separate regulations for specific products that may warrant prescribed methods, as has been done with bicycle helmets. The commenter expressed the belief that this is the kind of evidence-based decision making we envisioned in rejecting a single definition of ''high degree of assurance'' within a reasonable testing program for non-children's products.

(Response 30)—Although subpart B, describing a reasonable testing program, has been reserved in the final rule, the concept of certification testing and testing a sufficient number of samples to provide a high degree of assurance of compliance with applicable rules, bans, standards, and regulations remains in the final rule with regard to children's products in § 1107.20(a). We disagree with the commenter's assertion that ''testing with a sufficient number of samples to provide a high degree of assurance'' requires the testing method to meet minimum standards of statistical confidence. In the preamble to the proposed rule (75 FR at 28344), the discussion of a high degree of assurance intentionally avoided choosing a statistically based definition for the term. Therefore, the certifier is allowed to choose other means, using its knowledge of the product and how it is manufactured, to determine what would be a sufficient number of samples. A certifier may use statistical methods, but the determination of a sufficient number of samples to achieve a high degree of assurance is not required to be statistically based.

We decline to provide guidance on alternatives that certifiers may use to fulfill the duty to justify their plan if they were to choose anything other than a random statistical sample. With the wide variety of children's products, manufacturers, and manufacturing processes that will be subject to the final rule, it would be impractical to attempt to provide guidance applicable to all or to attempt to provide individualized guidance for some or all products, as requested by the commenter. Because the certifier typically possesses greater knowledge of the product and how it is made than other parties possess, the certifier is in the best position to determine how to achieve a high degree of assurance that its products are compliant with all the applicable children's product safety rules.

Regarding the commenter's observation of the CPSC's use of 12 or fewer samples, those samples were not used for children's product certification purposes. Thus, tests run by CPSC staff are not germane to the discussion of product certification. Depending upon the manufacturer's knowledge of a children's product and its manufacture, a sufficient number of samples to provide a high degree of assurance of compliance with the applicable children's product safety rules may be greater, or fewer, than 12.

The commenter may be misunderstanding the rule as it relates to random samples. In proposed § 1107.22, the testing of random samples was required only during periodic tests of children's products subject to an applicable children's product safety rule. Pursuant to H.R. 2715, the testing of ''random samples'' to ensure continued compliance has been replaced with testing of ''representative samples'' to ensure continued compliance. Given the change in the statute, we have decided to remove § 1107.22 in the final rule. Regardless, certification testing in the proposed rule never required the selection of random samples for children's products.

For children's products, section 14(a)(2)(A) of the CPSA requires that every manufacturer or private labeler of a children's product:

> Submit sufficient samples of the children's product, or samples that are identical in all material respects to the product, to a third party conformity assessment body accredited * * * to be tested for compliance with such children's product safety rule.

Therefore, the statute requires children's products to be tested before they can be certified, and the statutory requirement for third party periodic testing applies.

We agree that there are instances in which it may be preferable to specify a testing program in a particular regulation, and several of our existing regulations require such programs. Should a particular standard at some point necessitate consideration of such an approach, we will provide due consideration of how to specify, within the statutory framework that requires third party certification and third party periodic testing, such a particular testing program.

(Comment 31)—One commenter expressed concern about the requirement to perform certification tests. The commenter said they did not believe that a requirement to test pre-production samples should be part of a reasonable testing program, adding that it may be impractical for seasonal items or short production runs. The commenter stated that preproduction samples cannot be tested because we will not accept the test results on samples as test results on the finished product. The commenter asked: if the preproduction samples fail and the retailer/importer has the product reworked by the manufacturer to correct any defects, and the production units pass tests to meet all applicable

standards, then why should it matter if the samples failed, as long as the final product meets the requirements? The commenter expressed the belief that sample testing should be optional, not required.

(Response 31)—Although subpart B, describing a reasonable testing program, has been reserved in the final rule, the concept of certification testing and testing a sufficient number of samples to provide a high degree of assurance of compliance with applicable rules, bans, standards, and regulations remains in the final rule with regard to children's products in § 1107.20(a). Section 1107.20(a) states that certification tests must be performed on samples that are identical in all material respects to the children's product distributed in commerce. Thus, finished children's product samples or preproduction samples are acceptable for certification test purposes if their performance for the test under consideration is the same as the finished product.

The commenter did not explain why they believe that certification tests may be impractical for seasonal or short production run items. Thus, we cannot respond to the commenter's concern. The final rule requires passing certification test results before a Children's Product Certificate can be issued.

With regard to the commenter's concern regarding a test failure of preproduction samples, the commenter may have misunderstood the requirements of certification testing. The commenter described a circumstance in which a manufacturer tested samples for compliance to a regulation. Upon receiving a failing test result, the manufacturer addressed the causes of the failing test results and conducted new certification tests on samples of the ''corrected'' product and received passing test results. This describes an acceptable process for initial product certification.

We disagree with the commenter's suggestion that certification tests should be optional. Section 14(a)(2) of the CPSA expressly refers to testing as being the basis of a certification and does not make such testing optional.

(Comment 32)—A commenter suggested that the final rule not require finished product/component part testing and should allow samples that are identical in all material respects to the finished product to be tested. The commenter added that testing on samples since the 1950s has not resulted in a recall for failing to comply with the applicable rule. Thus, requiring finished product/component testing would be extremely costly and burdensome and would not increase safety. The commenter would revise the rule to make it clear that component parts that are materially similar to the finished part can be used for certification testing.

(Response 32)—We agree with the commenter regarding the testing of samples. Section 1107.20(a) states that samples must be identical in all material respects to the children's product.

We also agree with the commenter's suggestion that we clarify the rule; therefore, we have revised § 1107.20(c) to state that component part testing may be used for certification of a finished product.

(Comment 33)—One commenter expressed the belief that the manufacturer should determine the number of units to be tested, but added that they do not believe that statistical sampling is appropriate.

(Response 33)—A manufacturer may use statistical or qualitative means to determine how many units of a product are needed for certification testing to give the manufacturer a high degree of assurance that the product complies with the applicable rules. The manufacturer is not required to use statistical methods, but they should be prepared to describe how their technique shows the product's compliance.

(Comment 34)—One commenter noted that products using ''food grade'' materials have supplier certificates stating that these materials meet the requirements of the Federal Food, Drug, and Cosmetic Act (FFDCA) and/or the packaging requirements for the Coalition of Northeastern Governors (CONEG). The commenter suggested supplementing these certificates with other analyses, as part of the certification (*e.g.,* gas chromatography—mass spectrometry, GC–MS) and a reasonable testing program. The commenter said that such assurances also can be used, consistent with the Commission's authority under section 3 of the CPSIA, to reduce the burden of testing on manufacturers of consumer products. Because the proposed rule would acknowledge that children's product manufacturers who implement a reasonable testing program have a reduced third party test burden from the standpoint of third party periodic testing, the commenter said that such compliance assurances can be incorporated into a program for children's products as well.

(Response 34)—Section 14(a)(2) of the CPSA requires third party conformity assessment body testing of children's products as a condition of certification. Additionally, those third party conformity assessment bodies must have a CPSC-accepted accreditation for the scope of the testing undertaken in support of product certification. ''Food grade'' materials and CONEG requirements are not conducted by these laboratories and do not necessarily demonstrate compliance with the requirements of applicable children's product safety rules or compliance with the third party testing requirement in section 14(a)(2) of the CPSA. Accordingly, we cannot adopt those certifications in lieu of the certification required under section 14(a)(2) of the CPSA.

While manufacturer-supplied certificates stating that these materials meet FFDCA or CONEG requirements may not be used as the basis for a third party-supported product certification, they can be used as part of a production testing plan implemented to extend the maximum periodic testing interval from one year to two years if they are sufficient to demonstrate compliance with a children's product safety rule such as the lead content limits. We note that some food additives are GRAS, or ''generally recognized as safe.'' However, these designations might not be based on scientific analyses or testing. Instead, the GRAS status for a material might be based on longstanding acceptance or belief.

Furthermore, on August 12, 2011, the President signed into law H.R. 2715, which amended the CPSIA in several respects. One provision in H.R. 2715 requires us to seek public comment on opportunities to reduce the cost of third party testing requirements, consistent with assuring compliance with any applicable consumer product safety rule, ban, standard, or regulation. H.R. 2715 directs us to seek public comment on seven specific issues, including the extent to which the use of materials subject to regulations of another government agency that requires third party testing of those materials may provide sufficient assurance of conformity with an applicable consumer product safety rule, ban, standard, or regulation without further third party testing. Elsewhere in this issue of the **Federal Register**, we have published a notice seeking public comment on the issues in H.R. 2715.

H.R. 2715 further requires us to review the public comments and states that we may prescribe new or revised third party testing regulations if we determine that such regulations will reduce third party testing costs consistent with assuring compliance with the applicable consumer product safety rules, bans, standards, and regulations. Should new information

become available, the Commission may revisit this issue in the future.

b. The Interaction Between the Manufacturing Process and Samples

Proposed § 1107.20(b) would state that, if the manufacturing process for a children's product consistently creates parts that are uniform in composition and quality, a manufacturer may submit fewer samples to provide a high degree of assurance that the finished product complies with the applicable children's product safety rules. If the manufacturing process for a children's product results in variability in the composition or quality of children's products, a manufacturer may need to submit more samples to provide a high degree of assurance that the finished product complies with the applicable children's product safety rules.

(Comment 35)—One commenter stated that phrases, such as ''sufficient number of samples'' and ''variability in composition or quality,'' can be confusing. The commenter said that regular internal monitoring and periodic testing should be able to provide sufficient data and information to support any assessment of product quality.

(Response 35)—The commenter is correct that internal monitoring and testing can provide data to support the assessment of product quality. Because § 1107.20 applies to both tightly and loosely controlled manufacturing processes, we emphasize in § 1107.20(b) of the final rule that the number of samples needed to give the certifier a high degree of assurance of the product's compliance is affected by how well the product's manufacturing process controls those variables associated with compliance. A sufficient number of samples would be the quantity of samples selected for certification testing that gives the certifier a high degree of assurance that the product complies with all the applicable children's product safety rules.

''Variability in the composition or quality,'' for purposes of § 1107.20, means unit-to-unit differences of a product that can affect its compliance with the applicable children's product safety rules.

We have finalized this paragraph without change.

(Comment 36)—One commenter stated that regular internal monitoring and periodic testing should be able to provide sufficient data and information to support any assessment of product quality. The commenter noted that this procedure is commonly practiced by many manufacturers at present.

(Response 36)—Section 1107.20(b) of the final rule states, in part, that if the manufacturing process for a children's product consistently creates finished products that are uniform in composition and quality, a manufacturer may submit fewer samples to provide a high degree of assurance that the finished product complies with the applicable children's product safety rules. We interpret the comment to assert that internal manufacturing controls and regular testing should obviate the need for numerous samples for product certification. The commenter is correct in that the manufacturer's internal controls and testing can provide information to use in determining how many certification test samples would be required to give the certifier a high degree of assurance of the product's compliance with the applicable rule.

c. Component Part Testing

Proposed § 1107.20(c) would state that, except where otherwise specified by a children's product safety rule, a manufacturer may substitute component part testing for finished product testing pursuant to 16 CFR part 1109, if the component part, without the remainder of the finished product, is sufficient to determine compliance for the finished product.

(Comment 37)—One commenter requested that we make an explicit statement about component testing indicating that certain components are exempt from testing and certification. The commenter was concerned that, without specific language, the final customer will not accept component testing if exempt parts are not tested. The commenter recommended revising proposed § 1107.20(c) as follows:

> (c) Except where otherwise specified by a children's product safety rule, a manufacturer may substitute component part testing for complete product testing pursuant to 16 CFR [part] 1109 if the component part, without the remainder of the finished product, is sufficient to determine compliance for the entire product. *Component part testing can be used to substantiate compliance for those children's products where part of the product has been exempted from testing pursuant to Section 1500.91.* (Italics indicate proposed language.)

(Response 37)—We agree that language similar to what the commenter suggested would be helpful, but we believe that the commenter's change is more appropriate in the rulemaking pertaining to component part testing, specifically with component part testing for the lead content of children's products under proposed 16 CFR 1109.12. Therefore, we have considered this comment under the proposed rule for component part testing.

On our own initiative, we have revised § 1107.20(c) to state: ''Except where otherwise specified by a children's product safety rule, component part testing pursuant to 16 CFR part 1109 may be used to support the certification testing requirements of this section.'' We made these changes to simplify the language in § 1107.20(c) and to remove descriptions of 16 CFR part 1109 to avoid potential confusion over what the final rule requires and what 16 CFR part 1109 mandates.

(Comment 38)—One commenter stated that raw (or base) material testing is critical to its ability to develop programs to comply with the law. The commenter noted that, although it is a component manufacturer, it has more than 384,000 stock-keeping units (SKUs). These hundreds of thousands of products could be seen as different combinations of a smaller population of subcomponents and raw materials. The commenter stated that it is through working with this smaller population of subcomponents and raw materials that they can effectively manage quality in areas such as lead levels.

(Response 38)—Component part testing of raw materials is beyond the scope of this rule and is considered in the final rule on *Conditions and Requirements for Relying on Component Part Testing or Certification, or Another Party's Finished Product Testing or Certification, to Meet Testing and Certification Requirements* (16 CFR part 1109). However, in that final rule, in many cases, raw materials or subcomponents may be considered component parts, as long as due care has been taken to ensure that no action subsequent to component part testing has adversely affected the raw materials' or subcomponents' compliance with the applicable product safety rules.

d. Remedial Action

Proposed § 1107.20(d) would state that, if a product sample fails certification testing, even if other samples have passed the same certification test, the manufacturer must investigate the reasons for the failure and take remedial action. A manufacturer would not be allowed to certify the children's product until the manufacturer establishes with a high degree of assurance that the finished product complies with all applicable children's product safety rules.

(Comment 39)—Two commenters raised questions about what action must be taken when a product fails a test. One commenter interpreted the proposed rule to mean that all similar toys are

also not compliant, resulting in a factory shutdown. The other commenter noted that different products vary in design and manufacture, and if one product fails, it does not mean that other products would have the same problem.

(Response 39)—Section 1107.20(d) of the final rule states that if a product sample fails certification testing to the applicable children's product safety rule(s), even if other samples have passed the same certification test, the manufacturer must investigate the reasons for the failure and take the necessary steps to address the reasons for the failure. Generally, certification testing of a children's product requires all samples tested to pass the applicable children's product safety standard. Otherwise, the certifier cannot ensure with a high degree of assurance that the tests conducted for certification purposes accurately demonstrate the ability of the children's product to meet all applicable children's product safety rules. However, some regulations allow for some individual samples of a test set to exceed the limit but still comply with the regulation. For example, in the *Standard for the Surface Flammability of Small Carpets and Rugs* (FF 2–70) in 16 CFR part 1631, there is an allowance within the standard for a failure during a test and a prescribed action. Because the regulation specifies the procedure for dealing with a sample test failure, or through labeling, we would view such a properly labeled product as meeting the applicable product safety standard.

A test failure for one children's product applies only to that product and is not necessarily representative of all products in the factory. An exception to this might be a test on a component part used in many products. In that circumstance, the nature of the test failure and the component part's use in the other products would affect which products the failing test result applies. For example, if a component part over the lead content limit is inaccessible, the use of that component part would not make the children's product noncompliant.

Additionally, on our own initiative, we have revised § 1107.20(d) by adding the phrase: ''to the applicable children's product safety rule(s)'' after the phrase ''if a product sample fails certification testing.'' This change is for clarification purposes and is not intended to have a substantive effect on the final rule. We also replaced the phrase ''take remedial action'' with the phrase ''take the necessary steps to address the reasons for the failure'' because we have removed the remedial action plan requirement in § 1107.25 from the final rule. We discuss the removal of the remedial action plan requirement in part III.D.7. of this document, below.

3. Proposed § 1107.21 Periodic Testing

a. General Periodic Testing Requirements

Proposed § 1107.21(a) would implement the periodic testing requirement in section 14(i)(2)(B)(i) (renumbered by H.R. 2715 from section 14(d)(2)(B)(i)) of the CPSA by requiring each manufacturer to conduct third party periodic testing at least annually, except as otherwise provided in proposed § 1107.21(b) and (d), or as provided in regulations under this title. The proposal also would explain that manufacturers may need to conduct third party periodic tests more frequently than on an annual basis to ensure a high degree of assurance that the product being tested complies with all applicable children's product safety rules and that more frequent third party periodic testing may help a manufacturer identify noncompliant products quicker and, as a result, may limit the scope of any potential product recall. In addition, more frequent third party periodic testing may reduce the manufacturer's liability for civil penalties resulting from a noncompliant product, reduce potential damage to a manufacturer's reputation, and increase the manufacturer's confidence in the effectiveness of the third party periodic testing.

(Comment 40)—One commenter asserted that the language of proposed § 1107.21 is not explicitly limited to children's products. The commenter recommended that the language in the final rule be revised so that the term ''manufacturer'' is changed to the phrase ''manufacturer of a children's product'' to clarify that § 1107.21 applies only to children's products. The commenter also stated that the same revision should be made throughout subpart C, wherever the term ''manufacturer'' appears without the qualifier ''of a children's product.''

(Response 40)—We believe it is clear that Subpart C applies only to children's products. While we believe the commenter's suggested change is unnecessary, we have made other revisions to the text and have added a reference to manufacturers of children's product in § 1107.21(a) of the final rule to reiterate that the requirement applies only to children's products.

On our own initiative, we have revised § 1107.21 to reflect changes to the periodic testing frequency in § 1107.21(b), (c), and (d) of the final rule, to mention component part testing, and to make nonsubstantive clarifications. For example, § 1107.21(a) of the final rule states: ''All periodic testing must be conducted by a third party conformity assessment body.'' The proposed rule had mentioned third party testing in proposed § 1107.21(b), but not in proposed § 1107.21(a), so adding this sentence to a revised § 1107.21(a) of the final rule reinforces the notion that periodic testing of children's products must be done by a third party conformity assessment body. We have reorganized § 1107.21 to state the general requirements at § 1107.21(a) and then identify different options for third party periodic testing frequencies at § 1107.21(b), (c), and (d). Thus, for example, we have modified and moved the annual periodic testing mentioned in proposed § 1107.21(a) to § 1107.21(b) in the final rule, and we have combined it with the periodic test elements that were at proposed § 1107.21(c). Consequently, § 1107.21(b) of the final rule states that a manufacturer must conduct third party periodic testing to ensure compliance with the applicable children's product safety rules at least once a year, except as otherwise provided in § 1107.21(c) and (d), or as provided in our regulations. (The final rule states that the periodic testing under § 1107.21(b) must be done ''once a year,'' as opposed to ''annually,'' to eliminate potential confusion in determining how to calculate the proper interval for periodic testing.) Under § 1107.21(b), the manufacturer must conduct periodic testing at least once a year when using a periodic test plan. Section 1107.21(b)(1) of the final rule (regarding the periodic test plan) is substantially the same as proposed § 1107.21(c)(1), except that the final rule states that manufacturers must develop a periodic test plan to ''ensure with a high degree of assurance'' that children's products continue to comply with all applicable children's product safety rules. (The proposed rule stated that the manufacturer must develop a periodic test plan to ''assure that children's products'' continue to comply.) Section 1107.21(b)(2), ''Testing Interval,'' is substantially the same as proposed § 1107.21(c)(2), except that, for consistency, the final rule refers simply to a ''testing interval,'' rather than a ''periodic testing interval.'' (The proposed rule had used different terms, such as ''periodic testing interval,'' ''testing interval,'' ''interval,'' and ''interval for periodic testing,'' for the same concept.)

(Comment 41)—One commenter supported third party testing for the initial certification for any new products and said that any major changes in

design, critical component changes, or meeting changing regulations should require recertification by third party testing bodies. The commenter also supported periodic testing by third party conformity assessment bodies of any products, providing that a much more refined and more specific requirement can be presented and confirmed by a proper authority. The commenter noted that it would be difficult and extremely risky to leave such a decision and ruling to the related parties. However, the commenter supported the earlier proposal of component part testing that certifies recognized components for toy production because it would enhance the elimination of certain repetitive and redundant testing on the finished product.

(Response 41)—The commenter was unclear what it meant by a ''proper authority'' or which parties are the ''related parties'' dealing with the difficulty and risk of periodic testing. In the final rule, the certifier (domestic manufacturer or importer) of a children's product must determine the frequency of periodic testing and the number of samples to be tested. The frequency of testing (within specified maximum periodic testing intervals) and the number of samples required must be sufficient to give the certifier a high degree of assurance that continuing production or importation of the children's product continues to meet the requirements of all applicable children's product safety rules.

The commenter did not indicate what factors should be added to the periodic testing requirements to make them more refined or specific. Thus, we have no basis to modify the rule to account for such factors. Further, identifying or creating a ''proper authority'' to confirm periodic testing programs would present practical difficulties due to the number of products requiring periodic testing plans and the variety of manufacturing techniques used in their production. Because periodic testing requirements apply to many different types of children's products and manufacturers, and because manufacturing techniques for those products vary widely, one set of refined or specific requirements for periodic testing is unlikely to be applicable to all children's products that require periodic testing.

(Comment 42)—One commenter noted that some children's products are not produced on a regular basis, and more than one year may pass between production runs. Because there are no production units on which to perform periodic testing, the commenter suggested that an ''Inactive'' product status be created for a children's product that has passed certification testing—but currently is not being produced. Once production resumes, periodic testing can be performed on the new units.

(Response 42)—A new ''Inactive'' status is unnecessary because periodic testing of children's products is only required for continuing production after certification. If, in the commenter's example, more than a year passes between production runs, when production recommences, the final rule requires periodic tests on new production runs to assure continued compliance. The certifier must use due care to ensure that no material change has occurred in the product's design or manufacturing process, including the sourcing of component parts. Otherwise, new certification tests must be conducted on the newly manufactured product.

(Comment 43)—One commenter noted that while the proposed rule would accept the use of component part testing for certification purposes, it does not address its use for periodic testing. The commenter would revise proposed § 1107.21(c)(1) to include language allowing for the use of a component part testing program to meet the periodic testing requirements. The commenter stated that it could foresee customers requiring the development of a periodic testing program as a contractual requirement.

Another commenter remarked that the proposed rule does not recognize items that are exempt from testing pursuant to 16 CFR 1500.91, *Determinations regarding lead content for certain materials or products under section 101 of the Consumer Product Safety Improvement Act.*

(Response 43)—Section 1107.21(a) of the final rule states that manufacturers must conduct third party periodic testing. This testing is to ensure that children's products manufactured after the issuance of a Children's Product Certificate, or since the previous periodic testing was conducted, continue to comply with all applicable children's product safety rules. Periodic testing can use component part testing to ensure compliance with some or all of the applicable children's product safety rules. We have clarified the language of § 1107.21(a) of the final rule to state that component part testing may be used to meet the periodic testing requirements, subject to the conditions of § 1107.21.

Regarding items that are exempt from testing for lead content, those items are also exempt from any periodic testing requirements. In 16 CFR 1500.91, we have determined that these materials fall under the lead content limit, and no testing is required.

(Comment 44)—One commenter stated that the testing frequency should be left to the manufacturer and to the market; and the commenter further asserted that a rule requiring manufacturers to test according to these standards every year is an unaffordable economic burden. The commenter indicated that it is unrealistic to imagine that testing cost savings from maintaining a reasonable testing program (as described in the proposed rule) will be useful because that program is ''wasteful and gargantuan.'' The commenter asserted that a firewalled conformity assessment body would be unrealistic for small businesses. The commenter also maintained that component part and composite testing likewise, will provide no relief. The commenter asked: If a firm has a good long-term record of safety, then why are they required to test according to the proposed rule?

(Response 44)—Section 14(i)(2)(B)(i) of the CPSA requires us to establish protocols and standards for ensuring that children's products are subject to testing periodically. We have revised § 1107.21 to allow third party periodic testing: At least once per year for children's product with a periodic testing plan; at least once every two years for children's products with a production testing plan; or at least once every three years for a production testing plan using an ISO/IEC 17025:2005-accredited testing laboratory (and provided other requirements are met, including, but not limited to, using that lab to test to the children's product safety rule(s) to which the product is subject). Allowing firms with a good long-term record of safety to forego testing their children's products would not comply with the law, which requires periodic testing of children's products, regardless of past performance.

Regarding the commenter's assertion that children's product manufacturers will not attempt to save on testing costs because implementing a reasonable testing program is ''wasteful and gargantuan,'' the final rule does not require manufacturers of children's products to have a reasonable testing program in order to save on third party conformity assessment body testing costs. By increasing the manufacturer's options to qualify for an extension of the maximum periodic testing interval, we hope that more manufacturers wishing to implement such a program will find it advantageous to do so.

Additionally, pursuant to H.R. 2715, elsewhere in this issue of the **Federal Register**, we have published a notice seeking comment on other techniques for lowering the cost of third party testing, consistent with assuring compliance with the applicable consumer product safety rules, bans, standards, and regulations.

As for the commenter's remark about firewalled conformity assessment bodies, the final rule does not require that small businesses have a firewalled conformity assessment body.

Finally, regarding the commenter's statements on component part and composite part testing, we address those comments in the preamble to the final rule, *Conditions and Requirements for Relying on Component Part Testing or Certification, or Another Party's Finished Product Testing or Certification, to Meet Testing and Certification Requirements* (16 CFR part 1109).

(Comment 45)—One commenter stated that periodic testing is unnecessary because when a product is manufactured in China, the initial product sample is inspected by the China Entry-Exit Inspection and Quarantine Bureau to ensure that it complies with all European Union, United States, and China product safety standards. Additionally, the commenter observed, the China Entry-Exit Inspection and Quarantine Bureau will conduct the random sample in-line inspection to inspect a number of samples in the production twice a year. The commenter said that products that fail the inspection will not be allowed to be exported. The commenter said that the strict product safety inspections by China Entry-Exit Inspection and Quarantine Bureau are enough to have the high degree of product safety assurance and that a periodic testing requirement would be duplicative.

The commenter also said that periodic testing was unnecessary because, as the manufacturer, they have a high degree of self-discipline and strictly supervise their products' safety. Furthermore, the commenter stated that 90 percent of manufacturers have their own testing laboratories that conform to international laboratory standards and already have a series of internal product safety testing in place to maintain a high degree of product safety and quality assurance. In addition, the commenter stated that most customers require testing by the third party conformity assessment body per order before the manufacturer exports the goods to ensure a high degree of product safety.

(Response 45)—The final rule requires periodic testing to be conducted by a CPSC-accepted third party conformity assessment body. China Entry-Exit Inspection and Quarantine Bureaus do not currently meet the conditions specified in the Consumer Product Safety Improvement Act for governmental conformity assessment bodies to participate in the CPSC's program. Further, the third party testing requirements apply irrespective of the level of a manufacturer's self-supervision of product safety.

With regard to internal testing facilities, these are considered first party laboratories, and their tests are not allowed for periodic test purposes, unless the laboratory is a CPSC-accepted firewalled conformity assessment body. However, if the third party laboratories testing the manufacturer's products for the customer are CPSC-accepted for the scope of the testing, test results from those laboratories may be used for fulfilling the periodic testing requirements. We note that internal testing facilities can be used to extend the maximum testing interval for periodic testing from one year to two years. Further, if the internal testing facility is ISO/IEC 17025:2005-accredited and other conditions are met, the maximum testing interval for periodic testing is extended to three years.

(Comment 46)—One commenter stated that the importer who purchases a product from a manufacturer and takes possession of the product prior to importation does not have full visibility and knowledge of the manufacturing process and must treat each shipment produced by the manufacturer as a discrete lot.

(Response 46)—An importer is responsible for issuing a Children's Product Certificate for the children's products they import. If a foreign manufacturer tests or certifies a children's product and provides the importer with the test results or certificate and other required documentation, then the importer, exercising due care, using the manufacturer's test data or certificate as a basis, may issue its own Children's Product Certificate.

In this circumstance, due care by the importer involves ensuring that the foreign manufacturer conducts periodic tests. If the foreign manufacturer does not certify the children's product, but the importer has documentation of the manufacture and testing of the children's product, then the importer is responsible for certifying the children's product and is subject to the requirement for periodic testing. However, if the importer has no knowledge of the manufacture of the product, then it should treat each shipment as a discrete lot and subject it to certification testing because the importer does not know whether material changes have been made to the product since its last shipment. In this circumstance, the shipment that has undergone certification testing is not considered continuing production of the product, and is not subject to the periodic testing requirements.

b. Periodic Testing and Reasonable Testing Programs

Proposed § 1107.21(b) would state that if a manufacturer has implemented a reasonable testing program, as described in subpart B of this part (with the exception of the certification element which, for children's products, would have to comply with the requirements in proposed § 1107.20), it would have to submit samples of its product to a third party conformity assessment body for periodic testing to all applicable children's product safety rules at least once every two years. If a manufacturer's reasonable testing program fails to provide a high degree of assurance of compliance with all applicable children's product safety rules, proposed § 1107.21(b) would state that we may require the manufacturer to meet the periodic testing requirements in proposed § 1107.21(c) or modify their reasonable testing program to ensure a high degree of assurance. One element of the reasonable testing program in proposed subpart B would be the ''production testing plan'' in proposed § 1107.10(b)(3); a production testing plan would describe what tests must be performed and the frequency with which those tests must be performed to provide a high degree of assurance that the products manufactured after certification continue to meet all applicable safety rules, bans, standards, or regulations.

(Comment 47)—One commenter recommended that we require children's products to be tested by a third party conformity assessment body at least every year, not every two years, as proposed. The commenter felt that many changes can occur over time in the manufacturing process, materials, test standards, and test protocols that could cause products tested infrequently to drift away from compliance with applicable children's product safety rules. The commenter felt that more frequent independent testing would be able to keep this in check better.

(Response 47)—We disagree with the commenter's inference that a production testing plan will not be capable of detecting ''drift'' in a product's

compliance with the applicable safety rules. We are aware of numerous forms of production testing techniques that have been implemented successfully to control product quality and ensure continuing compliance.

Manufacturers are free, however, to test their products more frequently than the rule would require.

Additionally, on our own initiative, we have reorganized § 1107.21 to move the requirements that were at proposed § 1107.21(b) to § 1107.21(c) of the final rule. Furthermore, because we have reserved subpart B (which would pertain to a reasonable testing program), we have removed references to a ''reasonable testing program'' in subpart C and replaced them with the key element of the ''reasonable testing program,'' which is the ''production testing plan.'' We decided to maintain the requirement for a production testing plan because children are a vulnerable population, and traditionally, we have had a greater interest in ensuring the safety of children's products. Additionally, with the passage of the CPSIA, Congress indicated that it intended for children's products to be subject to more stringent requirements than non-children's products, as demonstrated by the requirements for third party testing and the protocols and standards for continuing third party testing for children's products promulgated in this rulemaking.

Section 1107.21(c)(1) of the final rule states that if a manufacturer implements a production testing plan, as described in § 1107.21(c)(2), to ensure continued compliance of the children's product with a high degree of assurance to the applicable children's product safety rules, the manufacturer must submit samples of its children's product to a third party conformity assessment body for periodic testing to the applicable children's product safety rules at least once every two years. The 2-year period is derived from proposed § 1107.21(b) for manufacturers who have a reasonable testing program. Section 1107.21(c)(1) further states that a manufacturer may consider the information obtained from production testing when determining the appropriate testing interval (up to two years) and the number of samples needed for periodic testing to ensure that there is a high degree of assurance that the other untested children's products manufactured during the testing interval comply with the applicable children's product safety rules. The preamble to the proposed rule noted: ''[t]he appropriate periodic testing interval may vary for a manufacturer depending on the manufacturer's knowledge of the product and its manufacturing processes'' for the factors to consider when determining the periodic testing interval under proposed § 1107.21(c)(2) (renumbered to § 1107.21(b)(2) in the final rule) (75 FR at 28349). This concept applies equally to the information obtained from production testing. Information gained from production testing can be used to determine the appropriate testing interval (up to two years), and so we added this concept to § 1107.21(c)(1).

Section § 1107.21(c)(2) of the final rule describes the production testing plan, and it is substantially the same as the production testing plan in proposed § 1107.10(b)(3) (which is reserved in the final rule, along with the rest of subpart B). Section 1107.21(c)(2) explains that the production testing plan describes ''the production management techniques and tests that must be performed to provide a high degree of assurance that the products manufactured after certification continue to meet all the applicable children's product safety rules.'' It further explains that a production testing plan may include: recurring testing or the use of process management techniques, such as control charts, statistical process control programs, or failure modes and effects analyses (FMEAs), designed to control potential variations in product manufacturing that could affect the product's ability to comply with the applicable children's product safety rules.

Section 1107.21(c)(2) also states that a manufacturer may use measurement techniques that are nondestructive and that are tailored to the needs of an individual product to ensure that a product complies with all applicable children's product safety rules. Thus, the tests in a production testing plan under § 1107.21(c)(2) do not have to be the tests described in the applicable children's product safety rule, and they do not have to be conducted by a CPSC-accepted third party conformity assessment body. However, the implementation of the production testing plan still requires some testing. Purely mathematical techniques, such as a Failure Modes and Effects Analysis only, or a computer simulation of the product alone, are not allowed. Purely mathematical techniques, without verifying measurements, may not characterize the product with sufficient fidelity to predict accurately its compliance to the applicable rules.

Section 1107.21(c)(2) of the final rule has revised the requirement in proposed § 1107.10(b)(3)(iii)(B), which stated: ''Any production test method used to conduct production testing must be as effective in detecting noncompliant products as the test used for certification'' to ''Any production test method used to conduct production testing must be effective in determining compliance'' in the final rule. The language of the proposed rule could practically be interpreted to require the use of the test method mandated for certification because a manufacturer would be unclear about what ''as effective'' means and therefore, use the test method for certification. We changed the language in the final rule to clarify the point that production testing does not require the use of the test method for certification. Additionally, § 1107.10(b)(3)(iii)(C) of the proposed rule would state: ''If a manufacturer is uncertain whether a production test is as effective as the certification test, the manufacturer must use the certification test.'' This provision has been eliminated from the final rule because it is no longer necessary after the above clarification that production testing does not require use of the test method for certification.

Finally, § 1107.21(c)(3) of the final rule states that if a production testing plan fails to provide a high degree of assurance of compliance with the applicable children's product safety rules, we may require the manufacturer to meet the requirements of § 1107.21(b) for a periodic testing plan to ensure a high degree of assurance of compliance. This is not a new requirement. Proposed § 1107.21(b) had the same requirement for manufacturers with a reasonable testing program. Because we have removed the reasonable testing program and reserved subpart B in the final rule, the periodic testing requirement is no longer linked to the reasonable testing program. However, we have moved this requirement to the production testing plan option in § 1107.21(c)(3) and the ISO/IEC 17025:2005-accredited laboratories option in § 1107.21(d) of the final rule.

(Comment 48)—A commenter strongly recommended that we recognize or endorse certain internal in-house testing facilities that conform to ISO 17025:2000 standard. The commenter felt that this recognition would greatly expedite testing procedures and the time for certain required testing and reduce costs and lessen dependence on the third party conformity assessment bodies. Another commenter stated that we should recognize internal laboratories as a way to reduce dependence on third party conformity assessment bodies. The reasons for the suggestions include:

Better monitoring of product safety, a desire to reduce testing costs, encourage other manufacturers to develop their own internal testing facilities, and promote continuous product improvements.

(Response 48)—We recognize that using ISO/IEC 17025:2005-accredited laboratories for testing purposes provides an added measure of assurance to production testing. The laboratories are accredited by an independent body as competent to perform specified tests. They are also recognized as having instituted a management system that establishes procedures and properly maintains records. Laboratory accreditation also establishes controls concerning data integrity, equipment calibration, and procedures to resist undue influence over testing results.

For these reasons, we have amended the final rule to include a new § 1107.21(d), which provides a maximum periodic testing interval of three years for a manufacturer using an ISO/IEC 17025:2005-accredited laboratory for production testing purposes. The laboratory must be accredited by an ISO/IEC 17011:2004(E) (more commonly known as ISO/IEC 17011:2004 and how it will be referred to in the preamble) (*Conformity assessment—General requirements for accreditation bodies accrediting conformity assessment bodies*) accreditation body, and must use the same test method(s) used for certification testing when conducting testing to ensure continued compliance. We chose the 3-year time period because: (1) Having a laboratory accredited by an independent body as competent to perform specified tests provides an additional measure of assurance in the accuracy and the integrity of the testing results; (2) a laboratory accredited to ISO/IEC 17025:2005 must have implemented a management system that establishes and follows procedures, properly maintains records, and establishes controls concerning data integrity equipment calibration, and procedures to resist undue influence; and (3) using the same tests as the tests used for product certification provides a more direct assessment of compliance to the applicable children's product safety rules than process control techniques. Section 1107.21(d)(1) of the final rule also states that manufacturers must conduct testing using the ISO/IEC 17025:2005-accredited testing laboratory frequently enough to provide a high degree of assurance that the children's product continues to comply with the applicable children's product safety rules. In addition, section 1107.21(d)(1) of the final rule states that a manufacturer may consider the information obtained from testing conducted by an ISO/IEC 17025:2005-accredited testing laboratory when determining the appropriate testing interval and the number of samples for periodic testing that are needed to ensure that there is a high degree of assurance that the other untested children's products manufactured during the testing interval comply with the applicable children's product safety rules.

Section 1107.21(d)(2) of the final rule states that if the continued testing described in § 1107.21(d)(1) fails to provide a high degree of assurance of compliance with all applicable children's product safety rules, then we may require the manufacturer to comply with § 1107.21(b) or modify the testing frequency or number of samples required to ensure a high degree of assurance of continued compliance. Section 1107.21(d)(2) is substantially the same, in this respect, as proposed § 1107.21(b), in requiring the use of other third party periodic testing options if a manufacturer's testing program fails to provide a high degree of assurance of compliance, except that § 1107.21(d)(2) refers to ''continuing testing,'' rather than a ''reasonable testing program.''

Section 1107.21(g) of the final rule describes the incorporation by reference of ISO/IEC 17025:2005 and ISO/IEC 17011:2004, as required by the Director of the Federal Register. This incorporation by reference is necessary because § 1107.21(d)(1) references ISO/IEC 17025:2005 and ISO/IEC 17011:2004.

(Comment 49)—Two commenters stated that periodic testing or auditing should be considered a regular internal function. One commenter stated that any manufacturer with qualified internal testing facilities should perform such duties easily and regularly to ensure product quality. Having a third party conformity assessment body conduct periodic testing would result in a significant cost impact and would create production delays and difficulties. The commenter suggested that we not specify the frequencies of testing under different manufacturing conditions. The commenter stated that product safety rules should apply to finished products.

Another commenter noted that a consistently good product testing record should reflect the competency of qualified internal testing facilities and expertise. Accredited and qualified in-house testing facilities should be able to handle this effectively and economically. The commenter noted that smaller manufacturers may have to use the services of third party conformity assessment bodies per the agreed schedule, which needs to be defined and specified.

(Response 49)—The final rule requires periodic testing to be conducted by a CPSC-accepted third party conformity assessment body. If the ''qualified internal testing facility'' is a CPSC-accepted firewalled conformity assessment body, then tests from that conformity assessment body can be used for periodic testing purposes. Otherwise, an internal testing facility is considered a first party laboratory, and its test results would not be allowed for third party periodic testing purposes.

Regarding the commenter's assertion of significant costs, the commenter did not describe how third party testing would result in significant costs and production difficulties relative to internal testing. However, a manufacturer with internal testing facilities may use product test data from those facilities to increase its knowledge of the product and its manufacture, and thus, may reduce the number of samples required for periodic testing purposes as a means of controlling costs. Section 1107.21(c)(1) of the final rule states that if a manufacturer has implemented a production testing plan, the maximum testing interval for periodic testing is extended to two years. Additionally, under § 1107.21(d)(1) of the final rule, if the manufacturer uses an ISO/IEC 17025:2005-accredited testing laboratory for the production testing (and other requirements are met), the maximum testing interval is extended to three years. These methods may be used by a manufacturer to reduce the costs of third party conformity assessment body testing. (We explain the reasons for adding § 1107.21(d) to the final rule at part III.D.3.b. of the preamble.)

We agree with the commenter on the undesirability of specifying testing frequencies for different manufacturing conditions. Thus, the final rule specifies only the maximum testing interval for periodic testing and lists some factors to be considered by manufacturers in developing their periodic test plans. We also agree with the commenter that product safety rules should apply to finished products.

As noted above, pursuant to H.R. 2715, elsewhere in this issue of the **Federal Register**, we have published a notice seeking public comment on other techniques for lowering the cost of third party testing consistent with assuring compliance with the applicable consumer product safety rules, bans, standards, and regulations.

(Comment 50)—One commenter said we should clarify what level of detail or generality we would allow in mandating that a production test plan describe the tests to be conducted or the measurements to be tested. The commenter assumed that a manufacturer would have the flexibility to create a test plan that could be applied to multiple products. For example, the commenter suggested that a production testing plan could address testing by generic specifications of products, such as die-cast cars or fashion dolls. However, the commenter said that if we expect a production testing plan to specify the testing details for each product, then it would be so burdensome as to be economically not feasible.

(Response 50)—The use of production testing as a means to increase the maximum periodic test interval to two years is intended to be general in nature and flexible enough to be adaptable to many different products and manufacturing processes. It is the manufacturer's responsibility to tailor its production testing to its specific products. As stated in § 1107.21(c)(2) of the final rule, production testing is intended to ensure continued compliance of the product to the applicable children's product safety rules with a high degree of assurance. It is not required that a manufacturer's production testing plan specify all testing details for each product. However, § 1107.21(c)(2)(i) of the final rule specifies that a production testing plan must include a description of the process management techniques used, the tests to be conducted, or the measurements to be taken; the intervals at which the tests or measurements will be made; the number of samples tested; and the basis for determining that the combination of process management techniques and tests provide a high degree of assurance of compliance if they are not the tests prescribed for the applicable children's product safety rule. This is necessary because techniques and test methods other than those prescribed in the applicable children's product safety rules may be used in production testing and are needed to show the effectiveness of the production testing plan.

(Comment 51)—Two commenters stated that, although we acknowledged that a production testing plan could include procedures such as process management techniques, statistical process control programs, or failure mode analysis, the proposed rule would describe a rather rigid product testing plan. One commenter characterized the following two requirements as ''a rigid product testing plan'': (1) The requirement for each site to have a separate production testing plan, and (2) the production testing interval should be short enough to ensure that, if the samples selected for production testing comply with an applicable rule, ban, standard, or regulation, there is a high degree of assurance that the untested product will comply with the applicable rule, ban, standard, or regulation. The commenter urged us to acknowledge more clearly that the elements of a production test plan enumerated in the rule are not the only elements that we will recognize and that other processes, such as statistical process control mechanisms, also may be used to show compliance.

One commenter suggested that the terms ''production testing plan'' and ''remedial action plan'' be replaced with ''production testing plan or procedures'' and ''remedial action plan or procedures'' because the use of the word ''plan'' may be interpreted too narrowly to allow for the range of methods that manufacturers may use to meet the requirements.

(Response 51)—Manufacturers may use production testing plans with any procedure that is effective in detecting noncompliant products (with the requirement that purely mathematical methods with no testing are not allowed). Statistical process control mechanisms, properly applied, are acceptable methods for production testing. The production testing plan implemented at each manufacturing site may be identical, if appropriate; but each site must have identifiable production testing specific to the products produced at that site. On our own initiative, we have added language to § 1107.21(c)(2)(ii) that clarifies this point. This is a matter of documentation, and the commenter has not provided a reason why this creates a problem. The final rule does not mandate a specific testing interval for all products. Rather, the requirement in the final rule is for production testing to be effective in detecting noncompliant products with whatever fixed or variable testing interval achieves a high degree of assurance of compliance to the applicable product safety rules.

We decline to adopt the suggestion to change ''production testing plan'' to ''production testing plan or procedures.'' Dictionary definitions of ''plan'' and ''procedure'' are so similar that, to use both terms would be redundant. We believe that the description of a production testing plan in § 1107.21(c) of the final rule provides a sufficient description of its scope.

Additionally, because the final rule does not require a remedial action plan for children's products, the suggestion to replace the term ''remedial action plan'' with ''remedial action plan or procedures'' is no longer applicable.

(Comment 52)—One commenter supported the acknowledgement that the same production testing plan that is available to the manufacturing site and the importer of record (retailers) is sufficient. The commenter gave the example of a manufacturer who developed a production testing plan and demonstrated to their customers (the importers of record or retailers) that their production testing plan provides a high degree of assurance of compliance. The commenter said that importers could validate critical aspects of the plan through factory audits and evaluations, production inspections that ensure that the testing plan records are present and match the specifications, and periodic testing using a CPSC-accepted third party conformity assessment body.

(Response 52)—An importer can arrange for another party (e.g., a foreign manufacturer) to develop and conduct production testing for a product. The same production testing plan from another party may be used by multiple importers as a means of increasing the importers' maximum periodic test interval to two years. The importer, as the product certifier, must use due care to ensure that the implementation of a production testing plan ensures with a high degree of assurance that continuing production complies with the applicable product safety rules.

(Comment 53)—One commenter noted that proposed § 1107.21(b) would specify that if a manufacturer's reasonable testing program fails to provide a high degree of assurance of compliance with all applicable children's product safety rules, we may require the manufacturer to meet the requirements of proposed § 1107.21(c) or modify its reasonable testing program to ensure a high degree of assurance of compliance. The commenter asked who would determine whether a reasonable testing program provides a high degree of assurance of compliance, and how.

(Response 53)—With regard to the language in proposed § 1107.21(b) referenced by the commenter, because we have reserved the reasonable testing program option for periodic testing in the final rule, we have moved that language to §§ 1107.21(c)(3) and (d)(2) (renumbered in the final rule) and modified it to refer to the production testing plan option with a maximum periodic testing interval of two years and/or the testing by an ISO/IEC

17025:2005-accredited testing laboratory option with a maximum periodic test interval of three years. With these changes in mind, we will decide, based on the available evidence, whether a children's product's production testing plan provides a high degree of assurance of continuing compliance to the applicable children's product safety rules.

(Comment 54)—One commenter noted that the voluntary establishment of a reasonable testing program for a children's product increases the period between periodic tests to—at least once every two years—from the requirement of annual periodic testing for children's products without a reasonable testing program. The commenter suggested that we consider the costs involved in establishing and maintaining a reasonable testing program, and noted that a reasonable testing program reasonably warrants a more relaxed periodic testing frequency standard, particularly when the manufacturing process inherently results in uniform production, with very little variability in the composition or quality.

The commenter also noted that the preamble to the proposed rule stated that not all periodic testing was required to be conducted by a third party conformity assessment body (75 FR at 28348). In addition, the commenter pointed out that the preamble to the proposed rule also stated that the appropriate periodic testing interval ''may vary for a manufacturer depending on the manufacturer's knowledge of the product and its manufacturing processes'' (75 FR at 28349).

The commenter urged us to permit a manufacturer of a children's product with a reasonable testing program in place to determine when to obtain third party conformity assessment body testing of ordinary children's books or other children's paper-based printed products under a testing frequency standard of at least once every four years. The commenter noted that third party conformity assessment body testing still would occur in response to a material change to the children's product.

(Response 54)—The final rule extends the maximum testing interval for periodic testing from one to two years for manufacturers who have implemented a production testing plan as a means of ensuring continued compliance of the product to the applicable children's product safety rules. The production testing plan in § 1107.21(c) of the final rule is the same production testing plan in the reasonable testing program described in proposed § 1107.10(b)(3). This increase in the maximum testing interval was not based on the costs of third party testing or on the costs of implementing a production testing plan. When a manufacturer implements a production testing plan and conducts production testing, such testing provides more information about a product's manufacture and compliance with the applicable children's product safety rules, which justifies allowing a longer period of time between third party periodic tests. If a manufacturer uses an ISO/IEC 17025:2005-accredited testing laboratory for testing to assure continued compliance, the maximum third party periodic testing interval is extended to three years.

The commenter is correct that the preamble to the proposed rule stated that not every periodic test has to be done by a third party conformity assessment body if the manufacturer has implemented four elements of a reasonable testing program. However, § 1107.21(c) of the final rule states that a manufacturer who has implemented a production testing plan for a children's product must submit samples of the product to a third party conformity assessment body for periodic testing at least once every two years. We recognize that these two statements may be confusing, and we have clarified the text in § 1107.21(a) of the final rule to state that all third party periodic testing must be conducted by a CPSC-accepted third party conformity assessment body accredited to the scope of the tests required.

Additionally, on August 12, 2011, the President signed into law H.R. 2715 which amended the CPSIA in several respects. One provision in H.R. 2715 requires us to seek public comment on opportunities to reduce the cost of third party testing requirements consistent with assuring compliance with any applicable consumer product safety rule, ban, standard, or regulation. Elsewhere in this issue of the **Federal Register**, we have published a notice seeking public comment on the issues in H.R. 2715. H.R. 2715 further requires us to review the public comments and states that we may prescribe new or revised third party testing regulations if we determine that such regulations will reduce third party testing costs consistent with assuring compliance with the applicable consumer product safety rules, bans, standards, and regulations.

Regarding the commenter's suggestion on testing ordinary children's books or other children's ordinary paper-based printed materials, section 14(i)(4) of the CPSA, as amended by H.R. 2715, excludes ordinary books from the third party testing requirements in section 14(a) of the CPSA. Additionally, we have decided to reserve, rather than finalize, subpart B, which would have pertained to a reasonable testing program for nonchildren's products. Therefore, it is unnecessary for us to address the commenter's suggestion.

c. Periodic Testing in the Absence of a Reasonable Testing Program

Proposed § 1107.21(c) would state that if a manufacturer has not implemented a reasonable testing program, as described in subpart B of this part, then all periodic testing would be required to be conducted by a third party conformity assessment body, and the manufacturer would be required to conduct periodic testing, described in proposed § 1107.21(c)(1) and (c)(2).

Proposed § 1107.21(c)(1) would require the manufacturer to develop a periodic testing plan to ensure that children's products manufactured after issuance of a children's product certification, or when the previous periodic testing was conducted, continue to comply with all applicable children's product safety rules.

Proposed § 1107.21(c)(2) would require the periodic testing interval selected to be short enough to ensure that, if the samples selected for periodic testing pass the test, then there is a high degree of assurance that the other untested children's products manufactured during the interval comply with the applicable children's product safety rules. The interval for periodic testing may vary, depending upon the specific children's product safety rules that apply to the children's product. Proposed § 1107.21(c)(2)(i) through (c)(2)(ix) listed factors to be considered when determining the periodic testing interval.

On our own initiative, we made several editorial and complementary changes to proposed § 1107.21(c). In brief:

- We have renumbered proposed § 1107.21(c) as § 1107.21(b) in the final rule.
- In § 1107.21(b), we have revised the text to state the periodic testing options more clearly. Section 1107.21(b) now states that a manufacturer ''must conduct periodic testing to ensure compliance with the applicable children's product safety rules at least once a year,'' except as otherwise provided in § 1107.21(c) and (d) (the other periodic testing options in the final rule), or as provided in regulations under this title. Section 1107.21(b) of the final rule further states that if a manufacturer does not conduct

production testing under § 1107.21(c), or testing by a testing laboratory under § 1107.21(d), the manufacturer must conduct periodic testing pursuant to the periodic test plan requirements at § 1107.21(b)(1) and the testing interval requirements in § 1107.21(b)(2).

• In § 1107.21(b)(1) (formerly proposed § 1107.21(c)(1)), we have replaced ''assure'' with ''ensure with a high degree of assurance.'' We made this change to be consistent with other language used throughout the final rule. We also replaced ''children's product certification'' with ''Children's Product Certificate,'' for consistency throughout the final rule, and we eliminated the requirement of providing a basis for determining that the periodic testing plan provides a high degree of assurance that the product being tested continues to comply with all applicable children's product safety rules. We eliminated the requirement that a manufacturer provide the basis for determining that a periodic test plan provides a high degree of assurance because manufacturers would need to demonstrate how their production testing plan provides a high degree of assurance if we requested that information. However, it is unnecessarily burdensome to require a manufacturer to provide the basis for this in every instance, when we may never inquire about the basis for a particular periodic test plan. Therefore, we have eliminated this requirement from the final rule. In addition, we have added language to § 1107.21(b)(1) to clarify that a manufacturer must have a periodic testing plan specific to each children's product manufactured at a manufacturing site.

• In § 1107.21(b)(2) (pertaining to testing intervals), we have revised the text to refer to ''testing interval'' or ''testing,'' instead of ''periodic testing interval'' or ''periodic testing.'' ''Testing Interval,'' is substantially the same as proposed § 1107.21(c)(2), except that, for consistency, the final rule refers simply to a ''testing interval,'' rather than a ''periodic testing interval.'' (The proposed rule had used different terms, such as ''periodic testing interval,'' ''testing interval,'' ''interval,'' and ''interval for periodic testing,'' for the same concept.) We removed the word ''periodic'' because it is redundant in the context of the section, which addresses ''periodic testing.'' Additionally, § 1107.21(b)(2) states that the testing interval may vary, depending upon the specific children's product safety rules that apply to the children's product, ''but may not exceed one year.'' We added ''but may not exceed one year'' to clarify that, consistent with § 1107.21(b), the periodic testing must occur at least once a year.

• Section 1107.21(b)(2)(i) through (x) lists the factors to be considered in determining the testing interval. This list is almost identical to proposed § 1107.21(b)(2)(i) through (ix), except that the final rule separates the examples of nonmaterial changes that were at proposed § 1107.21(b)(2)(v). Proposed § 1107.21(b)(2)(v) would mention ''Nonmaterial changes, such as introduction of a new set of component parts into the assembly process, or the manufacture of a fixed number of products.'' Upon further consideration, we felt that the two examples were dissimilar, so § 1107.21(c)(2)(v) of the final rule now states: ''Introduction of a new set of component parts into the assembly process''; and § 1107.21(c)(2)(vi) of the final rule states: ''The manufacture of a fixed number of the products.'' We have renumbered the remaining subparagraphs in § 1107.21(c)(2), accordingly.

d. Periodic Testing Frequency for Low-Volume Manufacturers

Proposed § 1107.21(d) would pertain to the periodic testing frequency for low-volume manufacturers. In brief, the proposal would not require a manufacturer to conduct periodic testing unless it has produced or imported more than 10,000 units of a particular product; instead, once that threshold has been reached, the manufacturer would be subject to the periodic testing requirements of proposed § 1107.21(a), and (b), or (c).

Several commenters addressed proposed § 1107.21(d). The comments spanned a range of issues. For example, one commenter said that the production or importation volumes for different children's products may vary substantially, such as large electrical motorcycles and small stuffed toys, so the commenter said it is not reasonable to apply the same volume of 10,000 to all children's products. The commenter asked whether periodic testing is necessary when a large number of products are produced in a short timeframe, for example, 100,000 toys produced in three months. Other commenters also focused on the 10,000 figure, asking whether the figure applies only to the number of children's products produced, whether the number applies to each distinct product or to all children's products made at a facility, or whether the figure of 10,000 units is too high or too low. (One commenter stated that its analysis of CPSC-announced recalls in 2009, showed that 47 percent of the recalls involved products of 10,000 units or less.) Yet another commenter interpreted the provision as an acknowledgement by the CPSC that the periodic testing frequency standard is not essential to safety because it dispenses with periodic testing altogether in the case of manufacturers who produce or import no more than 10,000 units of a product.

On August 12, 2011, the President signed H.R. 2715 into law. H.R. 2715 requires, among other things, that we seek public comment on opportunities to reduce the cost of third party testing requirements consistent with assuring compliance with any applicable consumer product safety rule, ban, standard, or regulation. It also contains special rules for small batch manufacturers and directs us to consider alternative testing requirements or exempt small batch manufacturers from certain third party testing requirements. Given these new statutory obligations resulting from H.R. 2715, and, as part of the overall reorganization of § 1107.21, proposed § 1107.21(d) is being renumbered and reserved as § 1107.21(e), so that we may consider issues relating to cost, low-volume products, and small batch manufacturers more fully.

We are also reserving § 1107.21(f) for an amendment to this rule where, elsewhere in this issue of the **Federal Register**, we have published a proposed rule that would implement the ''representative samples'' provision in section 14(i)(2)(B)(ii) of the CPSA.

4. Proposed § 1107.22—Random Samples

Proposed § 1107.22 would implement the testing of random samples requirement in former section 14(d)(2)(B)(ii) of the CPSA (renumbered by H.R. 2715 as section 14(i)(2)(B)(ii) of the CPSA), by requiring each manufacturer of a children's product to select samples for periodic testing by using a process that assigns each sample in the production population an equal probability of being selected.

We received many comments on proposed § 1107.22. The commenters made numerous assertions, such as: Product samples should be reasonably representative of the product population; samples should not be golden samples; samples should be selected blindly; samples should not be selected with overt bias; and the rule should not use a statistical definition for random sample. Commenters also expressed concern over practical problems with the proposed section for random sampling. However, on August 12, 2011, the President signed H.R. 2715 into law. H.R. 2715 revised section

14(i)(2)(B)(ii) of the CPSA, by replacing testing of ''random samples'' to ensure continued compliance with testing of ''representative samples'' to ensure continued compliance. Given this change in the statute, we have removed § 1107.22 from the final rule. Elsewhere in this issue of the **Federal Register**, we have published a proposed rule that would implement the ''representative samples'' provision in H.R. 2715.

5. Proposed § 1107.23—Material Change

a. General Requirements

Proposed § 1107.23(a) would state that if a children's product undergoes a material change in product design or manufacturing process, including the sourcing of component parts, that a manufacturer exercising due care knows or should know that such material change could affect the product's ability to comply with the applicable children's product safety rules, the manufacturer must submit a sufficient number of samples of the materially changed product for testing by a third party conformity assessment body. Such testing would be required before a manufacturer could certify the children's product. The extent of such testing would depend on the nature of the material change. Proposed § 1107.23(a) also would state that, when a material change is limited to a component part of the finished children's product and does not affect the ability of the children's product to meet other applicable children's product safety rules, a manufacturer may issue a Children's Product Certificate based on the earlier third party certification tests and on test results of the changed component part conducted by a third party conformity assessment body. For example, if the paint is changed on a children's product, issuance of a Children's Product Certificate may be based on previous product testing and on tests of the new paint for compliance to lead, heavy metal, and phthalate concentrations. Proposed § 1107.23(a) also would state that changes that cause a children's product safety rule to no longer apply to a children's product are not considered to be material changes. For example, assume that a children's product consists of a cotton sweater with metal buttons and that the children's product would be subject to the lead limits in section 101 of the CPSIA. If the manufacturer decided to use wooden buttons instead of metal buttons, the use of wooden buttons would eliminate the need to test the product for lead, and the change to wooden buttons, while arguably a change in the product's component parts, would not be a ''material change'' under proposed § 1107.23(a) for the purposes of complying with the lead content limits. However, for other children's product safety rules, such as small parts, the change may be a material change.

Additionally, proposed § 1107.23(a) would require a manufacturer to exercise due care to ensure that reliance on anything other than retesting of the finished product after a material change would not allow a noncompliant children's product to be distributed in commerce. A manufacturer should resolve any doubts in favor of retesting the finished product for certification. A manufacturer also would be required to exercise due care to ensure that any component part undergoing component-part-level testing is the same as the component part on the finished children's product in all material respects.

We received several comments regarding ''material change'' and proposed § 1107.23, as well as the corresponding provision at proposed § 1107.10(b)(2)(ii). Although we have decided to reserve subpart B in the final rule, to the extent that comments on proposed § 1107.10(b)(2)(ii) were equally applicable to proposed § 1107.23, we have considered those comments here.

(Comment 55)—A commenter suggested that the definition of ''material change'' should be moved from proposed § 1107.10(b)(2)(ii) to the definitions in § 1107.2.

(Response 55)—Section 1107.10 has been reserved in the final rule. We agree with the commenter, and we have moved the definition of ''material change'' to § 1107.2 in the final rule, as this definition still applies to § 1107.23 regarding material changes in children's products. Thus, § 1107.2 defines ''material change'' as ''any change in the product's design, manufacturing process, or sourcing of component parts that a manufacturer exercising due care knows, or should know, could affect the product's ability to comply with the applicable rules, bans, standards, or regulations.''

(Comment 56)—Some commenters suggested revising the proposed definition of ''material change'' to refer only to changes that ''reasonably could affect'' compliance.

(Response 56)—The commenters are concerned about a remote possibility that some set of circumstances could combine, such that a seemingly innocuous change could affect the product's compliance to an applicable product safety rule. We realize that it would be difficult for a manufacturer to identify every conceivable theoretical effect a change could have on a children's product's compliance. Therefore, manufacturers should exercise prudence and competence in determining the effects of a change to the product and in considering whether that change is material. This prudence and competence is encompassed in the manufacturer's use of due care in evaluating the change.

We decline the commenters' suggestion to modify the definition of ''material change'' because the definition now in § 1107.2 of the final rule includes the phrase ''a manufacturer exercising due care.'' Because the definition of ''due care'' includes the exercise of prudence and competence by the manufacturer, the addition of ''reasonably could'' is duplicative.

(Comment 57)—One commenter stated that different versions of the same product (e.g., color, packaging) should not require different tests.

(Response 57)—The commenter is correct that different versions of the same product that are not materially different do not require separate certification tests. The final rule defines a ''material change'' as any change in the product's design, manufacturing process, or sourcing of component parts that a manufacturer exercising due care knows, or should know, could affect the product's ability to comply with the applicable rules, bans, standards, or regulations. Therefore, if the differences between various versions of the same product are not material changes, no additional testing is required. It is the manufacturer's responsibility to determine if a difference between versions of a product constitutes a ''material change.''

(Comment 58)—One commenter suggested that after certification testing of a product, if another product differs by a few minor components from the certified product, and proper proof of equivalent specifications are documented, a reduced sample size for certification should be allowed.

(Response 58)—In the circumstance described by the commenter, if a new product differs from an existing certified product by a few component parts, the manufacturer's knowledge of the new product and its manufacture might be extensive enough to result in requiring fewer samples for certification testing than the number required for the existing certified product. We reiterate that if a new product is based on changes to an existing certified product, only the applicable product safety rules affected by the changes require

certification testing. The number of samples still must be sufficient to give the manufacturer a high degree of assurance of the new product's compliance with the applicable children's product safety rules. The certifier also may use component part testing as a means of reducing the number of finished samples needed for certification. If the changes from the existing certified product to the newer product are not material, then the certification tests on the existing certified product can be used for certification purposes on the newer product.

Thus, on our own initiative, we have revised § 1107.23(a) to make several clarifying changes to the paragraph. First, we have added language to the final rule to require the number of samples submitted to be sufficient to provide a high degree of assurance that the materially changed component part or finished product complies with the applicable children's product safety rules. This language was added because third party testing that occurs after a material change serves as recertification of the product for the applicable children's product safety rules affected by the material change. This language is essentially the same requirement contained in § 1107.20(a) of the final rule for initial certification of children's products. Additionally, § 1107.23(a) was revised to add the following: ''A manufacturer of a children's product that undergoes a material change cannot issue a new Children's Product Certificate for the product until the product meets the requirements of the applicable children's product safety rules.'' Also, we added the following words to the first sentence: ''and issue a new Children's Product Certificate.'' These are not intended to be substantive changes, but rather, meant to make clear what is already the case—that material changes require recertification based on passing test results. Finally, we have removed the language in proposed § 1107.23(a) that would require a manufacturer to exercise due care to ensure that reliance on anything other retesting of the finished product after a material change would not allow a noncompliant children's product to be distributed in commerce. This provision was removed because this issue is addressed in § 1109.5(a)(1) of the accompanying component part testing rule. We also removed the requirement that a manufacturer should resolve any doubts in favor of retesting the finished product for certification. This provision was removed because the issue is addressed in § 1109.5(c) of the accompanying component part testing rule.

(Comment 59)—Two commenters raised issues related to products subject to 16 CFR part 1201, *Safety Standard for Architectural Glazing Materials,* although the issues they raised have wider implications that involve other products, including children's products. The products subject to that safety standard are glazing materials (glass) used or intended for use in doors and enclosures. The commenters noted that these types of glass normally are manufactured in a continuous process that is subject to numerous minor and ongoing adjustments to respond to atmospheric and other factors and to make sure that the tempering process continues properly. In addition, there can be numerous minor variations in format, size, and thickness of the glass, as well as other product characteristics that are a normal part of shifting from one product to another to meet customers' orders. This industry's current process of certification and quality control involves periodic third party ''certification'' testing to the requirements of 16 CFR part 1201 and uses alternate means for checking breakage performance of samples from subsequent production, such as a center punch test for tempered glass and the drop-ball and/or pummel test for laminated glass, in order to monitor ongoing compliance with the standard. If a potential failure of the standard is detected by these alternate tests, corrective action is taken, and product distribution is not resumed until a subsequent production test shows that the breakage performance has been restored.

The commenters requested clarification that the ongoing adjustments described above would not be ''material changes'' that would require recertification of the product. The proposed rule defines ''material change'' as one that ''could affect the product's ability to comply with the applicable rules * * *'' One commenter requested that we state:

> An adjustment to equipment or machinery made in order to maintain, achieve, or assure compliance with the applicable rules * * * is *not* a material change within the meaning of section 1107.10.

The other commenter suggested the following addition to the rule:

> Adjustments in the equipment or machinery to affect the product's ability to comply with any applicable rules or standards should not be considered a ''material change'' in the manufacturing process * * * but will require the manufacturer, following those adjustments to subject the product to its production testing plan and to achieve passing production test results before the manufacturer may resume production of that product.

(Response 59)—Although regulated non-children's products still must meet the certification requirements in section 14(a)(1) of the CPSA, we have reserved subpart B, including the reasonable testing program described in proposed § 1107.10. However, the broader issue presented by this commenter, which relates to adjustments in equipment or machinery, is applicable to children's products as well, so we will address this issue with regard to children's products.

In order for a change to be a ''material change,'' it should be one that could adversely affect the product's ability to comply with the rule, ban, standard, or regulation. Minor and ongoing adjustments during manufacturing, especially in continuous flow processes, to maintain compliance with the applicable product safety rules are not considered material changes. However, we do not agree entirely with the commenters' suggested language because that language would include adjustments made to ''achieve'' compliance (*i.e.,* to change a product from noncompliance to compliance). Such a change would constitute a ''material change''; thus, additional certification testing would be required.

(Comment 60)—One commenter suggested that, in proposed § 1107.10(b)(2), it also should be noted that testing of units within a common family of products should allow a test of one unit to represent all others within the family of products if the other models are materially the same. The commenter added that, regarding proposed § 1107.10(b)(2)(ii)(B), a manufacturer should not be required to conduct additional ''certification'' testing upon a change to the parts or materials, if the change does not affect the overall safety of the system. The commenter suggested that we revise the section to give manufacturers the ability to make changes to parts and materials without having to undergo costly and time-consuming certification testing. The commenter would allow manufacturers to conduct in-house testing that would show that the results of any change do not materially alter the performance of that part or system with regard to the safety elements in the applicable rule.

(Response 60)—Although regulated non-children's product must still meet the certification requirements in section 14(a)(1) of the CPSA, we have reserved subpart B, including the reasonable testing program described in proposed § 1107.10. However, the broader issue presented by this commenter related to

certification testing of units within a common family and when there has been a material change to a product is applicable to children's products as well, so we will address this issue with regard to children's products.

The final rule does allow what the commenter is suggesting—that testing of units within a common family of products be allowed to represent all of the other units within the family. Section 1107.20(a) of the final rule states that samples used for certification must be identical in all material respects to the finished children's product. If, as the commenter has stated, the tested units are identical in all material respects as others within the product family, then the test results can be applied to the other units within the product family.

Section 1107.23(a) describes testing requirements when there has been a material change in a children's product. If a change could adversely affect compliance with the applicable children's product safety rules, then it is considered a ''material change,'' and retesting is required. If the commenter's phrase ''does not affect the overall safety of the system'' means that the change does not affect compliance with the applicable rules, then the change is not considered a ''material change,'' and no recertification testing is required.

(Comment 61)—Some commenters stated that the requirement to submit a sufficient number of samples of a materially changed product for third party testing before certifying the changes would be costly and would inhibit manufacturers from making continuous product improvements. Ultimately, according to the commenters, this will reduce the safety of children's products.

(Response 61)—Section 14(i)(2)(B)(i) of the CPSA requires children's products to be subject to third party conformity assessment body testing when there has been a material change in the product's design or manufacturing process. These types of changes may introduce new hazards or may result in the product no longer being in compliance with the applicable children's product safety rules. After a material change to the product, only those applicable product safety rules that could adversely be affected require recertification. The samples selected must be of a sufficient number to provide a high degree of assurance that the test, conducted accurately, demonstrates the ability of the children's product to meet all applicable children's product safety rules.

Regarding continuous product improvements, changes that do not adversely affect compliance to the applicable children's product safety rules are not ''material changes'' under the final rule and do not require recertification testing. However, manufacturers may wish to consider possible material change testing as part of their product improvement processes.

(Comment 62)—Three commenters characterized the testing requirements resulting from the proposed definition of ''material change'' as ''overly burdensome'' and ''very unreasonable.'' The commenters differed in their reasons for arriving at this conclusion. One commenter characterized the proposed rule's material change testing requirements as too ''open ended'' because of imprecise language. The consequence of this lack of specificity, according to the commenter, is that ''either you will always test or you take a big risk. This is completely unfair and unreasonable.''

Another commenter expressed concern with the examples in proposed § 1107.23(c). Specifically, the commenter stated that manufacturing process changes, ''such as new solvents to clean equipment or a new mold for an accessible metal component part of a children's product pose undue burdens on manufacturers without advancing safety goals.'' The commenter contended that ''to require companies to develop new product specifications for every new solvent used in a facility or installation of a new mold made to the exact specifications as a prior mold'' would require new third party testing, and this could not have been Congress' intent. The commenter suggested: ''it should be left to the consumer product manufacturer to assess whether changes are likely to affect the ability of the particular product to meet a specific standard, ban, rule, or regulation.''

The third commenter stated that the proposed definition is not clear and asked whether ''using the same quality level of component part but just the different brand is a material change.'' The commenter stated that if third party testing of each such change is necessary, then ''it is very unreasonable.''

(Response 62)—The intent of § 1107.23 for children's products is not to be overly burdensome, but rather, to demonstrate the product's continued compliance with applicable children's product safety rules when a change in the product's design, manufacturing process, or component part sourcing has been made that could adversely affect a previously certified product's compliance. Because the final rule applies to a variety of products and manufacturing methods, it is impractical to anticipate every type of product change that could occur to all affected products that might adversely affect compliance to an applicable product safety rule and provide specific language. Therefore, the final rule is written using general language to allow manufacturers the flexibility to determine, in each particular circumstance, whether a product change could adversely affect the product's compliance with an applicable children's product safety rule. Manufacturers should use their special knowledge of a product's design, components, and manufacturing processes to differentiate what changes may constitute a ''material change,'' and require certification testing, as opposed to nonmaterial changes.

After initial certification of a product, a ''material change'' is a change that ''could affect the product's ability to comply with applicable rules, standards or regulations.'' The ability to adversely affect compliance is what distinguishes a ''material change'' from nonmaterial changes. The final rule acknowledges that a manufacturer has special knowledge of its product design, components and, production processes, and the rule states that a ''manufacturer exercising due care knows or should know'' when a change is material. For example, a new solvent that does not contain any of the prohibited chemicals (lead and the prohibited phthalates), or a replacement mold shown to be made to the same specifications as a compliant mold, would not be examples of ''material changes.''

(Comment 63)—One commenter noted that proposed § 1107.10(b)(2)(ii)(A) would state that, for material changes that only affect product compliance to certain rules, certification may be based on the materially changed component, unless the change affects the finished product. If the change affects the finished product, then the certification must be based on the finished product. (The commenter is referring to proposed § 1107.10(b)(2)(ii)(A) and (C).) The commenter asked, when a disagreement arises, who makes the final determination of whether the material change affects the finished product's compliance?

(Response 63)—We have reserved subpart B, including the reasonable testing program described in proposed § 1107.10. However, the broader issue presented by this commenter relates to certification testing of units when there has been a material change is applicable to children's products as well, so we will address this issue with regard to children's products.

The commenter is correct that when a material change to a product occurs, only product safety rules affected by the material change would require recertification. If the material change solely affects a component part of a children's product and does not affect the ability of other component parts or the finished product to comply with applicable children's product safety rules, then § 1107.23(a) allows a manufacturer to base certification on earlier third party certification tests and on third party testing of the changed component part.

With regard to disagreements regarding whether the finished children's product is needed for certification after a material change, a manufacturer must use due care in determining whether testing the finished product or a component part is required. This due care is applied on a per-rule basis. Some rules, such as prohibited phthalate content, can be evaluated on component parts. Other rules, such as the safety standard for cribs, always require the use of the finished product for certification testing. Assuming the disagreement is between the manufacturer and the CPSC regarding whether a finished product is required for certification after a product change, we will decide, based on the available evidence, whether a material change requires samples of the finished product for certification.

b. Product Design

Proposed § 1107.23(b) would state that, for purposes of subpart C, the term ''product design'' includes all component parts, their composition, and their interaction and functionality when assembled. To determine which children's product safety rules apply to a children's product, a manufacturer should examine the product design for the children's product as received by the consumer. For example, if a children's product has a component part that contains lead or has a sharp edge, but is inaccessible when the product is assembled, then the lead and sharp edge requirements would not be applicable to the finished product. Changes to a product's design may result in a product being subject to additional children's product safety rules. For example, if a wooden button on a children's product is replaced with a plastic button, the wooden button previously excluded from testing for lead content has been replaced with a component part (the plastic button) that would be subject to testing for compliance with the lead content requirements.

We received no comments on this paragraph. However, on our own initiative, we have revised the second sentence in § 1107.23(b) to state that a manufacturer should examine the product design for the children's product ''as received or assembled by the consumer.'' We inserted the words ''or assembled'' because some children's product safety rules require the product to be tested in the finished product state in order to assess compliance with the applicable children's product safety rule. For example, assessing compliance with the inaccessibility requirements for the lead requirements mandates testing of the finished product in order to determine whether a component part of the product is accessible. The new language, ''or assembled,'' was added to make it clear to the manufacturer that products must be tested as received or assembled by the consumer in those instances where the product is not received in assembled form.

c. Manufacturing Process

Proposed § 1107.23(c) would state that a material change in the manufacturing process is a change in how the children's product is made that could affect the finished children's product's ability to comply with the applicable children's product safety rules. For each change in the manufacturing process, a manufacturer should exercise due care to determine if compliance to an existing applicable children's product safety rule could be affected or if the change results in a newly applicable children's product safety rule. The following are some examples of a material change to the manufacturing process of a children's product:

- A new technique is used to fasten buttons to a doll's dress that could affect the children's product's ability to comply with the small parts rule;
- New solvents are used to clean equipment employed in the manufacture of children's products; the new solvents could affect the children's product's ability to comply with the lead content and phthalates requirements; and
- A new mold for an accessible metal component part of a children's product is introduced into the assembly line that could affect the children's product's ability to comply with requirements for sharp edges.

We received no comments on this paragraph and have finalized it without change.

d. Sourcing of Component Parts

Proposed § 1107.23(d) would state that a material change in the sourcing of component parts results when the replacement of one component part of a children's product with another component part could affect compliance with the applicable children's product safety rules. This would include, but would not be limited to, changes in component part composition, component part supplier, or use of a different component part from the same supplier who provided the initial component part.

We received no comments on this paragraph. However, on our own initiative, we have revised the first sentence to replace the phrase ''applicable children's product safety rules'' with ''applicable children's product safety rule.'' We made this change to avoid creating any misunderstanding of whether a material change results only if multiple children's product safety rules are affected; in other words, a material change can result, even if compliance with only one children's product safety rule is affected.

6. Proposed § 1107.24—Undue Influence

Proposed § 1107.24(a) would implement the requirement to safeguard against undue influence, pursuant to section 14(i)(2)(B)(iv) of the CPSA, by requiring each manufacturer to establish procedures to safeguard against the exercise of undue influence by a manufacturer on a third party conformity assessment body.

a. Procedures To Safeguard Against the Exercise of Undue Influence

Proposed § 1107.24(a) would require the manufacturer to establish procedures to safeguard against the exercise of undue influence by a manufacturer on a third party conformity body.

(Comment 64)—Several commenters disagreed with the requirement in proposed § 1107.24(a) that manufacturers must establish procedures to safeguard against the exercise of undue influence on a third party conformity assessment body. One commenter noted that we already require third party conformity assessment bodies to train their staff to detect, avoid, and report undue influence. Another commenter stated that third party testing facilities already have these training programs in place. Two commenters asserted that third party conformity assessment bodies are not likely to be influenced unduly because their accreditation would be withdrawn.

(Response 64)—Section 14(i)(2)(B)(iv) of the CPSA requires us to establish, by rule, protocols and standards for safeguarding against the exercise of

undue influence by a manufacturer or private labeler on a third party conformity assessment body. This provision applies to manufacturers and private labelers as opposed to third party conformity assessment bodies. Consequently § 1107.24 of the final rule requires manufacturers of children's products to establish procedures to avoid actions that could undermine the integrity of laboratory test data. We have an interest in ensuring the integrity of laboratory test results used in the certification of children's products.

In a separate rulemaking, we will address the issue of requiring third party conformity assessment bodies to report undue influence.

(Comment 65)—Some commenters expressed concern regarding foreign manufacturers and the undue influence requirement. One commenter suggested that we will be unable to enforce the undue influence requirement on foreign manufacturers and importers. Another commenter said that the importer of record should not be responsible for undue influence initiated by people not directly employed by the importer of record. The commenter requested confirmation that importers will be responsible for training their employees only, and will not have the responsibility of training the employees of other companies, such as manufacturers, vendors, freight handlers, or laboratories.

(Response 65)—Section 1107.24 of the final rule requires ''each manufacturer'' to establish procedures to safeguard against the exercise of undue influence by a manufacturer on a third party conformity assessment body. Section 1107.2 of the final rule defines a ''manufacturer'' as ''the parties responsible for certification of a consumer product pursuant to 16 CFR part 1110.'' Under 16 CFR part 1110, a foreign manufacturer is not required to certify a finished product; only a domestic manufacturer or the importer of a product made outside the United States is required to issue a finished product certificate. Thus, under § 1107.24, it is a domestic manufacturer or the importer who must establish procedures to safeguard against undue influence.

We agree that an importer is not directly responsible for training employees of other companies. This fact, however, does not absolve the importer issuing a finished product certificate of its duty to exercise due care when relying on test results provided by another company or third party conformity assessment body. A manufacturer or importer who issues a finished product certificate that is based on test reports from a third party conformity assessment body over whom undue influence has been exercised provides a basis for the CPSC to deem the certificate invalid. We will hold the finished product certifier responsible for exercising due care that component part or finished product manufacturers or suppliers have not exercised undue influence over third party conformity assessment bodies.

(Comment 66)—Two commenters stated that because the term ''undue'' is undefined, nothing should be construed to prohibit a manufacturer from exercising its rights to challenge third party conformity assessment body test results based upon the manufacturer's belief that they are inaccurate.

(Response 66)—Section 1107.24 is not intended to preclude a manufacturer from challenging failing test results in appropriate circumstances. If a manufacturer has reason to think a test result received from a third party conformity assessment body is in error, it is appropriate to ask the third party conformity assessment body about the test result. Such inquiry does not constitute undue influence. Additionally, § 1107.20(d) requires a manufacturer to investigate the reasons for a negative certification test result and to take action to address failing test results before a Children's Product Certificate can be issued. This investigation may involve discussions about the test results with the third party conformity assessment body.

b. Minimum Requirements

Proposed § 1107.24(b) would require the procedures described in § 1107.24(a) to include minimal requirements. Proposed § 1107.24(b)(1) would require safeguards to prevent attempts by the manufacturer to exercise undue influence on a third party conformity assessment body, including a written policy statement from company officials that the exercise of undue influence is not acceptable, and directing that appropriate staff receive annual training on avoiding undue influence and sign a statement attesting to participation in such training. Proposed § 1107.24(b)(2) would impose a requirement to notify the Commission immediately of any attempt by the manufacturer to hide or exert undue influence over test results. Proposed § 1107.24(b)(3) would impose a requirement to inform employees that allegations of undue influence may be reported confidentially to the Commission and describe to employees the manner in which such a report can be made.

(Comment 67)—Several commenters made remarks about training programs. Two commenters stated that the training program and recordkeeping requirements (proposed § 1107.26(a)(5)) are burdensome and redundant because companies already have requirements to prohibit unethical behavior, such as exerting undue influence over third party conformity assessment body staff. Other commenters described this requirement as excessive and unreasonable. One commenter stated that the requirements for training are vague and urged us to describe what needs to be included. Another commenter raised questions about the content and form of the training, especially whether a written manual would be enough. Another commenter recommended deleting these requirements.

One commenter urged us to delete the requirement for appropriate staff to receive ''annual training'' on how to avoid undue influence. The commenter felt that an annual training mandate would be unnecessary and impose excessive costs and burdens on manufacturers of children's products.

(Response 67)—Section 14(i)(2)(B)(iv) of the CPSA requires us to establish protocols and standards, by rule, for safeguarding against the exercise of undue influence on third party conformity assessment bodies by a manufacturer or private labeler. Therefore, we decline the suggestion to delete these requirements from the final rule.

Section 1107.24 of the final rule implements the statutory mandate by requiring manufacturers to establish procedures to safeguard against the exercise of undue influence by a manufacturer on a third party conformity assessment body. The rule does not prescribe the form or content of these programs in order to provide manufacturers flexibility in implementing the requirements. For example, manufacturers may wish to create written manuals and may include this training along with other forms of employee training. Manufacturers must keep records of employee participation in the training to be able to ensure that all relevant staff members receive this training pursuant to § 1107.26(a)(6).

We do agree, however, with the commenter who suggested that an annual training requirement reiterating previously presented procedures can impose costs and burdens the benefits of which are unclear. Thus, we have replaced the proposed requirement for annual training with a requirement for retraining when a substantive change to the rule is made regarding undue influence; this requirement appears as a new § 1107.24(b)(2), and we have

renumbered proposed §§ 1107.24(b)(2) and 1107.24(b)(3) as §§ 1107.24(b)(3) and 1107.24(b)(4), respectively, in the final rule. Manufacturers of children's products are free to modify their procedures and conduct retraining as often as they feel it is necessary to institute effectively their policies for safeguarding against the exercise of undue influence.

Additionally, on our own initiative, we have revised § 1107.24(b) of the final rule to make minor editorial or grammatical changes. We have revised § 1107.24(b)(1) to direct that ''every appropriate staff member'' receive training on how to avoid undue influence. The proposal would state that ''appropriate staff receive annual training.'' By referring to ''every appropriate staff member,'' the final rule clarifies that the emphasis is on training individuals rather than collections of individuals. Additionally, in § 1107.24(b(4), we have replaced ''Commission'' with ''CPSC'' and replaced ''to describe the manner'' with ''a description of the manner.''

7. Proposed § 1107.25 Remedial Action

Proposed § 1107.25 would require each manufacturer of a children's product to have a remedial action plan that contains procedures that the manufacturer must follow to investigate and address failing test results.

(Comment 68)—One commenter stated that requiring each manufacturer to have an actual remedial action plan to address failing test results is unnecessary because the remedial action will likely be different, depending upon the situation. Another commenter stated that because they are familiar with how to resolve compliance and quality issues, the preparation of a detailed written remedial action plan is a waste of time, money, resources, and intellect.

(Response 68)—The commenter is correct that, depending on the product and the nature of the test failure, remedial actions may take many different forms. The development of a remedial action plan before production commences could help in the determination of factors, such as lot size or what tracking information to maintain. These factors could help limit the number of production units subject to recall in the event that noncompliant products are introduced into commerce.

However, although it may be efficient and useful to have a formal process (such as the remedial action plan in proposed § 1107.25) to follow after receiving failing test reports, such preformulated plans are not essential, either for certification or for ensuring continued compliance of consumer products. Ultimately, the manufacturer is responsible for ensuring that the product that they make complies with the applicable product safety rules. For some products and types of failing test reports, *ad hoc* methods may be as effective as preestablished plans in addressing the test failures and ensuring that products are compliant. For these reasons, we have removed the requirements for remedial action plans for children's products from the final rule. We encourage manufacturers who believe that remedial action plans would be advantageous for their product to develop such plans as part of their overall quality assurance system.

(Comment 69)—One commenter appreciated the acknowledgement that a remedial action plan could be a formal standard operating procedure (SOP), along with recordkeeping of each event. The commenter asked whether, when a particular component causes a product to become noncompliant with a rule, and the remedial action eliminates this specific component from the product, would certification have to be repeated. The commenter noted that documentation would be provided that the noncompliant component had been removed and that the product specification was revised. The commenter stated that there would be an SOP that requires a corrective action, along with documentation of the instance of noncompliance, to provide evidence that the product has been corrected and is compliant.

(Response 69)—As noted in our response to Comment 68, we have removed the requirement for a remedial action plan for children's products from the final rule. If a finished product has a noncompliant component part (such as an accessory item), and that item is removed from the finished product, the finished product certifier does not have to repeat certification testing on the newly constituted finished product because the certifier has certification test data demonstrating compliance with all applicable product safety rules for that product. The certifier should make sure that eliminating the noncompliant component part does not affect compliance with another applicable children's product safety rule for the finished product.

(Comment 70)—Several comments addressed the issue of retesting samples. Some commenters noted that often, a testing failure might result from a faulty laboratory test and not from a noncompliant product. The commenters said that the rule should allow retesting in appropriate situations when there is suspicion about the manner in which a sample was handled or processed, or the certifier is challenging the results of a third party test.

One commenter asserted that if the manufacturer documents and supports any assertions related to the faulty test and the product's compliance, there should be no need for remedial action. Another commenter suggested that the implication in the rule is that any test failure, no matter how trivial, would trigger the need for remedial action, which would be costly. The commenter suggested that establishing tolerances for test results is necessary to reduce testing costs, as well as the burden of remedial actions, and at the same time ensure product safety. The commenter added that children's products are not so consistent that every test produces the same test result. The commenter asserted that retesting is a valid means of responding to a failing test result. Banning retesting out of fear that some unscrupulous parties will attempt to test the product into compliance will create severe problems.

(Response 70)—We have removed the requirement for a remedial action plan for children's products from the final rule. However, we recognize that an error or failure in the testing of a sample may lead to a failing test result, and therefore, investigating the test method and test execution is a legitimate avenue of investigation in those instances. Such an investigation can include examining the test procedures, sample preparation steps, equipment calibration, and other factors, in addition to tests on samples of the product as part of the investigation, which may affect test results, but are not indicative of a noncompliant product. Additionally, § 1107.20(d) of the final rule states that if a product sample fails certification testing to the applicable children's product safety rule(s), even if other samples have passed the same certification test, the manufacturer must investigate the reasons for the failure and take the necessary steps to address the reasons for the failure. A manufacturer cannot certify the children's product until the manufacturer establishes, with a high degree of assurance that the finished product does comply with all applicable children's product safety rules. While the final rule no longer refers to remedial action plans, a manufacture still ''must investigate the reasons for the failure and take the necessary steps to address the reasons for the failure.'' Retesting a product without investigating why the test yielded failing results, and taking whatever action addresses the situation (for

example, calibrating the testing machine before retesting, or correcting a manufacturing problem) to achieve passing results, is not acceptable for certification purposes because the certifier would not have a high degree of assurance that the products produced will be compliant with the applicable product safety rules.

Retesting should not be conducted to ''shop'' for passing test results or to keep testing the product until a sample finally passes (and disregarding all other tests that suggest the product is not in compliance).

With regard to establishing tolerances for test results, the acceptable values for test results are established in each rule, ban, regulation, or standard and are beyond the scope of this rule.

(Comment 71)—One commenter stated that some standards, such as the standard for the surface flammability of carpets and rugs (16 CFR part 1630), have alternative requirements for products that fail tests. The commenter suggested modifying the language to refer to a product that does not pass the applicable product safety standard, rather than a product that ''fails'' a test.

(Response 71)—In 16 CFR part 1630, the standard allows for a single failure in eight tests. Because there is an allowance in the standard for a failing test result, we would view such a product as compliant with the standard.

8. Proposed § 1107.26 Recordkeeping

a. The Records To Be Kept

Proposed § 1107.26(a) would require a children's product manufacturer to maintain records pertaining to:

- The Children's Product Certificate for each product (proposed § 1107.26(a)(1));
- Each third party certification test (proposed § 1107.26(a)(2));
- The periodic test plan and periodic test results (proposed § 1107.26(a)(3));
- Descriptions of all material changes in product design, manufacturing process, and sourcing of component parts, and the certification tests run and the test values (proposed § 1107.26(a)(4));
- Undue influence procedures (proposed § 1107.26(a)(5)); and
- All remedial actions taken following a failing test result (proposed § 1107.26(a)(6)).

We did not receive any comments directly addressing proposed § 1107.26(a). However, on our own initiative, or to complement other changes in the final rule, we have revised § 1107.26(a) as follows:

- In § 1107.26(a)(1), we have changed ''Records of the children's product certificate'' to ''A copy of the Children's Product Certificate.'' This change is intended to simplify the language in the codified text and use a consistent style throughout part 1107 when referring to the Children's Product Certificate.
- We have finalized § 1107.26(a)(2) without change.
- In § 1107.26(a)(3), we have revised the recordkeeping elements to reflect changes to the periodic testing provision at § 1107.21. Thus, the final rule requires records of: (1) The periodic test plan and periodic test results; (2) a production testing plan, production test results, and periodic test results; or (3) testing results of tests conducted by a testing laboratory accredited to ISO/IEC 17025:2005 and periodic test results.
- We have reserved § 1107.26(a)(4). We intend to place any recordkeeping requirement associated with the testing of ''representative samples'' at § 1107.26(a)(4). As we stated earlier in part III.D.4 of this document, the final rule removes § 1107.22 because H.R. 2715 amended the CPSA to change ''random samples'' to ''representative samples.''
- We have renumbered proposed § 1107.26(a)(4) as § 1107.26(a)(5), and we have finalized it without change.
- We have renumbered proposed § 1107.26(a)(5) as § 1107.26(a)(6), and we have finalized it with one change to clarify that manufacturers must retain copies of the attestations required under § 1107.24(b)(1).
- We have deleted proposed § 1107.26(a)(6), which would pertain to records of all remedial actions. We have deleted this provision from the recordkeeping requirements because the final rule does not establish remedial action requirements for children's products.

b. The Location Where Records Are To Be Kept, the Recordkeeping Period, and the Records' Availability in the English Language

Proposed § 1107.26(b) would require a manufacturer to maintain the records specified in subpart C at the location within the United States set forth in 16 CFR 1110.11(d) or, if the records are not maintained at the custodian's address, at a location within the United States specified by the custodian. The manufacturer would be required to make these records available, either in hard copy or electronically, for inspection by the CPSC, upon request.

Proposed § 1107.26(c) also would require a manufacturer to maintain records (except for test records) for as long as the product is in production or imported by the manufacturer, plus five years. Test records would be required to be maintained for five years. All records would be required to be available in the English language.

(Comment 72)—One commenter expressed concern about the recordkeeping requirements in proposed § 1107.10(b)(5) and asked for clarification of the phrase ''for as long as the product is in production or imported.'' The commenter noted that the requirements would lead to a massive undertaking for any manufacturer or importer, especially if all of the records must be maintained within the United States.

Another commenter stated that we should clarify the relationship between the requirement to maintain records and the proposed rule's treatment of material changes requiring recertification, and thus, effectively creating a new product. To simplify the recordkeeping requirements, the commenter asked that the recordkeeping requirements apply ''for as long as the product, *without a material change,* is in production or imported by the manufacturer plus five years'' (emphasis in original). Otherwise, the commenter stated, manufacturers of long-running products would have to maintain records in perpetuity, which would increase costs without assisting safety or compliance.

(Response 72)—Although the final rule reserves subpart B (which includes proposed § 1107.10(b)(5)), the issues raised by the commenters are applicable to the recordkeeping requirement for children's products, so we address this issue here for children's products.

We agree that the burden of maintaining records for the life of a product, plus five years, could be unduly burdensome and difficult to implement, in cases where products undergo changes over time. Moreover, having a different time period for the retention of test reports versus other records may be confusing. Accordingly, we have revised the recordkeeping provision, such that all records must be maintained for at least five years from the date of their creation. If a product does not comply with an applicable children's product safety rule in a significant way, it is likely that the noncompliant aspect of the product would become apparent within the 5-year period. This change should result in less confusion for the regulated community regarding how long records for a particular product must be maintained.

Additionally, on our own initiative, we have reorganized proposed § 1107.26(b) and (c), by combining them into § 1107.26(b) of the final rule. We

describe other changes in § 1107.26 immediately below.

(Comment 73)—Several commenters expressed concern about the requirement that records be maintained in English. Some commenters stated that we should allow records to be kept in the local language and only require translation into English by the manufacturer or importer when we request documentation. One commenter noted that the proposed rule will require millions of test reports and records to be created and maintained in English, even though only a small fraction of a percent of these test reports will ever be reviewed by the CPSC or other third parties. The commenter maintained that this would be very expensive for the manufacturer because they must find and hire English-speaking technicians to perform the testing.

The commenter also contended that this requirement could be potentially hazardous. The commenter posed this example:

> For example, a quality assurance technician in Vietnam may be excellent at maintaining the quality of a product, and she may even have a passable grasp of English, but her English skills may not be sufficient to communicate precise technical findings in English. If she is nonetheless required to record her findings in English, then there is a risk the test results will be transcribed, described and maintained inaccurately. Thus, we ask that the Commission reconsider this English-only requirement in the proposed rule.

Another commenter asserted that a method for making documents available in English in the United States would need to be created to comply with the rule. The commenter contended that the requirement to have English language documents available within the United States does not offer additional confidence in product safety for U.S. consumers. Alternatively, the commenter suggested that a 3-year stay of the requirement that documents be maintained in English would allow a transition period to establish and implement appropriate infrastructure and processes for expanded recordkeeping.

(Response 73)—We agree that it would be burdensome in many cases for all records to be maintained in English. Therefore, § 1107.26(b) in the final rule allows records to be maintained in languages other than English, if the records in the original language can be provided immediately by the manufacturer to the CPSC, and if an accurate English translation can be provided within 48 hours, or within such longer period of time, as may be negotiated with CPSC staff. Given this change to the final rule, we decline to adopt the suggestion that a 3-year stay of enforcement be implemented for this part of the rule.

(Comment 74)—Many commenters expressed concern about the requirement in proposed § 1107.26(b) that all records be maintained in the United States. Several commenters suggested that instead of requiring manufacturers to maintain records at a location within the United States, we should allow the records to be maintained outside the United States, so long as the records can be accessed from a location within the United States that is specified on the certificate. Some commenters noted that this requirement would be a burdensome and massive undertaking. One commenter did not believe that storing foreign manufacturing documents in the United States for every regulated product increases product safety. The commenter noted that these documents could be stored in their existing location and be submitted to the CPSC, upon request. Alternatively, the commenter suggested that a 3-year stay of the requirement that documents be maintained in the United States would allow a transition period to establish and implement appropriate infrastructure and processes for expanded recordkeeping.

Another commenter noted that ISO 9001, *Quality management systems—Requirements,* requires manufacturers to maintain these types of records at the factory where a product subject to certification is manufactured. Rather than requiring foreign manufacturers to maintain duplicate records in the United States, the commenter suggested that the final rule should harmonize CPSC requirements with ISO's, and require records to be made available to us for inspection, either in hard copy or electronically, through the U.S. subsidiary or other U.S. corporate entity, within a reasonable time after the CPSC requests them, pursuant to section 16(b) of the Consumer Product Safety Act.

(Response 74)—We agree that it may be burdensome and duplicative in many cases to maintain all records in the United States. To reduce this burden and still maintain prompt access to records when needed, § 1107.26(b) of the final rule no longer requires records to be maintained in the United States. However, all records must be made available, either in hard copy or electronically, such as through an Internet Web site, for inspection by the CPSC, upon request. Because the change eliminates the requirement that records be kept in the United States, we decline to adopt the suggestion of a 3-year stay of enforcement of this part of the rule.

Regarding harmonization with the requirements of ISO 9001, the commenter did not specify which requirements in ISO 9001 should be harmonized. However, eliminating the requirement that records be maintained at a location within the United States would be consistent with sections 4.2.3.d of ISO 9001 (to ensure that relevant versions of applicable documents are available at points of use), and section 4.2.3.g of ISO 9001 (to prevent the unintended use of obsolete documents, and to apply suitable identification to them if they are retained for any purpose).

(Comment 75)—One commenter stated that some of the required recordkeeping is ''redundant and unnecessarily duplicative,'' such as production testing plans for multiple factories. Fees for outsourcing these services could be significant and burdensome to many small businesses, the commenter asserted.

(Response 75)—Section 1107.21(c)(2) of the final rule sets forth the option to implement a production testing plan to increase the maximum periodic test interval, and § 1107.21(c)(2)(ii) of the final rule requires that each manufacturing site conduct separate production testing because the location at which a product is manufactured could have a material effect on the product's ability to comply with the applicable rules. Factors such as power quality, climate, personnel, and factory equipment could materially affect the manufacture of a product. Because it cannot be assumed that units of the same product manufactured in more than one location are identical in all material respects, the finished product certifier must conduct separate production testing for the product for each manufacturing site. We have taken other steps to reduce the recordkeeping burden, such as not requiring that records be kept in the United States, and we are eliminating the requirement that all records must be maintained in English.

(Comment 76)—One commenter noted that companies have established processes and formats and, in many cases, invested in information technology solutions to prepare and transmit these certificates in accordance with the law. The commenter added: ''Retailers are relying upon such certificates as they can with the benefit of reduced liability under section 19 of the CPSA'' as evidence that the products comply with all the applicable product safety rules. The commenter stated that

we need to clarify that the form of delivery of title, in and of itself, should not require additional testing, documentation, and certification. The commenter also asked us to clarify that retailers can rely upon domestically located supplier certifications without duplication of testing and certification requirements.

(Response 76)—A certificate must accompany the product, as specified in 16 CFR part 1110. Certificates can be in paper or electronic form, as described by the commenter. The commenter is correct that the issuance of a Children's Product Certificate means that the children's product has passed its certification tests. If the commenter is referring to additional third party tests requested by retailers after the issuance of a certificate, we emphasize, as we did in the preamble to the proposed rule, that retailers and sellers of children's products can rely on certificates provided by product certifiers without having to conduct additional testing, if those certificates are based on testing conducted by a CPSC-accepted third party conformity assessment body.

(Comment 77)—One commenter stated that the proposed recordkeeping requirements will have the largest immediate impact to the retail industry. The commenter stated that to meet these provisions, a process to centrally maintain records for an estimated 300,000 items per year would need to be created. The number of pages of documentation covering a portion of products for one large general merchandise retailer acting as importer of record, would range from a low of 375,000,000 pages to more than 1,000,000,000 pages per year. The commenter's estimate was based upon the following:

- Full product specification (150–200 pages);
- Certification testing (30–100 pages);
- Production testing plan (inspection records, testing documents, and production plans quality control documents) (1,000–3,000 pages); and
- Periodic testing (50–200 pages).

This estimate did not include records of remedial action, if necessary.

Another commenter stated that the standards of recordkeeping outlined in the proposed rule are clear and should not present an unreasonable burden on manufacturers or importers. The commenter asserted that any responsible firm would maintain these records even without the rule, and they further asserted that establishing a reasonable baseline for product safety recordkeeping is crucial to enforcement.

(Response 77)—We have revised the final rule to reduce costs associated with recordkeeping requirements, such as reducing and simplifying the record retention period to five years from the date of creation for all records, eliminating the requirement that records must be maintained in English, and eliminating the requirement that records must be maintained in the United States. Moreover, removal of the remedial action plan requirement for children's products should further reduce the recordkeeping burden for manufacturers.

Even with these changes, the burden associated with the rule's recordkeeping requirements will vary among manufacturers or importers. As the commenters indicate, some manufacturers will consider the burden to be significant, whereas others will feel that the recordkeeping requirements are comparable to those at ''any responsible firm.'' The recordkeeping burden could be fairly heavy for some products and relatively light for others, depending upon the complexity of the product, the number of product safety rules that are applicable to the product, and the amount of testing required. However, as stated in the preamble to the proposed rule (75 FR at 28360), documentation and recordkeeping are required to establish the identity of the product and to demonstrate that the product complies with the applicable safety rules, not only when it is certified, but also on a continuing basis after certification.

The final rule gives manufacturers and importers the flexibility to maintain records. The final rule does not require that the records be maintained in a specific CPSC format. While the final rule specifies what records or information must be maintained, a manufacturer may maintain the records—as the commenter suggested—within their own recordkeeping systems, if those systems meet the traceability requirements and ensure that products are certified properly before they enter into commerce.

(Comment 78)—One commenter stated that manufacturers of children's furniture cannot provide any data on the cost of the recordkeeping requirements because they do not know yet the storage capacity that will be required to comply with the rule. Furniture manufacturers of non-children's products have reported that the cost of creating the system to collect their data on 16 CFR part 1303 compliance was approximately $100,000, and the cost of records maintenance was in the range of $30,000 to $50,000 per year. Based on this, furniture manufacturers of children's products are certain that it will cost them in excess of $100,000 to build and program such a system. These furniture companies will require additional staff to maintain and update the system, and that will require the expenditure of at least $30,000 to $50,000 a year, per person.

(Response 78)—We acknowledge that there will be costs for tracking the data and maintaining the records, which could involve the development of software for tracking and managing the data and hiring additional staff. However, the final rule's recordkeeping requirements give manufacturers flexibility in determining how to meet them. Further, we have revised the final rule to reduce costs associated with recordkeeping requirements, such as reducing and simplifying the record retention period to five years from the date of creation for all records, eliminating the requirement that records must be maintained in English, and eliminating the requirement that records must be maintained in the United States.

(Comment 79)—One commenter stated that as long as the manufacturer can use existing documentation, then there should not be an undue burden on the regulated community to comply with third party testing requirements for children's products. However, the commenter noted that if we intend to require that the manufacturer maintain documentation in a different format, then there will be a cost associated with maintaining this information.

(Response 79)—The final rule does not require manufacturers to develop codes, numbering systems, or special data formats. A manufacturer is free to use any format, provided that the required information is available to the CPSC, when requested.

(Comment 80)—One commenter objected to the requirement that records must be maintained for five years. The commenter pointed out that the larger suppliers to the U.S. market, including chain stores, divide an order and ship separately to different states. Without giving details, the commenter implied that this would make the requirement to keep all required records for five years a heavy burden on manufacturers.

(Response 80)—This comment is from a trade association for a foreign manufacturer of children's products that may have misinterpreted the proposed rule. The proposed rule would require test records to be maintained for five years; other records would be maintained for as long as the product was in production or imported (without a material change), plus five years. In any event, a foreign manufacturer has no obligation to keep the records specified under § 1107.26, unless it

agrees contractually to maintain the records on behalf of the importer. Even under these circumstances, only the importer has the obligation to keep the records. The importer, as the certifier, is responsible for maintaining the records or having another party maintain the records on its behalf. As for the retailer in the distribution chain, they are not required to keep the records unless they are also the importer. An importer's obligation to maintain the records for the product is independent of how many different retailers distribute the product. Regarding the burden of keeping records for five years, the 5-year record retention requirement was selected to be consistent with the 5-year statute of limitations in 28 U.S.C. 2462. However, this requirement is not intended to supersede record retention times that are specified in existing regulations.

E. Proposed Subpart D—Consumer Product Labeling Program

1. Introduction

Proposed subpart D, consisting of one section, would implement the label provision at section 14(i)(2)(A) of the CPSA. Section 14(i)(2)(A) of the CPSA requires the Commission to initiate a program by which a manufacturer or private labeler may label a consumer product as complying with the certification requirements in section 14(a) of the CPSA.

2. General Requirements

Proposed § 1107.40(a) would allow manufacturers and private labelers of a consumer product to indicate, by a uniform label on or provided with the product, that the product complies with any consumer product safety rule under the CPSA, or with any similar rule, ban, standard or regulation under any other act enforced by the CPSC.

(Comment 81)—One commenter contended that allowing manufacturers to place an optional label on their products that states: ''Meets CPSC Safety Requirements,'' could give manufacturers who use such a label an unfair market advantage over manufacturers who choose not to include the label. The commenter stated that some manufacturers will not use the label because it will increase their product's cost. The commenter suggested that some consumers may choose the labeled product based upon a false assumption that a product without the label is somehow less safe. The commenter stated that some manufacturers will use the label as a misleading marketing tool or even alter the font type or size of the label for marketing purposes.

(Response 81)—Section 14(i)(2)(A) of the CPSA requires us to initiate a program by which a manufacturer or private labeler may label a consumer product as complying with the certification requirements of section 14(a) of the CPSA. Section 1107.30 of the final rule (formerly proposed § 1107.40) implements this requirement. Use of the labeling program is at the discretion of the manufacturer or private labeler, and the manufacturer or private labeler must determine costs versus benefits for their particular products. The label specifications are designed to avoid giving consumers the false impression that the product is CPSC-tested, -approved, or -endorsed. Section 1107.30(d) of the final rule prohibits manufacturers or private labelers from implying, through manipulation of the font type, font size, or other means that the CPSC has tested, approved, or endorsed the product.

Other than renumbering this section, we have finalized paragraph (a) without change.

3. Label Specifications

Proposed § 1107.40(b) would require the label to be printed in bold typeface, using an Arial font of not less than 12 points, be visible and legible, and state: ''Meets CPSC Safety Requirements.''

(Comment 82)—One commenter stated that the final rule should not specify the features that must be used for the optional label indicating that a product meets the CPSC's safety requirements. The commenter did not think we should specify features such as size, color, font, or location because these will depend on the product. The commenter noted that there is the possibility that the specified text type and size will not be compatible with the different internal systems developed by retailers and manufacturers to meet the needs of the affected product. The commenter said that to specify any requirements other than what works with a firm's internal systems would have absolutely no benefit at all.

Another commenter expressed concern with the font size being ''no less than 12 points'' because that could be a problem on some small containers. The commenter said that we should use instead, the font size requirements in the Federal Hazardous Substances Act.

One commenter agreed with our approach of labeling products to indicate compliance with the rules. The commenter recommended that the CPSC's labeling program include guidelines for the type, style, color, and font of such labels and should consider use of symbols or a mark, rather than words or initials, as proposed. Symbols also would help overcome language barriers for communicating compliance. The commenter said that the guidelines should allow variations in the label's size to accommodate products of different physical dimensions, but the general appearance of the label must remain consistent. They recommended that the labels appear as a permanent mark on the product packaging, as well as on the product itself.

(Response 82)—We agree with the commenters that specifying particular fonts and minimum sizes for the label could make adding a label difficult for some products. Depending on the product's characteristics, such as size, surface finish, and the presence of a smooth, flat area for the label, a label with a minimum font size may be difficult to apply. Therefore, § 1107.30(b) of the final rule (renumbered from proposed § 1107.40(b)) specifies that the label must be visible and legible and does not specify a font and a minimum size. This change will give manufacturers the flexibility to implement a labeling system tailored to their product.

The text of the message on the label remains: ''Meets CPSC Safety Requirements.'' The label may be affixed to the product or provided with the product to provide flexibility for the manufacturer or private labeler in their implementation of the labeling requirements. Because the labeling requirements will apply to all consumer products covered by an applicable product safety rule, it would be impossible to design a label that would work with every firm's internal system.

Regarding the labeling requirements in the Federal Hazardous Substances Act (FHSA), the commenter did not specify which labeling requirements should be used. The general labeling requirements for labeling certain toys and games in section 24(d) of the FHSA states that the label shall be displayed in the English language in conspicuous and legible type in contrast by typography, layout, or color with other printed matter. The changes to the final rule are consistent with the FHSA in this regard.

The final rule does not allow for the use of a symbol or mark because a symbol or mark might be misinterpreted as a CPSC certification mark or CPSC endorsement of the product. Additionally, the recommendation that a label be affixed to the product and its packaging may reduce the flexibility of manufacturers who choose to use the labeling program.

In reviewing the comments submitted regarding labels and the provisions of subpart D of the proposed rule, we noticed that proposed § 1107.40(d) (renumbered as § 1107.30(d) in the final rule) could be misunderstood to imply that an alternative label may be used in place of the label specified in proposed § 1107.40(b). We have revised § 1107.30(d) in the final rule to state that other labels, in addition to the label specified in § 1107.30(b), may be placed on the product, as long as the additional labels do not change the meaning of the label specified in § 1107.30(b).

(Comment 83)—One commenter argued that the requirement to provide only the statement: ''Meets CPSC Safety Requirements,'' is not adequate for indicating compliance. The commenter asserted that a registered certification mark is the only way to indicate adequately full compliance, and they noted further that the use of a registered certification mark is also used as a tool to address counterfeiting activities.

(Response 83)—The consumer product labeling program described in proposed § 1107.40 (renumbered as § 1107.30 in the final rule) is voluntary on the part of a manufacturer, importer, or private labeler. Section 14(a) of the CPSA requires the manufacturer, importer, and private labeler to issue a General Conformity Certificate or a Children's Product Certificate for any product covered by an applicable product safety rule, regardless of whether a manufacturer elects to label their product under § 1107.30. A registered certification mark authorized by a certification body for a manufacturer to include with the product does not contain the information required by a certificate, as specified in 16 CFR part 1110, and it cannot be used in place of the certificate. Thus, we disagree with the commenter that certification marks are the only way to indicate full compliance. Other products, such as mattress sets, indicate compliance (in this case to 16 CFR part 1633) without the use of certification marks. Furthermore, we are aware of multiple instances of counterfeit certification marks on consumer products. As a result, we decline to revise the rule as suggested by the commenter.

4. Conditions Under Which a Consumer Product May Bear the Label

Proposed § 1107.40(c) would allow a consumer product to bear the label if the manufacturer or private labeler has certified, pursuant to section 14 of the CPSA, that the consumer product complies with all applicable consumer product safety rules under the CPSA and with all rules, bans, standards, or regulations applicable to the product under any other act enforced by the Consumer Product Safety Commission.

We received no comments on this paragraph and, other than renumbering § 1107.40 as § 1107.30, we have finalized it without change.

5. Use of Other Labels

Proposed § 1107.40(d) would allow a manufacturer or private labeler to use another label on the consumer product, as long as such label does not alter or mislead consumers as to the meaning of the label described in proposed § 1107.40(b). A manufacturer or private labeler would not be allowed to imply that the CPSC has tested, approved, or endorsed the product.

In reviewing the comments submitted regarding labels and proposed subpart D, we noticed that proposed § 1107.40(d) (renumbered as § 1107.30(d) in the final rule) could be misunderstood to imply that an alternative label may be used in place of the label specified in § 1107.40(b). Therefore, on our own initiative, we have revised § 1107.30(d) to state that other labels, in addition to the label specified in § 1107.30(b), may be placed on the product, as long as the additional labels do not change the meaning of the label specified in § 1107.30(b).

F. Other Comments Received

Several commenters raised questions on whether the final rule should contain ''safe harbors'' (where certain actions are considered to be complying with a particular requirement), and questioned the rule's effective date. Other commenters raised issues that were outside the scope of the rulemaking, such as whether a particular product was a ''children's product'' or raised concerns on matters pertaining to the accreditation of third party conformity assessment bodies.

(Comment 84)—Two commenters suggested that the rule clearly should allow for recognition of ''safe harbors'' based upon adherence to national standards for good manufacturing practices, international ISO standards governing GMP, and industry-based GMP category-specific guidelines that manufacturers may use as evidence of their good faith commitment to attaining a high degree of assurance that their products meet or exceed applicable federal safety standards. The commenters noted that we have recognized that such programs may be considered evidence of meeting the requirements under the proposed rule but noted as well that we have not yet recognized our authority to provide for such safe harbors, claiming the CPSIA did not make such specific provision (75 FR at 28339). According to the commenters, specific statutory authority is not a precondition to an agency acting under its rulemaking and enforcement authority to recognize such safe harbors. The commenters contended that we should provide such recognition.

(Response 84)—As we noted previously in the preamble to the proposed rule (75 FR at 28339), section 14 of the CPSA does not contain a safe harbor exception, nor does it establish any criteria by which the Commission could recognize testing programs for purposes of a safe harbor.

The final rule does not contain a safe harbor provision based upon a manufacturer's participation in a voluntary or industry-sponsored program; nor have we recognized any such program to indicate compliance with the final rule. We note that ISO standards for good manufacturing practices are generally industry-specific in areas such as cosmetics, pharmaceutical operations, food handling, and medical devices, products largely beyond the CPSC's jurisdiction. It is unlikely that any one GMP standard would be deemed workable or acceptable for all manufacturing methods for children's products.

(Comment 85)—One commenter noted that the preamble to the proposed rule refers to a 95 percent statistical significance level as constituting a ''high degree'' of assurance. The commenter asked whether the CPSC would consider 95 percent probability or confidence level to be a safe harbor level.

(Response 85)—In the preamble to the proposed rule, the 95 percent probability level was discussed as an alternative definition of a ''high degree of assurance'' that we considered and subsequently rejected. We ''decided against defining 'high degree of assurance' with respect to a 95 percent probability or confidence level (or any other level of statistical confidence) because there may be difficulty in applying the statistical methods to all manufacturing processes'' (75 FR at 28344). Therefore, we do not consider a 95 percent confidence level to constitute automatically a ''high degree of assurance''; nor do we consider it to constitute a safe harbor level for purposes of compliance with the final rule. Determining what constitutes a ''high degree of assurance'' varies, depending upon the product manufactured and the manufacturing processes used. The determination must be made by individual manufacturers, based upon their knowledge of their products and manufacturing processes.

(Comment 86)—One commenter noted that, for most major retailers, the creation of a product begins with a design specification that originates 12 months or more prior to manufacture or import into the United States. The commenter said that retroactively applying all the requirements of the final rule would be unduly burdensome. The commenter added that manufacturers of compliant products that are currently on retailers' shelves may not have any or all of the components of a reasonable testing program. Generating this documentation ''after the fact'' is simply not possible. The commenter asked that the rule apply only to products whose development begins 180 days on or after adoption. Accordingly, products would begin to be certified based upon a reasonable testing program with all accompanying documentation approximately 18 months after adoption of the final rule.

One commenter suggested that we set the effective date at one year from the publication of the final rule because that is how long it would take their industry to change its manufacturing processes to be able to comply with the requirements of a reasonable testing program.

Another commenter said that they simply do not have the staff or the resources to get the third party testing done on all of the products that could fall within the definition of ''children's product'' and record it in a data collection and storage system (yet to be designed and implemented) within the 180-day timeframe mentioned in the preamble to the proposed rule. That commenter suggested that they needed at least 365 days, and therefore, they requested that we extend the stay of enforcement until February 2012.

(Response 86)—The preamble to the proposed rule indicated that a final rule would become effective 180 days after its date of publication in the **Federal Register** (75 FR at 28361). However, on August 12, 2011, the President signed H.R. 2715 into law. H.R. 2715 revised the CPSIA in several different ways, and it also affected section 14(i)(2)(B)(ii) of the CPSA. H.R. 2715 also created a new section 14(i)(3)(B) of the CPSA, which requires us, no later than one year after H.R. 2715's date of enactment, to review the public comments (on opportunities to reduce the costs of third party testing requirements), and it permits us to ''prescribe new or revised third party testing regulations,'' if we determine that ''such regulations will reduce third party testing costs consistent with assuring compliance with the applicable consumer product safety rules, bans, standards, and regulations.'' Consequently, we have finalized those provisions that H.R. 2715 did not affect directly. We also have decided to make the final rule effective 15 months after date of publication in the **Federal Register** so that parties can begin taking steps to develop internal processes, such as recordkeeping, and so that we, and interested parties, can consider how H.R. 2715 interacts with the final rule.

We note that the effective date for the final rule is not calculated based on when development of a product begins, but rather, is calculated based on the date the product is manufactured. The requirements of the final rule apply only to products manufactured on or after the effective date of the final rule, and they do not apply retroactively to products already manufactured and certified.

(Comment 87)—One commenter expressed concern that the rule has the potential to multiply the current volume of product testing by several fold and that third party conformity assessment bodies will be unable to provide accurately and efficiently the increased testing capacity needed by retailers/importers to comply with this rule. The commenter asserted that currently, without the rule being in effect, retailers already are experiencing delayed turnarounds in product testing, and it is not uncommon to have special requests denied due to the current backlog in testing.

The commenter also expressed concern that the increased testing demand may affect laboratory execution, potentially resulting in incorrect laboratory results, which may cause compliant product to be lost, or may allow noncompliant product to enter commerce. The commenter said that if the capacity of the third party test conformity assessment bodies is exceeded, retailers' and manufacturers' ability to meet the rule's effective date could be jeopardized. The commenter asked that the third party conformity assessment body capacity issue be taken into consideration when establishing the effective date of the final rule.

(Response 87)—We are aware that implementation of section 14(a)(2) of the CPSA potentially could result in insufficient testing capacity at CPSC-accepted third party conformity assessment bodies. We note that in the majority of the notices of requirements that have issued since 2008, there have been very few claims of insufficient capacity, and when such issues have arisen, we have taken steps to address the matter (see 75 FR 34360, June 17, 2010). We intend to monitor and address, if possible, any capacity issues that arise after the final rule becomes effective.

(Comment 88)—One commenter objected to the application of the regulation to some juvenile furniture. The commenter stated that it is difficult to estimate the cost of testing for children's products when we have not yet decided on the definition of a children's product. Another commenter generally supported the idea of third party testing of children's products but was unclear about what products are included in the category of children's products.

(Response 88)—The final rule does not address what products fall within the definition of ''children's products''; and therefore, the comment is outside the scope of the rule. However, after the comment was submitted, we issued an interpretative rule (now codified at 16 CFR part 1200) regarding the definition of children's product, providing the guidance the commenter is seeking.

(Comment 89)—One commenter wondered whether a manufacturer or importer of a children's product subject to a children's product safety rule for which no third party testing conformity assessment bodies have been accredited by CPSC, is required to certify the product based on such testing. The commenter also wondered whether an importer is prohibited from importing the children's product until we accredit third party testing conformity assessment bodies for the children's product safety rule.

(Response 89)—The final rule does not address the issuance of notices of requirements for accreditation of third party conformity assessment bodies; and therefore, the comment is outside the scope of the rule. However, if there are no CPSC-accepted third party conformity assessment bodies whose scope includes a rule applicable to a children's product, those products are not prohibited from being imported. The children's products must still comply with the requirements of the applicable children's product safety rules. For example, if a rule established a limit of X for a particular chemical in children's products, but there were no CPSC-accepted third party conformity assessment bodies to test for X, the children's product would still be subject to the limit of X for that particular chemical; the absence of a CPSC-accepted third party conformity assessment body would not mean that the limit no longer applies.

(Comment 90)—One commenter recommended that conformity assessment bodies should: (a) Comply with the standards in ISO/IEC Guide 65, or (b) in fulfillment of the requirements in ISO/IEC 17025:2005, during each audit review and resubmission of CPSC

Form 223, demonstrate independence from ''* * * financial and other pressures and influences that may adversely affect the quality of their work * * *''; the commenter also suggested requirements for audits of conformity assessment bodies.

Another commenter expressed ongoing concern over the distinct possibility that accredited testing organizations, especially ''firewalled'' and ''government laboratories,'' could be subject to influence and threats to impartiality by outside or related interests. The commenter expressed concern that the new audit procedures stated that all types of third party conformity assessment bodies: Independent, firewalled suppliers, and government-owned or -controlled would be treated the same and were all called third party conformity assessment bodies. The commenter stated that these different types of conformity assessment bodies have different modes of operation, and they need to be treated differently by us in both the auditing and accreditation requirements. The commenter suggested that we require applicants to submit the evidence used to validate the fulfillment of ISO/IEC 17025:2005 requirements for the laboratory to ''have arrangements to ensure that its management and personnel are free from any undue internal and external commercial, financial and other pressures and influences that may adversely affect the quality of their work,'' not only as part of their application to the CPSC, but also on an ongoing basis, as part of each audit review and resubmission of CPSC Form 223.

Two commenters stated that the proposed rule fails to differentiate between firewalled and independent conformity assessment bodies. According to one commenter, a manufacturer can submit samples to its firewalled conformity assessment body even if its reasonable testing program fails to provide a high degree of assurance of compliance with the applicable children's product safety rules. The commenter sought clarification of the provision that a manufacturer of children's products with a reasonable testing program may submit samples to its firewalled conformity assessment body every two years.

(Response 90)—The final rule does not address the requirements for conformity assessment bodies; and therefore, the comments are outside the scope of the rule. Conformity assessment body requirements will be addressed in a separate rulemaking. Further, section 14(f) of the CPSA defines third party, firewalled, and governmental conformity assessment bodies.

(Comment 91)—Two commenters recommended that we consider a number of steps to ensure that third party conformity assessment bodies are protected against undue influence. These included the following: (1) Adopting the requirements in Clause 4.2 of the ISO/IEC Guide 65; (2) using the OSHA NRTL program as a model for laboratory accreditation; and (3) requiring all laboratories applying to the Commission to submit evidence that they fulfilled ISO/IEC 17025:2005 section 4.1.5 b. One commenter made the recommendation for ''firewalled'' conformity assessment bodies. Another commenter would require annual reassessments of third party conformity assessment bodies.

(Response 91)—The final rule does not address undue influence requirements for third party conformity assessment bodies; and therefore, the comments are outside the scope of this rule. This rule establishes the requirements for manufacturers to safeguard against the exercise of undue influence on third party conformity assessment bodies.

(Comment 92)—Several commenters submitted comments on the concurrent rulemaking for component part testing in proposed 16 CFR part 1109.

(Response 92)—The final rule does not establish the requirements for component part testing; and therefore, these comments are outside the scope of this rule. We have, instead, considered those comments in that rulemaking. (*See Conditions and Requirements for Relying on Component Part Testing or Certification, or Another Party's Finished Product Testing or Certification, to Meet Testing and Certification Requirements* (16 CFR part 1109)).

(Comment 93)—One commenter opined that an existing third party certification system under the OSHA NRTL program, in conjunction with testing being carried out in testing facilities accredited to ISO/IEC 17025, is the preferred method for product certification for the CPSC. The commenter recommended that we consider a similar program or an accredited certification program that meets the requirements of ISO/IEC Guide 65 and ISO/IEC Guide 67.

(Response 93)—The final rule does not address certification systems or accreditation, such as ISO/IEC Guides 65 and 67; and therefore, the comment is outside the scope of this rule.

(Comment 94)—Several commenters asked us to exempt silk from 16 CFR part 1610. They argued that the regulation exempts plain surface fabrics weighing at least 2.6 ounces per square yard and fabrics made from acrylic, modacrylic, nylon, olefin, polyester, and wool, but not silk. The commenters stated that silk's reaction to fire is comparable to wool and better than the synthetics that are exempted.

(Response 94)—The final rule does not address 16 CFR part 1610; and therefore, the comments are outside the scope of this rule.

(Comment 95)—One commenter noted that heavy element and phthalates testing use some chemicals. The commenter stated that, with increased testing, there will be more chemical waste, which may not be desirable.

(Response 95)—The final rule does not address testing methods for specific substances; and therefore, the comment is outside the scope of the rule.

(Comment 96)—One commenter suggested developing an exemption list for vinyl fabrics produced in accordance with 16 CFR part 1611, *Standard for the Flammability of Vinyl Plastic Film,* using a process similar to that used to develop the exemption list in 16 CFR part 1610, *Standard for the Flammability of Clothing Textiles.* In the latter case, testing over a number of years showed that certain types of fabrics always produce passing results when tested according to 16 CFR part 1610, and those types of fabrics eventually were exempted from the standard.

(Response 96)—The final rule does not address 16 CFR part 1611; and therefore, the comment is outside the scope of the rule.

(Comment 97)—One commenter disagreed that a standard of general application to all consumer products in a category should be considered a ''children's product safety rule'' for purposes of the CPSIA.

(Response 97)—The final rule establishes the requirements for the testing and certification of children's products and for the labeling of compliant consumer products. Determinations of whether a particular safety standard is a children's product safety rule are outside the scope of this rule.

(Comment 98)—One commenter suggested that we consider developing training guidelines for the regulated community and testing laboratories that explain key elements of a reasonable testing program for non-children's and children's products. The guidelines could include helpful training aids and presentations to increase knowledge and understanding. The guidelines could include helpful examples and scenarios

for most common issues (*e.g.,* developing a random sampling program) and even infrequent but complex issues (*e.g.,* traceability for raw materials and product components).

(Response 98)—The final rule is limited to establishing the requirements for testing and certification for children's products and for labeling of consumer products as compliant; therefore, the comment is outside the scope of the rule. Further, we have reserved proposed subpart B (the reasonable testing program for non-children's products) for future consideration. We may consider establishing training programs in the implementation of the final rule.

(Comment 99)—One commenter noted that the proposed rule had to be worded very generally to be applicable to a wide range of products. This has had the effect of making it more difficult to understand how the rules will be applied in any specific industry. The commenter suggested that we conduct regional, industry-specific workshops to explain to the regulated manufacturers how these general rules will apply to their existing procedures and where new regulatory obligations exist.

(Response 99)—The final rule is limited to establishing the requirements for testing and certification for children's products and for labeling of consumer products as compliant; therefore, the comment is outside the scope of the rule. We may consider establishing regional industry-specific workshops in the implementation of the final rule.

(Comment 100)—One commenter recommended that the labels for toys be used to communicate not only compliance with the standards, but also the appropriate age range for the toy. The commenter said that the European Union uses a universal mark that indicates the inappropriate age ranges of a toy if it presents a choking hazard. The commenter said that the CPSC's program could expand on that concept, by recommending labeling that caregivers can use to separate toys intended for siblings of differing ages, while also preventing parents and other caregivers from buying toys that may be inappropriate for the age of the child. The commenter believes that this could help enhance toy safety by reducing children's exposure to inappropriate toys.

(Response 100)—The final rule does not address labeling for the appropriate ages ranges for a toy; therefore, the comment is outside the scope of the rulemaking. Section 14(i)(2)(A) of the CPSA requires us to implement a program by which a manufacturer may label a product to comply with the certification requirements of section 14(a) of the CPSA. However, the CPSC staff has issued *Age Determination Guidelines: Relating Children's Ages to Toy Characteristics and Play Behavior,* T. P. Smith (Ed.) (2002) (which can be found on the CPSC Web site at *http://www.cpsc.gov/BUSINFO/adg.pdf*) which addresses the issue raised by the commenter.

(Comment 101)—One commenter asserted that the best approach would be to allow businesses to manage their compliance risks as best they can because ''* * * the prophylactic approach to testing adopted by the CPSC will inevitably put many small or micro businesses into bankruptcy * * *. If the law does not permit the agency to adopt sensible rules that allow businesses to manage their compliance risk as best they can (where the standards remain in place, but the government stops trying to tell businesses HOW to comply), then the Commission must finally tell Mr. Waxman what he doesn't want to hear—that his law is broken and can't be fixed * * *.'' The commenter then wrote: ''* * * I don't believe the agency can devise sensible regulations to fix this problem short of a legislative change.''

(Response 101)—Comments about the merits of section 14 of the CPSA or the CPSIA are beyond the scope of this rulemaking. However, on August 12, 2011, the President signed into law H.R. 2715, which amended the CPSIA in several respects. One provision provides relief for small batch manufacturers. Another provision in H.R. 2715 requires the CPSC to seek public comment on opportunities to reduce the cost of third party testing requirements consistent with assuring compliance with any applicable consumer product safety rule, ban, standard, or regulation. H.R. 2715 directs the CPSC to seek public comment on seven specific issues, including other techniques for lowering the cost of third party testing consistent with assuring compliance with the applicable consumer product safety rules, bans, standards, and regulations. Elsewhere in this issue of the **Federal Register**, we have published a notice seeking public comment on the issues in H.R. 2715. H.R. 2715 further requires the CPSC to review the public comments and states that the CPSC may prescribe new or revised third party testing regulations if we determine that such regulations will reduce third party testing costs consistent with assuring compliance with the applicable consumer product safety rules, bans, standards, and regulations.

(Comment 102)—One commenter, who manufactures die-cast metal toys, commented that the 90 ppm lead content limit is too low to allow use of the usual aluminum for casting their products, even though the same metal is used to make cooking utensils.

Furthermore, the commenter stated that it costs $3,700 to test one unit and that the market will not absorb the costs of testing multiple units per batch. The commenter implied that these costs would cause it to go out of business or make its products in China. The commenter expressed the belief that it should not have to test using third party conformity assessment bodies because:

1. They are ISO 9001:2008 compliant.
2. They document all of their supplier receipts of metal, plastic, and powder paint materials.
3. They conduct a metal analysis for each production run with their spectrometer.

(Response 102)—The final rule does not address lead content and surface coating limits and; therefore, comments on the allowable concentration levels are outside the scope of this rule.

However, H.R. 2715 directs the CPSC to seek public comment on seven specific issues, including the extent to which evidence of conformity with other national or international governmental standards may provide assurance of conformity to consumer product safety rules, bans, standards, or regulations, and the extent to which technology, other than the technology already approved by the Commission, exists for third party conformity assessment bodies to test or to screen for testing consumer products subject to a third party testing requirement. Elsewhere in this issue of the **Federal Register**, we have published a notice seeking public comment on the issues in H.R. 2715.

IV. Regulatory Flexibility Act

A. Introduction

We have examined the impacts of the final rule under the Regulatory Flexibility Act (5 U.S.C. 601–612). The Regulatory Flexibility Act requires agencies to analyze regulatory options that would reduce any significant impact of a rule on small entities.

Several sections that were included in the proposed rule are not included in the final rule, but they are being reserved for future rulemaking. Proposed subpart B, pertaining to a reasonable testing program for non-children's products, is not included in the final rule, but we may address the issue in a future rulemaking. The proposed section pertaining to the

selection of random samples for children's products (§ 1107.22) is not included in the final rule, and it is addressed in a separate rulemaking published elsewhere in this issue of the **Federal Register**. Proposed § 1107.21(d), which would provide a partial exemption from periodic testing for low-volume products is not included in the final rule. The reason for omitting proposed § 1107.21(d) from the final rule is that H.R. 2715 asked us to examine means to reduce the cost of third party testing requirements consistent with assuring compliance with any applicable consumer product safety rule, ban, standard, or regulation. It also contained special rules for small batch manufacturers and directed us to consider alternative testing requirements or to exempt small batch manufacturers from certain third party testing requirements. Given these new statutory obligations resulting from H.R. 2715, we are reserving § 1107.21(e) (formerly proposed § 1107.21(d)) so that we may consider issues related to cost, low-volume products, and small batch manufacturers more fully. Finally, proposed § 1107.25, which would establish requirements for remedial action for children's products, has not been included in the final rule.

Before promulgating a final rule, the Regulatory Flexibility Act requires agencies to prepare a final regulatory flexibility analysis of the rule that analyzes the impact that the rule will have on small entities. The final regulatory flexibility analysis must contain:

(1) A succinct statement of the need for, and objectives of, the rule;

(2) a summary of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a summary of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments;

(3) a description of and an estimate of the number of small entities to which the rule will apply, or an explanation of why no such estimate is available;

(4) a description of the projected reporting, recordkeeping, and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; and

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

B. Need for, and Objectives of, the Rule

Section 14(a)(2) of the CPSA requires that every manufacturer of a children's product that is subject to a children's product safety rule certify that the product complies with the applicable children's product safety rule based on testing conducted by a third party conformity assessment body accredited to conduct such tests. The final rule establishes requirements and procedures for manufacturers to certify children's products under this section of the CPSA.

Section 14(i)(2)(A) of the CPSA requires that we initiate a program by which a manufacturer or private labeler may label a product as complying with the applicable safety rules. The statute also requires us to establish protocols and standards: (i) For ensuring that a children's product is tested periodically and when there has been a material change in the product, (ii) for the testing of representative samples to ensure continued compliance, (iii) for verifying that a product tested by a conformity assessment body complies with applicable safety rules, and (iv) for safeguarding against the exercise of undue influence on a conformity assessment body by a manufacturer or private labeler. With the exception of items (ii) (standards and protocols for the testing representative samples), and (iii) (establish protocols and standards for verifying that a product tested by a conformity assessment body complies with applicable safety rules), the final rule implements these requirements.

The objective of the final rule is to reduce the number of children's products that are distributed each year that fail to comply with one or more children's product safety rules. The applicable children's product safety rules were established to reduce the unreasonable risk of injury or death due to foreseeable hazards associated with particular children's products.

C. Comments on the Initial Regulatory Flexibility Analysis, and Our Responses

The preamble to the proposed rule contained our initial regulatory flexibility analysis (76 FR at 28352 through 28360). Several commenters addressed issues pertaining to that analysis.

(Comment 103)—One commenter noted that in estimating the number of firms that could be impacted by the proposed rule, the book publishing industry (NAICS code 511130) and printing industry (NAICS code 323117) were not included. The commenter recommended their inclusion for the final regulatory flexibility analysis.

(Response 103)—We acknowledge that the initial regulatory flexibility analysis inadvertently omitted these industries. However, the recently enacted H.R. 2715 exempts ordinary books and ordinary paper-based printed materials from the third party testing requirements, so the commenter's concern no longer applies.

(Comment 104)—One commenter indicated that the cost of complying with the reasonable testing program requirements for furniture will vary according to: (1) Whether the furniture is children's or non-children's furniture; (2) whether the furniture is produced domestically or imported; and (3) whether the manufacturer produces a high or low-volume of products. High-volume producers can rely on a component part certificate from their paint suppliers, and the cost of testing would be relatively low. Higher quality, lower volume producers would have greater difficulty because these items often are ''made to order'' and ''as needed.'' These producers will use small batches of finishes issued in a number of different finishing materials, each of which would need to be tested.

(Response 104)—We agree that the costs of complying with the requirements will vary among products and manufacturers. Generally, the costs will be more significant for manufacturers of lower volume products. It should also be noted that proposed subpart B, which would contain the requirements applicable to non-children's products, is not being finalized at this time. Therefore, the final rule does not impose any requirements on non-children's furniture.

(Comment 105)—Two commenters expressed concern about costs. One commenter noted that reliance on third party conformity assessment body testing raises costs and imposes production delays. Another commenter, a charitable organization that makes wooden toys for donation to needy children, commented that it lacks the resources to pay for certification testing and would need to discontinue activities unless granted an exemption or some other type of relief.

(Response 105)—Section 14(a)(2) of the CPSA requires third party conformity assessment bodies to test children's products for compliance with applicable children's product safety

rules. We recognize that testing costs may be substantial and may have a significant adverse affect on some manufacturers, especially small businesses that may have limited financial resources. We also recognize that the testing will take time and could result in some delays in the production process.

Recently enacted H.R. 2715 requires us to seek public comment on opportunities to reduce the cost of third party testing requirements consistent with assuring compliance with any applicable consumer product safety rule, ban, standard, or regulation. H.R. 2715 directs us to seek public comment on seven specific issues, including techniques for lowering the cost of third party testing consistent with assuring compliance with the applicable consumer product safety rules, bans, standards, and regulations. Elsewhere in this issue of the **Federal Register**, we have published a notice seeking public comment on the issues in H.R. 2715. H.R. 2715 further requires us to review the public comments and states that we may prescribe new or revised third party testing regulations if we determine that such regulations will reduce third party testing costs consistent with assuring compliance with the applicable consumer product safety rules, bans, standards, and regulations.

H.R. 2715 also requires us to consider alternative requirements for the covered products of small batch manufacturers and, if no alternative requirements are available or economically practical, exempts small batch manufacturers from the third party testing requirements, with some exceptions. Covered products are those for which fewer than 7,500 units were produced in the previous year, and a small batch manufacturer is one whose gross sales revenue from all consumer products in the previous calendar year was less than $1 million. In the case of toys, however, no alternative requirements or exemptions would be permitted for third party testing for the lead content of paint, small parts, and pacifiers. Where possible, we tried to reduce testing costs by allowing the use of component part testing.

(Comment 106)—One commenter noted that the initial regulatory flexibility analysis acknowledged that the examples used only considered the out-of-pocket testing costs. Costs not considered in the examples include: Samples destroyed or damaged in testing; transportation of the samples; administrative costs for managing testing; administrative costs for managing the testing data and recordkeeping; an allocation of general management time; legal expenses, among other costs. The commenter estimated that, depending on the scale of the business, these costs will add 15 to 50 percent to the out-of-pocket testing costs.

The commenter also noted that the initial regulatory flexibility analysis considered the probability that some manufacturers or private labelers will have to test multiple samples to obtain the high degree of assurance required by the proposed rule. The commenter asserted that over the last 20 years of product testing at his company, multiple safety tests of the same product have not revealed anything useful. The commenter asserted that the testing rule is complex; that many small businesses will not have the skills necessary to understand what is expected of them in terms of compliance; and that many small businesses will exit the market for children's products.

(Response 106)—The initial regulatory flexibility analysis focused on the cost of third party testing because it will likely be the most significant cost for small manufacturers of children's products. Considering only the third party testing costs, the initial regulatory flexibility analysis found that the rule could have a significant impact on a substantial number of small entities. The initial regulatory flexibility analysis explicitly stated that the only costs considered in the analysis were the costs that the laboratories would charge to conduct the testing. The commenter is correct that the rule would impose other costs, including the cost of the samples destroyed in testing and freight, as well as the costs involved in administering and managing the testing and paperwork. The commenter's estimate that these costs would add 15 to 50 percent to the out-of-pocket testing costs, depending upon factors such as the product involved and the scale of the business, seems reasonable.

The commenter also is correct that the initial regulatory flexibility analysis considered the impact on firms that had to test more than one sample of a product in order for the manufacturer to obtain a high degree of assurance that the product complies with the applicable product safety rules. However, the final rule does not specify the number of samples that must be tested. It is possible that if the commenter, as asserted, has never found multiple tests on its products to reveal anything useful, then the products manufactured could be of such uniform composition and quality that the number of samples that the commenter will be required to submit for testing will be small. However, because the rule requires that every children's product subject to a children's product safety rule be tested periodically by a third party conformity assessment body, the commenter might need to conduct more testing than the commenter believes is necessary.

We acknowledge that the rule is complex, and some small businesses might have to hire outside consultants, such as lawyers, statisticians, or quality control experts to help them comply with the regulations. As a result, some small firms may exit the market for children's products.

(Comment 107)—One commenter stated that the testing rule would accelerate the decline of domestic manufacturing firms, as more manufacturers go offshore to minimize the cost of testing. The commenter asserted that the furniture industry will have no choice but to close down more and more factories in the United States and take those jobs off shore to benefit from the lower testing costs. The commenter stated that some small manufacturers have abandoned plans to offer products intended for the youth market.

(Response 107)—The initial regulatory flexibility analysis noted that the costs of some third party tests are less expensive abroad than they are in the United States. For example, while typical prices for lead content tests range from $50 to more than $100 in the United States, the same lead content test, in some cases, can be obtained for as little as $20 in China (75 FR at 28355). Higher third party testing costs in the United States would be an incentive for manufacturers to produce children's products abroad, to take advantage of the lower testing costs.

Given all of the factors that go into a decision by a manufacturer to produce consumer products abroad rather than in the United States, the impact of third party testing costs on such a decision might be small. It seems unlikely that the independent effect of higher third party testing costs, by itself, would result in a large number of factories in the United States closing down. With regard to small domestic manufacturers, it is possible that the third party testing costs associated with the children's furniture could lead some to manufacturers to reduce their children's furniture product lines or even cease their production of children's furniture. Any small manufacturer of children's furniture who qualifies as a small batch manufacturer might be offered relief by the alternative requirements or exemptions that are provided by H.R. 2715; however, matters regarding the small batch manufacturer's exception in

H.R. 2715 are outside the scope of this rulemaking. Elsewhere in this issue of the **Federal Register**, we have published a notice seeking public comment on the issues in H.R. 2715, including other techniques for lowering the cost of third party testing consistent with assuring compliance with the applicable consumer product safety rules, bans, standards, and regulations, pursuant to H.R. 2715.

(Comment 108)—One commenter stated that the cost to test a finish used in the furniture industry is about $50 (which is consistent with the discussion of testing costs in the initial regulatory flexibility analysis). A youth bed, which is also subject to the lead content requirements of section 101 of the CPSIA, might require 29 tests at a third party testing facility, which would bring the total cost of lead testing to $1,450. In addition, testing to the bunk bed standard would add $600 to $800 to the cost. A crib or toddler bed would cost an additional $750 to $765 ($450 to $520 in China) to test to the relevant children's product safety rules. The cost of testing other items of youth furniture, such as desks, entertainment centers, and bookcases, averages approximately $235. These costs do not include the cost of the samples, freight, random sampling, or the cost for employees to track and administer the recordkeeping requirements.

(Response 108)—As described in the initial regulatory flexibility analysis (75 FR at 28352 through 28362), the testing of some children's products by third party conformity assessment bodies can be costly. The testing costs described by the commenter do not appear to be unreasonable estimates, based on cost estimates we obtained. In cases where the same component is used in more than one product, manufacturers may be able to reduce their testing costs by using component part testing. However, component part testing will not offer any relief from the costs of tests that must be performed on the finished product, such as tests for conformity to the crib and bunk bed standards.

(Comment 109)—One commenter stated that furniture manufacturers who deal in high-quality but lower volume furniture manufacturing may offer products with between 30 and more than 2,000 possible combinations of finishes. Many of these finishes are custom or made to order, so that a batch can range from a 5-gallon bucket to a 55-gallon drum. Each custom finish consists of at least 10 different materials. The manufacturer must create a panel for each possible combination of finishing materials and then have it analyzed by a third party testing facility. An x-ray fluorescence (XRF) gun is then used to verify that the finished piece, in fact, complies with the lead-in-paint standard. It is estimated that 6 to 10 employees will be required to track the testing and compile the certificates of conformity. It is estimated that the cost to comply with the rule for non-children's products could range from $200,000 to $410,000, annually.

(Response 109)—We received many comments on proposed subpart B, which was concerned with reasonable testing programs for non-children's products. The comments raised many practical issues, which illustrates the difficulty of drafting a regulation that can apply to many different types of products and manufacturing processes and still provide sufficient guidance to enable manufacturers to implement the requirements effectively. Consequently, we are deferring action with respect to finalizing subpart B. Instead, we will reserve subpart B in the final rule and continue evaluating the issues raised in the comments.

It should be noted, however, that although we are not finalizing subpart B at this time, manufacturers of non-children's products that are subject to a product safety rule, ban, standard, or regulation are still obligated by the CPSA, as amended by the CPSIA, to certify that their products comply with all applicable safety rule, based on a test of each product or a reasonable testing program.

In the case of testing the lead content of paint, which the commenter mentioned, the use of component part or composite testing—as would be allowed by the final rule on component part testing—might allow some manufacturers to reduce their testing costs. For example, if the same 10 raw materials (and only those materials) are combined in different portions to produce 30 different finishes, a manufacturer could test the lead content of each of the materials, and if each of the materials met the lead content requirement, then the manufacturer would not need to test each of the 30 finishes separately.

(Comment 110)—One commenter stated that because the cost of testing and recordkeeping will be passed on to the consumer, this could create an ''upside down'' market in furniture, in which youth furniture is more expensive than adult furniture. This could lead some consumers to purchase ''adult'' furniture for children instead of purchasing youth furniture that has been third party tested.

(Response 110)—Section 14(a)(2) of the CPSA requires third party testing of children's products, including children's and youth furniture. Depending upon the structure of the market and market conditions, some or all of the testing costs may be passed on to consumers. We cannot determine whether passing on these costs will make children's furniture—in any absolute sense—to be more expensive to purchase than adult furniture; but passing on these costs to consumers is likely to increase the relative price of children's furniture, and it could provide a price incentive for parents to substitute adult furniture for children's furniture.

(Comment 111)—One commenter stated that the proposed rule will impose significant new costs on the mattress industry because mattresses are already subject to an expensive mandatory testing program pursuant to 16 CFR part 1633. The commenter asserted that because most manufacturers of mattresses are small businesses, the proposed rule would have a substantially greater impact on the mattress industry, given the nature of the products, the types of standards that the products must meet, the destructive nature of the testing involved, and the cost of the samples tested.

The commenter also noted that mattress testing entails other costs, such as: the cost of the samples tested, the laboratory test fees, freight costs to ship samples to the laboratory, and the manufacturers' staff sent to witness the test. The total cost of conducting a full test for 16 CFR part 1633 can range from $850 to $1,650 per sample tested, plus added travel costs and salary expenses for company personnel to witness the test. The commenter urged us to take into account the significant new costs that the rules will impose on the mattress industry, which is comprised overwhelmingly of small businesses.

(Response 111)—We acknowledge that the rule could impose additional costs on some firms. However, section 14(a)(2) if the CPSA requires third party testing of children's products that are subject to an applicable children's product safety rule.

Additionally, on August 12, 2011, the President signed into law H.R. 2715, which amended the CPSIA in several respects. One provision in H.R. 2715 requires us to seek public comment on opportunities to reduce the cost of third party testing requirements consistent with assuring compliance with any applicable consumer product safety rule, ban, standard, or regulation. H.R. 2715 directs us to seek public comment on seven specific issues. These issues include:

• The extent to which manufacturers with a substantial number of substantially similar products subject to third party testing may reasonably make use of sampling procedures that reduce the overall test burden without compromising the benefits of third party testing; and

• Other techniques for lowering the cost of third party testing consistent with assuring compliance with the applicable consumer product safety rules, bans, standards, and regulations.

Elsewhere in this issue of the **Federal Register**, we have published a notice seeking public comment on the issues in H.R. 2715. H.R. 2715 further requires us to review the public comments and states that we may prescribe new or revised third party testing regulations if we determine that such regulations will reduce third party testing costs consistent with assuring compliance with the applicable consumer product safety rules, bans, standards, and regulations.

Another provision of H.R. 2715 created a new section 14(i)(4) of the CPSA to provide for special rules for small batch manufacturers. The provision contemplates the possible development of alternative testing requirements for ''covered products'' made by ''small batch manufacturers.'' The provision also provides for possible exemptions of small batch manufacturers from the third party testing requirements and imposes certain limits on third party testing requirements. A covered product is a consumer product where no more than 7,500 units of the same product were manufactured by a small batch manufacturer in the previous calendar year, and a small batch manufacturer is a manufacturer that had no more than $1 million in gross revenue from sales of all consumer products in the previous calendar year. Any small mattress manufacturer who meets the definition of a ''small batch manufacturer'' might benefit from this provision when it is implemented.

(Comment 112)—One commenter stated that the discussion of sample size is unrealistic. An example was used in the initial regulatory flexibility analysis that provided the sample sizes that would be required to meet a specified statistical confidence level, assuming that both the historical variability (standard deviation) and the historical mean of the variable (lead content) are known. The commenter stated that continuously variable data on commonly available testing reports is generally not provided by the laboratories, and data for samples with a result below the method detection limit is generally provided in the form ''< X ppm,'' where X is the method detection limit. The commenter noted that these data cannot be included for calculations of the mean or standard deviation. The commenter stated that the example used is invalid, unless the data can be captured and tracked in full resolution, which is not the current state.

(Response 112)—To the extent that continuously variable data from testing results are unavailable, the discussion of sample size in the initial regulatory flexibility analysis may be unrealistic. Because the example is not widely applicable, and because we are not requiring that the periodic third party testing be used to provide a high degree of statistical assurance (*e.g.,* 95 percent confidence) that no children's products violate consumer product safety standards, we have omitted the example from the final regulatory flexibility analysis.

D. Small Entities To Which the Rule Will Apply

By regulation (16 CFR part 1110), the domestic manufacturer or importer is responsible for ensuring that a consumer product is tested properly, and, based on the testing results, must certify that the product conforms to all applicable consumer product safety rules. Manufacturers of children's products that are subject to a children's product safety rule must certify that the children's products comply with all applicable children's product safety rules, based on testing conducted by third party conformity assessment bodies that are accredited to conduct such tests. The definition of a ''children's product'' is broad, and it includes bicycles, books, furniture, apparel, jewelry, televisions, electronic games, toys, and so on, if designed or intended primarily for a child 12 years of age or younger. Virtually all children's products are subject to one or more children's product safety rules. For example, the lead content of paint and all non-excluded accessible component parts of children's products are subject to limits. Therefore, virtually all manufacturers of children's products will have to certify, based on tests by accredited third party conformity assessment bodies that their products comply with the lead content limits. We have excluded from the requirement to test for lead content a few materials that inherently do not contain lead. The excluded materials are limited to materials such as: most fabrics, precious metals, paper, gemstones, and a limited number of other items, and the list can be found at 16 CFR 1500.91. We also have issued a rule excluding from the lead content requirements (16 CFR 1500.87) inaccessible component parts in children's products. Section 1(b)(3) of H.R. 2715 excludes certain used children's products from testing for lead content. All other materials used in products intended for children must be tested for lead content.

In addition to the requirements to test for lead content, manufacturers must test for conformity with a wide variety of other children's product safety rules. For example, there are product safety rules that establish standards for children's products, such as toys, cribs, bicycles, bicycle helmets, youth all-terrain vehicles, bunk beds, baby walkers, and flammable clothing textiles. The CPSIA also limits the amount of six phthalates that can be present in children's toys and child care articles; thus, many plastic component parts will need to be tested for phthalate content. A full list of the children's product safety rules for which third party testing and certification will be required is given in Table 1.

TABLE 1—PRODUCT SAFETY RULES APPLICABLE TO CHILDREN'S PRODUCTS

16 CFR part # (or test method or standard)	Description
1420	All-Terrain Vehicles.
1203	Bicycle Helmets.
1512	Bicycles.
1513	Bunk Beds.
1500.86(a)(5)	Clacker Balls.
1500.86(a)(7) and (8)	Dive Sticks and Other Similar Articles.
1505	Electrically Operated Toys or Articles.
1615	Flammability of Children's Sleepwear, Sizes 0 through 6X.
1616	Flammability of Children's Sleepwear, Sizes 7 through 14.

TABLE 1—PRODUCT SAFETY RULES APPLICABLE TO CHILDREN'S PRODUCTS—Continued

16 CFR part # (or test method or standard)	Description
1610	Flammability of Clothing Textiles.
1632	Flammability of Mattresses and Mattress Pads.
1633	Flammability (Open Flame) of Mattress Sets.
1611	Flammability of Vinyl Plastic Film.
1219	Full-Size Cribs.
1215	Infant Bath Seats.
1216	Infant Walkers.
Sec. 101 of CPSIA (Test Method CPSC–CH–E1001–08, CPSC–CH–E1001–08.1 or 2005 CPSC Laboratory SOP).	Lead Content in Children's Metal Jewelry.
Sec. 101 of CPSIA (Test Method CPSC–CH–E1001–08 or CPSC–CH–E1001–08.1).	Lead Content in Children's Metal Products.
Sec. 101 of CPSIA (Test Method CPSC–CH–E1002–08 and/or CPSC–CH–E1002–08.1).	Lead Content in Children's Non-Metal Products.
1303	Lead Paint.
1220	Non-Full-Size Cribs.
1511	Pacifiers.
Sec. 108 of CPSIA (Test Method CPSC–CH–C1001–09.3)	Phthalate Content of Children's Toys and Child Care Articles.
1510	Rattles.
1501	Small Parts Rule.
1630	Surface Flammability of Carpets and Rugs.
1631	Surface Flammability of Small Carpets and Rugs.
1217	Toddler Beds.
(ASTM F963)	Toys.

E. Number of Small Firms Affected

We estimated the number of firms that could be impacted, by reviewing every industry in the North American Industrial Classification System (NAICS), and selecting industries with firms that could manufacture or sell any children's product potentially covered by a consumer product safety rule. Firms are classified in the NAICS category that describes their primary activity. Therefore, firms that might manufacture or import consumer products covered by a safety rule as a secondary or tertiary activity may not have been counted. There is no separate NAICS category for importers. Firms that import products might be classified as manufacturers, wholesalers, or retailers.

1. Manufacturers

According to the criteria established by the U.S. Small Business Administration (SBA), manufacturers are generally considered to be small entities if they have fewer than 500 employees. Table 2 shows the number of manufacturing firms by the North American Industrial Classification System (NAICS) categories that cover most children's products that are subject to a product safety rule. Although there are more than 26,000 manufacturers that would be considered small in these categories, not all of these firms are engaged in manufacturing children's products that are subject to a product safety rule. It would be expected that most firms engaged listed in the category, *Doll, Toy, and Game,* produce some products that are intended for children age 12 and younger. On the other hand, the *Surgical Appliance and Supplies Manufacturing* category includes crash helmets, but most other products in this category are not under our jurisdiction.

TABLE 2—MANUFACTURERS

NAICS Code	Description	Small firms	Total firms
31411	Carpet and Rug Mills	244	262
315	Apparel Manufacturing	7,126	7,195
316211	Rubber and Plastic Footwear Manufacturing	43	45
316212	House Slipper Manufacturing	1	1
316219	Other Footwear Manufacturing	53	54
326299	All Other Rubber Product Manufacturing	622	666
336991	Motorcycle, Bicycle, and Parts Manufacturing	447	452
33712	Household and Institutional Furniture Manufacturing	6,058	6,154
33791	Mattress Manufacturing	427	441
339113	Surgical Appliance and Supplies Manufacturing	1,817	1,916
33991	Jewelry and Silverware Manufacturing	2,470	2,484
33992	Sporting and Athletic Goods Manufacturing	1,707	1,748
33993	Doll, Toy and Game Manufacturing	694	705
339942	Lead Pencil and Art Good Manufacturing	124	129
339999	All Other Miscellaneous Manufacturing	4,646	4,695
	Total Manufacturers	26,479	26,947

Source: U.S. Department of Commerce, Bureau of the Census, 2008 County Business Patterns, Number of Firms, Number of Establishments, Employment, and Annual Payroll by Small Enterprise Employment Sizes for the United States, NAICS Sectors: 2008. (Available at: *http://www2.census.gov/econ/susb/data/2008/us_naicssector_small_emplsize_2008.xls,* last accessed on 16 August 2011.

In addition to the manufacturers in Table 3, there were 25,184 nonemployer businesses classified in NAICS 315 (Apparel Manufacturing) and 61,180 classified in NAICS 3399 (Other Miscellaneous Manufacturers) in 2008. Nonemployer businesses are generally very small businesses with no employees. They are typically sole proprietorships, and they may or may not be the owner's principal source of income. The average receipts for the nonemployer businesses classified in *Apparel Manufacturing* was about $31,000, and the average receipts for the nonemployer businesses classified *Other Miscellaneous Manufacturers* was about $41,000.[3]

2. Wholesalers

Wholesalers would be impacted by the rule if they import any children's product that is subject to a product safety rule. Wholesalers who obtain their products strictly from domestic manufacturers, or from other wholesalers, would not be impacted by the rule because the manufacturer or importer would be responsible for certifying the products. Table 3 shows the number of wholesalers by NAICS code that would cover most children's products that are subject to a product safety rule. According to SBA criteria, wholesalers are generally considered to be small entities if they have fewer than 100 employees. Although there are more than 78,000 wholesalers that would be considered small in these categories, not all of these firms are engaged in importing children's products that are subject to a consumer product safety rule. A significant proportion of the firms classified as *Toy and Hobby Goods and Supplies Merchant Wholesalers* probably import at least some children's products. However, the only firms classified as *Motor Vehicle and Motor Vehicle Parts and Suppliers* that would be impacted by the final rule are those that import all-terrain vehicles intended for children 12 years old or younger.

TABLE 3—WHOLESALERS

NAICS Code	Description	Small firms	Total firms
4231	Motor Vehicle and Motor Vehicle Parts and Suppliers	17,734	18,769
4232	Furniture and Home Furnishing Merchant Wholesalers	11,353	11,844
42362	Electrical and Electronic Appliance, Television, and Radio Set Merchant Wholesalers.	2,444	2,591
42391	Sporting and Recreational Goods and Supplies Merchant Wholesalers	5,019	5,196
42392	Toy and Hobby Goods and Supplies Merchant Wholesalers	2,227	2,302
42394	Jewelry, Watch, Precious Stone, and Precious Metal Merchant Wholesalers	7,363	7,447
42399	Other Miscellaneous Durable Goods Merchant Wholesalers	9,040	9,302
42432	Men's and Boy's Clothing and Furnishings Merchant Wholesalers	3,557	3,722
42433	Women's, Children's, and Infant's Clothing, and Accessories Merchant Wholesalers.	6,797	7,029
42434	Footwear Merchant Wholesalers	1,521	1,593
42499	Other Miscellaneous Nondurable Goods Merchant Wholesalers	11,203	11,490
	Total	78,258	81,285

Source: U.S. Department of Commerce, Bureau of the Census, 2008 County Business Patterns, Number of Firms, Number of Establishments, Employment, and Annual Payroll by Small Enterprise Employment Sizes for the United States, NAICS Sectors: 2008. (Available at: *http://www2.census.gov/econ/susb/data/2008/us_naicssector_small_emplsize_2008.xls,* last accessed on 16 August 2011.

In addition to the wholesalers tabulated in Table 3, the U.S. Census Bureau estimated that there were 206,072 nonemployer businesses classified in NAICS categories that could include wholesalers of children's products. Nonemployer businesses are generally very small sole proprietorships. The average receipts for the nonemployer business wholesalers were about $86,000.[4] An unknown number of nonemployer wholesalers could import children's products.

3. Retailers

Retailers that obtain their products from domestic manufacturers or wholesalers will not be directly impacted by the rule because the manufacturers or wholesalers would be responsible for the testing and certification of the products. However, there are some retailers that manufacture or directly import some products; and therefore, they will be responsible for ensuring that these products are properly tested and certified. The number of such retailers is not known. Table 4 shows the number of retailers by NAICS code that would cover most children's products. According to SBA size standards, retailers are generally considered to be small entities if their annual sales are less than $7 million to $30 million, depending on the specific NAICS category. Because of the way in which the data were reported by the Bureau of the Census, the estimates of the number of small firms in each category in Table 4 are based on similar, but different criteria. Although there are more than 100,000 firms that would be considered ''small businesses'' in these categories, it is not known how many of these firms are engaged in importing or manufacturing children's products. Many firms probably obtain all of their products from domestic wholesalers or manufacturers and would not be directly impacted by the rule.

[3] U.S. Department of Commerce, Bureau of the Census, ''Revised 2008 Nonemployer Statistics Table.'' Available at: *http://www.census.gov/econ/nonemployer/Revised%202008%20Data%20With%202009%20Methodology%20Applied.xls* (last accessed 16 August 2011).

[4] U.S. Department of Commerce, Bureau of the Census, ''Revised 2008 Nonemployer Statistics Table.'' available at *http://www.census.gov/econ/nonemployer/Revised%202008%20Data%20With%202009%20Methodology%20Applied.xls* (last accessed 16 August 2011).

TABLE 4—RETAILERS

NAICS Code	Description	SBA Size standard (millions of dollars of annual sales)	Criteria used for estimate of small firms (millions of dollars of annual sales)	Small firms	Total firms
441221	Motorcycle, ATV, and Personal Watercraft Dealers	< 30	< 25	4,794	4,879
4421	Furniture Stores	< 19	< 10	16,033	16,611
44813	Children's and Infant's Clothing Stores	< 30	< 25	2,057	2,074
44814	Family Clothing Stores	< 25.5	< 25	6,588	6,684
44815	Clothing Accessories Stores	< 14	< 10	2,757	2,774
44819	Other Clothing Stores	< 19	< 10	6,331	6,393
4482103	Children's & Juveniles' Shoe Stores	< 25.5	< 25	227	230
4482104	Family Shoe Stores	< 25.5	< 25	2,905	2,941
45111	Sporting goods stores	< 14	< 10	14,388	14,545
45112	Hobby, toy, & game stores	< 25.5	< 25	4,612	4,629
452	General Merchandise Stores	< 30	< 25	6,873	6,971
45322	Gift, Novelty, and Souvenir Store	< 30	< 25	19,297	19,339
454111	Electronic Shopping	< 30	< 25	11,374	11,646
454113	Mail Order Houses	< 35.5	< 25	5,281	5,645
4542	Vending machine operators	< 10	< 10	3,796	3,887
	Total			107.313	124,700

Source: U.S. Census Bureau, 2007 Economic Census, Release date 11/02/2010.

In addition to the retailers tabulated in Table 4, the U.S. Census Bureau estimated that there were 324,918 nonemployer businesses classified in NAICS categories that could include retailers of children's products. Nonemployer businesses are generally very small sole proprietorships. The average receipts for the nonemployer business retailers were about $40,000.[5] An unknown number of nonemployer retailers could import children's products.

F. Compliance, Reporting, and Recordkeeping Requirements of Rule

The final rule establishes some requirements for the certification of children's products. It also establishes protocols and standards for ensuring that children's products are subject to testing periodically, when there has been a material change in the product's design or manufacturing process, including the sourcing of component parts, and for safeguarding against the exercise of undue influence on a third party conformity assessment body by a children's product manufacturer or private labeler. The requirements are discussed in more detail below, and the impact that these could have on manufacturers is discussed in a later section of this preamble.

The final rule will impact virtually all manufacturers and importers of children's products because nearly all children's products are subject to some children's product safety rules. For example, the restrictions on lead content cover almost all children's products. Even products that contain some of the materials that have been excluded from the restrictions (see 16 CFR 1500.88) or that have been determined inherently not to contain lead in excess of the legal requirement (see 16 CFR 1500.91) might have to be tested for compliance with other rules. For example, although the fabric in wearing apparel might be excluded from the requirement to test for lead content, it may have to be tested for compliance with flammability requirements. Any other non-excluded objects on the apparel, such as buttons, snaps, zippers, or appliqués will also need to be tested for lead content.

In meeting the requirements of the final rule, manufacturers and importers can use component part testing, as provided by 16 CFR part 1109. This means, for example, that manufacturers could submit samples of paint that they are using on their products to a third party testing laboratory to be tested for lead and heavy metal content. This could reduce the amount of testing required because the results from the component part tests could be relied upon for demonstrating the compliance of all products on which that paint was used, rather than retesting the paint multiple times because it was used on multiple products. The final rule also allows manufacturers and importers to rely upon testing of component parts that was procured by their suppliers, provided that the testing meets all of the requirements in 16 CFR part 1109. The requirements include that the testing be performed by a third party conformity assessment body whose accreditation has been accepted by the CPSC. To rely upon component part testing—whether conducted by the children's product manufacturer or by a supplier of the component part—there must be sufficient documentation so that the component part can be traced back to the party who procured the third party test results demonstrating that the component part complies with the applicable safety rules. Provisions in 16 CFR part 1109 also allow an importer to rely upon testing procured by, or a certificate issued by, a supplier of a finished good in issuing their own certificate for a product. Therefore, if a foreign manufacturer has tested and certified a children's product in accordance with the requirements of 16 CFR part 1109, an importer may rely upon that testing or certification in issuing their own certificate for the product.

G. Partial Exemption for Small Batch Manufacturers

H.R. 2715, which was enacted on August 12, 2011, provides some relief for small batch manufacturers from the third party testing requirements contained in the final rule. H.R. 2715 requires that we consider alternative requirements for small batch manufacturers. Until we determine what alternative requirements are suitable for

[5] U.S. Department of Commerce, Bureau of the Census, ''Revised 2008 Nonemployer Statistics Table.'' Available at: *http://www.census.gov/econ/nonemployer/Revised%202008%20Data%20With%202009%20Methodology%20Applied.xls* (last accessed 16 August 2011).

small batch manufacturers, small batch manufacturers are not required to obtain third party testing results to confirm that their children's products conform to several children's product safety rules. However, small batch manufacturers are still subject to the third party testing requirements of the final rule with respect to the lead content of paint; full-size and non full-size cribs; pacifiers; small parts; children's metal jewelry; and baby bouncers, walkers, and jumpers.

H.R. 2715 defines a ''small batch manufacturer'' as a manufacturer who had no more than $1 million in total gross revenue from sales of all consumer products in the previous calendar year (which will be adjusted annually by the percentage increase in the Consumer Price Index for all urban consumers).

We will implement the small batch manufacturer provision of H.R. 2715 in a separate proceeding.

H. Certification Tests

To certify that a children's product complies with all applicable children's product safety rules, the final rule requires that manufacturers submit samples of the product to a third party conformity assessment body whose accreditation has been accepted by the CPSC. The final rule requires that the number of samples submitted must be sufficient to provide a high degree of assurance that the tests conducted for certification purposes accurately demonstrate the ability of the children's product to meet all applicable children's product safety rules. Fewer samples are needed if the manufacturing process consistently results in products that are uniform in composition and quality. More samples will be needed if there is more variability in the finished products. If any product fails certification testing, the manufacturer must investigate and address the cause of the failure, even if other samples passed the certification tests.

The cost of the third party testing is discussed in more detail later in part IV.N. of the preamble. Manufacturers also may incur costs for any consultants to provide advice for determining the number of samples that should be submitted for testing and to ensure that it was in compliance with the requirements. There also will be some administrative and recordkeeping costs associated with this requirement.

I. Periodic Third Party Testing

The final rule requires manufacturers and importers of children's products to periodically submit samples of their products to third party conformity assessment bodies whose accreditation has been accepted by the CPSC for testing to ensure their products continue to comply with all applicable children's product safety rules. Manufacturers need to conduct periodic third party testing frequently enough to ensure, with a high degree of assurance, that the product continues to comply with all applicable children's product safety rules, but in no case can the interval between periodic tests exceed the maximum periodic testing interval applicable to the manufacturer.

Depending upon other testing procedures that a manufacturer may opt to use, one of three possible maximum periodic testing intervals will apply to a children's product manufacturer. The first option applies to manufacturers who do not conduct other production testing of a children's product. Manufacturers who do not undertake other production testing must conduct periodic third party testing of the product at least once a year. The final rule requires manufacturers to develop a periodic test plan that will ensure that the children's products manufactured after the certification, or since the previous periodic testing was conducted, continue to comply with all applicable children's product safety rules. The periodic test plan must include the tests to be conducted, the intervals at which the tests will be conducted, and the number of samples to be tested. Although the manufacturer has some discretion in determining the interval between periodic tests, the interval must be short enough to ensure that if the samples selected for periodic third party testing pass the tests, then there is a high degree of assurance that the untested products manufactured during the interval comply with all applicable children's product safety rules; and the interval must be no longer than one year.

The second option applies to manufacturers who implement a production testing plan (which can use first or third party testing). If a manufacturer has implemented a production testing plan that meets the requirement of § 1107.21(c) of the final rule, the manufacturer must conduct third party periodic testing at least once every two years. The production testing plan must describe the production management techniques and tests that must be performed to provide a high degree of assurance that products manufactured after certification continue to meet all applicable children's product safety rules. The production testing plan must also include additional information, such as the intervals at which tests must be conducted or measurements will be made. The test methods used in the production testing plan need not be the same test methods used for certification, but they must be effective in determining compliance with the applicable children's product safety rules.

Manufacturers or importers who choose this second option, will need to ensure that their quality assurance or testing program meets the requirements of the final rule for production testing and that their testing program provides a high degree of assurance that all products manufactured or imported continue to comply with all applicable children's product safety rules. In addition, at least once every two years, this option requires the manufacturer or importer to submit samples to a CPSC-accepted third party conformity assessment body to be tested for conformity with all applicable children's product safety rules. The final rule does not specify how many samples must be submitted to the third party conformity assessment body, nor does it set forth what constitutes an appropriate periodic testing interval (other than stating it must not be greater than two years). However, the expectation is that this option will require less testing by third party conformity assessment bodies because, under this option, the (first party or third party) production testing provides the manufacturer or importer with a high degree of assurance that the products continue to comply with the applicable children's product safety rules and can provide manufacturers with information that can be used to determine the interval and number of samples required for the periodic third party testing.

The third option applies to manufacturers who conduct testing to ensure continuing compliance with the applicable children's product safety rules using a testing laboratory accredited to ISO/IEC 17025:2005, *General requirements for the competence of testing and calibration laboratories,* but whose accreditation has not been accepted by the CPSC. In most cases, these will be in-house testing laboratories. If a manufacturer conducts testing using such a testing laboratory, the manufacturer must conduct periodic third party testing at least once every three years. Any testing laboratory used under this option must be accredited by an accreditation body that is accredited to ISO/IEC 17011:2004, *Conformity assessment—General requirements for accrediting conformity assessment bodies.* The tests used under this option must be the same tests used for certification to the

applicable children's product safety rules. The testing must be conducted frequently enough to provide a high degree of assurance that the product continues to comply with all applicable children's product safety rules.

The final rule does not specify how many samples a manufacturer using the third option must submit to the third party conformity assessment body, nor does it set forth what constitutes an appropriate periodic testing interval (other than stating it must not be greater than three years). However, as with the second option, the intent behind including this option in the final rule is to reduce the cost that the rule imposes on children's product manufacturers, by reducing the amount of testing that they must obtain from third party conformity assessment bodies. The testing that the manufacturer performs in an ISO/IEC 17025:2005-accredited testing laboratory provides the high degree of assurance that the products comply with the applicable children's product safety rules, and it also can provide manufacturers with information that can be used to determine interval and number of samples required for the periodic third party testing.

Like the second option, the intent of the third option is to reduce the final rule's cost to manufacturers, by reducing the amount of testing that they must conduct using third party conformity assessment bodies. However, the manufacturers that are most likely to benefit from this third option are manufacturers who have their own in-house ISO/IEC 17025:2005-accredited testing laboratories. These are likely to be larger manufacturers, so this option is not expected to provide much relief to smaller manufacturers. To the extent that the smaller manufacturers compete with the larger manufacturers, this option may adversely affect the competitiveness of the smaller manufacturers relative to larger manufacturers because any cost reduction will disproportionately benefit larger manufacturers.

Under all periodic testing options, a manufacturer may need statistical or other knowledge in order to develop their testing plans, including determining the appropriate testing intervals and number of samples required to provide the manufacturer with a high degree of assurance that its children's products are in compliance with all applicable children's product safety rules. If these services are not available in-house, the firm may have to hire outside consultants. Additionally, firms will incur administrative and recordkeeping costs associated with the periodic testing requirement, in addition to the cost of the third party testing, which is described in more detail later in this analysis.

J. Third Party Testing Due to Material Changes

If a children's product undergoes a material change in product design or manufacturing processes, including the sourcing of component parts that could affect the product's ability to comply with the applicable children's product safety rules, the final rule requires the manufacturer to submit samples of the materially changed product to a third party conformity assessment body for testing. The number of samples must be sufficient to provide a high degree of assurance that the materially changed product complies with all applicable children's product safety rules. The testing can be limited to the portion or component part of the finished product that was changed and for compliance with those children's product safety rules for which compliance might have been affected.

The primary cost of this requirement will be the cost of the third party testing. There also will be some administrative and recordkeeping costs associated with this requirement. The professional skills required by the manufacturer are the same skills required for the initial certification and periodic tests.

K. Protection Against Undue Influence

The final rule requires that each manufacturer of children's products establish procedures to safeguard against the exercise of undue influence by a manufacturer on a third party conformity assessment body. At a minimum, these procedures must include written policy statements from company officials that the exercise of undue influence is not acceptable and directing that every appropriate staff member receives training on avoiding undue influence and signs a statement attesting to their participation in the training. The procedures also must include a requirement to retrain the appropriate staff if there are substantive changes in the requirements for safeguarding against the exercise of undue influence. The training procedures must include a requirement to notify us immediately of any attempt by the manufacturer to hide or exert undue influence over test results, and a requirement to inform employees that allegations of undue influence may be reported confidentially to us and to describe how such a report can be made.

Firms will incur some costs in establishing the safeguards against undue influence. Although several commenters stated that establishing these safeguards would be burdensome, none provided estimates of what the cost would be. The final rule gives firms great flexibility in meeting these requirements. For example, the final rule does not prescribe the form of the training, and firms may include this training along with other types of employee training.

L. Recordkeeping

The final rule requires manufacturers of children's products to keep the following records:

- A copy of the Children's Product Certificate for each product. The children's product covered by the certificate must be clearly identifiable and distinguishable from other products;
- Records of each certification test. The manufacturer must have separate certification test records for each manufacturing site;
- Records of one of the following for periodic tests of a children's product:
  - Periodic test plan and periodic test results;
  - Production testing plan, production test results, and periodic test results; or
  - Testing results of tests conducted by a testing laboratory accredited to ISO/IEC 17025:2005 and periodic test results.
- Records of descriptions of all material changes in product design, manufacturing processes, and sourcing of component parts, the certification tests, the test results, and the actual values of the tests, if any; and
- Records of the undue influence procedures, including training materials and training records of all employees trained on these procedures.

These records must be maintained for five years. The records must be made available for inspection by the CPSC, upon request. The records may be maintained in languages other than English, if the records can be provided immediately to us and translated accurately into English within 48 hours of a request by the CPSC or a longer period, as negotiated with CPSC staff.

We have estimated that, on average, it will take three to five hours for recordkeeping per product. However, the time needed for recordkeeping for any particular product could be substantially higher or lower. For example, recordkeeping for products that are subject to multiple standards, or products that require a substantial amount of testing, could need substantially more hours. For other products, such as those subject to only one standard, and for which little

testing is required, the number of hours needed for recordkeeping might be less.

M. Consumer Product Labeling Program

The final rule establishes a program by which any manufacturer or private labeler of a consumer product may label product as complying with the applicable certification requirements for the product. If the manufacturer has certified that a consumer product complies with all applicable consumer product safety rules, the manufacturer or private labeler may affix a label to the product which states that the product: ''*Meets CPSC Safety Requirements.*'' The label must be visible and legible. This program is voluntary in that manufacturers and private labelers are not required to affix this label to their products. However, opting not to affix the label to the product would not relieve the firm of its responsibility to ensure that the products comply with the applicable safety rules and with all other provisions of the rule. This provision is not expected to have a significant impact on firms, however, because the program is voluntary, and the costs of adding or modifying a label on a product are expected to be low.

N. Cost of Third Party Testing and Potential Impact of the Rule

The costs of the third party testing requirements are expected to be significant for some manufacturers and are expected to have a disproportionate impact on small and low-volume manufacturers. This section discusses the cost of third party testing and the potential impact of the third party testing and other requirements of the final rule on manufacturers.

1. Cost of Third Party Testing

The cost of third party testing is influenced by many factors, including the amount and skill of the labor required to conduct the tests, the cost of the equipment involved, the cost of transporting the product samples to the test facility, and the geographic area where the tests are conducted. Some tests require a substantial amount of time to conduct the tests, including the preparation of the samples. It might take a couple of days, for example, to test a bicycle for compliance with the bicycle standard (16 CFR part 1512). Similarly, a chemist testing the lead content of a product might be able to test only a few metal component parts per day, due to the amount of time required to prepare the samples and clean and calibrate the equipment between tests.

It should be noted that the price that a given manufacturer pays for testing is often the result of negotiations between the testing laboratory and the manufacturer. Manufacturers who do a large volume of business with a testing laboratory frequently can obtain discounts on the testing laboratory's normal charges; but manufacturers who do only a small volume of business may not be able to negotiate a discount on the testing.

Information on the cost of third party testing to determine compliance with some children's product safety rules is provided below. The information was collected from a number of sources, including published price lists from some testing laboratories, conversations with representatives of testing laboratories, actual invoices provided by consumer product manufacturers, and public comments we received. The data are not based upon a statistically valid survey of testing laboratories. Additionally, the costs include only the costs that would be charged by the testing laboratory. Not included in the information are the costs of the samples consumed in destructive tests, the cost of shipping the samples to the testing laboratories, and any related administrative or recordkeeping activity. According to one commenter, these costs could add 15 to 50 percent to the third party testing costs.

2. Lead Content and Lead-in-Paint

The cost per component part for testing lead content and lead-in-paint using inductive coupled plasma (ICP) analysis will range from a low of about $20 per test, to more than $100 per test. The lowest per-unit cost represents a substantially discounted price charged to a particular customer by a testing laboratory in China, and therefore, the price might not be typical. Within the United States, typical prices range from around $50, to more than $100 per test.

The cost of testing for lead content using X–Ray fluorescence (XRF) technology is significantly less expensive. Some firms have offered to screen products for lead content for as little as $2 per test. These offers are generally directed to stores or businesses that want to check their inventory for conformity with the retroactive lead content requirements contained in the CPSIA. Some testing laboratories will charge for XRF testing at an hourly rate, which can cost around $100. Ten to 30 tests can be conducted in an hour.

We have approved XRF test methods for determining the lead content of homogenous polymer products. Assuming that 10 to 30 tests can be conducted in an hour at a rate of $100 per hour, the cost of XRF testing for homogenous polymer products would be between $3 and $10 per test.

For testing the lead content of paint, we have approved the use of a specific XRF test method described in ASTM F2853 that uses energy dispersive XRF using multiple monochromatic beams. Generally, fewer tests can be conducted in an hour using this test method. If 6 to 12 tests can be conducted in an hour at a rate of $100 an hour, then the cost of testing a paint for lead content using the approved XRF technique would be about $8 to $17.

Other than for homogenous polymer components and the lead content of paint, we have not approved the use of XRF techniques for testing any other materials. For other materials, such as metal components, manufacturers will need to use ICP analyses techniques to test for lead content.

3. Phthalates

The cost of testing for phthalate content will range from around $100 (a discounted price by a testing laboratory in China) to about $350. These are the costs per component part, and they include testing for all six of the individual phthalates whose content is restricted.

4. Bicycle Standard (16 CFR part 1503)

According to one testing laboratory, it takes one to two days to test a bicycle. The estimated price for testing one bicycle may range from around $700, if the testing is performed in China, to around $1,100, if the testing is performed in the United States. A manufacturer who needs several models of bicycles tested at the same time, might be able to obtain discounts on these prices. This does not include testing for lead or phthalates in nonmetal component parts. H.R. 2715, however, exempted the metal components of bicycles from the third party testing requirements for lead content.

5. Bicycle Helmets

One testing laboratory quoted a price of $600 for testing one model of a bicycle helmet to the CPSC bicycle helmet standard. A price list from another testing laboratory stated that conducting the certification testing to the Snell Foundation's bicycle helmet standard, which is similar to the CPSC standard, is $830.

6. Full-Size Cribs

As with bicycles, testing cribs requires a substantial amount of labor time to assemble the crib, take the appropriate measurements, and perform the required tests. The cost of testing a

full-size crib to the pre-2010 standard was about $750 to $1,200 for testing performed in the United States. The cost of testing a full-size crib to the current standard may be somewhat higher. The cost can vary, depending on the features of the individual cribs that require testing and among the various testing laboratories. Some manufacturers might receive discounted prices. This does not include testing the crib for lead and phthalates, which, to the extent necessary, would add to the cost of testing a crib to all applicable safety rules.

7. Toys

The children's product safety rules applicable to toys, including the ASTM F963 standard made mandatory by the CPSIA, include a wide variety tests, including tests for soluble heavy metals in surface coatings and for various physical and mechanical criteria. Based on the itemized prices on several invoices provided to us by testing laboratories or otherwise made public, the cost of the physical and mechanical tests range from about $50 to $245. The cost of the chemical test for the presence of heavy metals ranges from about $60 to $190 per surface coating. Again, these costs do not include testing for lead and phthalates, which add to the total cost.

The flammability requirements of ASTM F963 were not made mandatory by the CPSIA, but we were directed to examine the flammability requirements and consider promulgating rules addressing the issue. If some flammability tests are eventually required, the cost per test could be in the range of $20 to $50, based on some observed costs for the ASTM F963 flammability tests.

8. Cost of Third Party Testing by Product

The cost to obtain the required third party testing for a product depends on the types and number of tests that must be performed, as well as the number of samples that are required to provide a high degree of assurance that the tests conducted for certification purposes accurately demonstrate the ability of the product to meet the applicable children's product safety rules or ensure continuing compliance with the applicable children's product safety rules. The cost of the testing also will be affected by the extent to which the manufacturer can use component part testing. Because of the wide variety of manufacturers and products that would be affected by the rule, we cannot provide comprehensive estimates of the impact of the rule on all manufacturers or products. The discussion below is intended to provide only some perspective on the potential impact.

9. Number of Samples Required

The final rule does not specify the exact number of samples that must be submitted to third party conformity assessment bodies, nor does it specify the testing interval, other than to provide maximum intervals. Instead, the final rule requires manufacturers to determine the number samples and the necessary testing interval based on factors such as: The variability of the product, manufacturing processes, and information obtained from other testing. However, it is likely that between certification testing, testing after a material change, and periodic testing, many manufacturers will need to submit more than one sample of a given product to third party conformity assessment bodies during a given year. Because some children's product safety rules require more than one unit of the product to complete all of the required tests, one sample may consist of multiple units of the product.

For purposes of certifying a children's product (including testing after a material change), the final rule requires manufacturers to submit enough samples to a third party conformity assessment body to provide a high degree of assurance that tests conducted for certification purposes accurately demonstrate the ability of the product to comply with all applicable children's product safety rules. In determining how many samples to submit, a manufacturer is to consider the variability in the product and manufacturing processes. If the manufacturing process for a children's product consistently creates finished products that are uniform in composition and quality, such as with die casting, a manufacturer may be able to submit a relatively small number of samples to the third party conformity assessment body. If the manufacturing process for a children's product results in variability in the composition or quality of children's products, such as what might be expected with hand assembly, a manufacturer may need to submit a greater number of samples.

For periodic testing, the final rule requires that the number of samples selected must be sufficient to assess—with a high degree of assurance—the continuing compliance of the children's product with all applicable safety rules. Additionally, the testing interval for periodic testing must be short enough to ensure that, if the samples selected for periodic testing pass the test, there is a high degree of assurance that the other untested children's products manufactured during the interval comply with the applicable children's product safety rules. Manufacturers who have implemented a production testing plan or test in an ISO/IEC 17025:2005-accredited testing laboratory may consider the information obtained from the testing in determining the testing interval and the number of samples that are needed.

10. Hypothetical Toy Testing Example

To provide some information on what the magnitude of the third party testing costs may be for some manufacturers of children's products, this section discusses the potential cost of obtaining third party testing for a hypothetical toy. This example is hypothetical and is intended to illustrate some potential cost implications of the rule. The example is not intended be representative of every product or manufacturer. The costs per test that are assumed in the examples are based on the cost of tests discussed above; but the actual costs can vary significantly between conformity assessment bodies. The testing costs for any particular manufacturer also depend upon factors such as the complexity of the products, the variation in the materials used, manufacturing processes used, opportunities to use component part testing, and so on. We used a similar example in the initial regulatory flexibility analysis. The discussion has been changed to reflect the fact that energy dispersive XRF analysis can be used to test for lead in paint in addition to XRF testing in homogenous polymer products. We also have modified the discussion to deemphasize references to statistical measurements because, although statistical measurements might be useful, the number of samples that must be tested need not be one that provides a particular confidence level, such as 95 percent confidence level that all products in a lot are compliant.

Toys must meet requirements concerning lead and phthalate content, as well as several physical and mechanical requirements, including the requirements of ASTM F963, which was made a mandatory standard by the CPSIA. In this example, we assume that the testing costs are at the low to middle part of the ranges discussed above, and we also assume that the hypothetical toy contains one metal component part that must be tested for lead content using ICP analysis (at $50) and two plastic component parts for which XRF analysis can be used for determining the lead content (two tests at $6 each). The plastic component parts also must be tested for phthalate content (two tests at $225 each). Additionally, we assume

that the toy contains four different paints that must be tested for both lead content ($13/test, assuming energy dispersive XRF analysis) and soluble heavy metals ($125/test). Finally, we assume that the toy is subject to some mechanical requirements that include use and abuse testing ($50 per test). Thus, the cost of testing the hypothetical toy for compliance to each applicable rule one time would be $1,114: $1,064 is associated with the chemical (lead, heavy metal, and phthalate) testing, and $50 is associated with the mechanical testing (including use and abuse testing).

Having one sample tested by a third party conformity assessment body will probably not be sufficient to meet the requirements of the final rule. Therefore, the cost of the third party testing for the manufacturer of this hypothetical toy would be greater than $1,114. For example, if four samples are needed, the cost would be $4,456. The cost would be higher if some tests had to be conducted more than four times to provide the required high degree of assurance. The manufacturer might be able to reduce the third party testing costs if it is able to use component part testing for the chemical content tests. For example, if the plastic resins, metal component part, and paints are used on other products, the manufacturer could test the component parts independently of the individual finished products and spread the cost of the chemical content tests over more than one finished product. If the average cost of the chemical content tests could be reduced by a factor of four through component part testing, then the cost of testing the toy in this example for conformity with all applicable safety rules one time would be $316 (cost of chemical testing of $1,064/4 and cost of the mechanical and use and abuse testing of $50). However, the cost of third party testing for the manufacturer would likely be higher because testing one sample will seldom be sufficient to provide the required high degree of assurance. For example, if each component part required four tests, and the mechanical testing required must be repeated four times to provide the required high degree of assurance, then the cost of the third party testing for the hypothetical toy would be $1,264.

11. Impact of Final Rule on Firms

Whether the third party testing costs would have a substantial adverse impact on a firm depends upon the individual circumstances of the firm. One factor is the magnitude of the impact in relation to the revenue of the firm. A typical profit rate is about five percent of revenue. In other words, for every one dollar of revenue, only five cents might remain after paying all expenses. Therefore, a new cost that amounted to one percent of revenue could, all other things equal, reduce the profit by 20 percent and would be considered to be a significant impact by most firms. This would be consistent with what some other agencies consider to be significant. The Occupational Safety and Health Administration (OSHA), for example, considers an impact to be significant if the costs exceed 1 percent of revenue or 5 percent of profit.[6]

Some insight on the disparate impact that the final rule could have on small businesses can be provided by examining how the rule might impact three hypothetical toy manufacturers of different sizes. The costs associated with third party testing that the hypothetical manufacturers would face will be described, and the potential impact on the hypothetical manufacturers will be discussed. This discussion is summarized in Table 5.

TABLE 5—IMPACT OF RULE ON THREE HYPOTHETICAL FIRMS

		Hypothetical firm A—large manufacturer	Hypothetical firm B—small manufacturer	Hypothetical firm C—small batch manufacturer
1	Number of Different Products	1,000	100	10
2	Annual Production Volume per Product	100,000	10,000	1,000
3	Total Annual Production Volume (Row 1 × Row 2)	100,000,000	1,000,000	10,000
4	Revenue per unit sold	$4	$4	$4
5	Total Annual Revenue (Row 4 × Row 3)	$400,000,000	$4,000,000	$40,000
6	Cost of testing each product for compliance with all rule once	$1,114	$1,114	$102
7	Cost of Testing Each Product 4 Times (Row 6 × 4)	$4,456	$4,456	$408
8	Total Third Party Testing Cost (Row 7 × Row 1)	$4,456,000	$445,600	$4,080
9	Cost of Samples (4 samples of 2 units of each product)	$32,000	$3,200	$320
10	Recordkeeping (5 hours/product at $36.43/hour)	$182,150	$18,215	$1,822
11	Total Testing Cost for One Year (Sum of Rows 8 through 10)	$4,670,150	$467,015	$6,222
12	Testing Cost as Percent of Revenue (Row 11/Row 5)	1.2%	11.7%	15.6%

12. Three Hypothetical Manufacturers

The first hypothetical manufacturer, Firm A, is a large toy manufacturer that offers 1,000 different toys with an annual production or sales volume of 100,000 units each. Its total annual production volume is then 100 million units (1,000 products × 100,000 units each), which is shown in Row 3 of Table 5. The second hypothetical manufacturer, Firm B, is a smaller toy manufacturer offers 100 different products with an annual production or sales volume of 10,000 units each. Finally, the third hypothetical toy manufacturer is a small batch manufacturer that offers only 10 products that with an annual production or sales volume of about 1,000 units each.

13. Revenue

The average price of a toy is $7 to $8.[7] However, because the retailer and any wholesalers or distributors would also get a share of the revenue, the manufacturer would be expected to get a fraction of the retail price. Therefore, the revenue received by a manufacturer of a toy that retails for $7 to $8 might be about $4 per unit. For some toys, the revenue per unit received by the

[6] OSHA, Assigned Protection Factors, Final Rule, **Federal Register** (71 FR 50121–50192), 24 August 2006.

[7] Retail sales of toys in the United States are about $22 billion per year (Toy Industry Association press release dated 27 June 2011). A representative of the Toy Industry Association estimated that there are about 3 billion individual toys sold annually in the United States. This suggests an average retail price of $7 to $8 ($22 billion x 3 billion).

manufacturer might be lower, and for others it might be higher. To begin the example, we assume that the average revenue is $4 per unit. The Total Annual Revenue of the Firm (Row 5) is found by multiplying the Revenue per unit (Row 4) by the Total Annual Production Volume (Row 3).

14. Third Party Testing Costs

The final rule requires manufacturers to have children's products tested by a third party conformity assessment body before the products are distributed, periodically after that, and when there has been a material change in the product. In these hypothetical examples, we assume that the manufacturers must submit samples of their products to third party conformity assessment bodies annually, whether for initial certification of products, periodic testing, or recertification after a material change.

The cost of the third party testing for a toy is a function of the characteristics of the toy, such as the number and type of component parts, the materials used in its construction, and the specific toy standards and tests that apply to it. The cost of third party tests would not be expected to be affected by the size of the manufacturer (although some conformity assessment bodies might offer discounts to firms for whom they conduct a lot of testing). In the hypothetical example, we assume that the conformity assessment bodies will charge the manufacturer $1,114 to test the toy for conformance with each applicable children's product safety rule (Row 6), which is the same cost used in the earlier discussion of the cost to test a hypothetical toy. In the case of Firm C, a small batch manufacturer, the third party testing costs may be lower. Unless we establish alternate requirements for small batch manufacturers, H.R. 2715 may effectively exempt the qualifying products of small batch manufacturers from many third party testing requirements, including the requirements for phthalates, heavy metal content of paints, and the lead content of substrates (but not from other requirements, such as lead-in-paint or children's metal jewelry). In the case of the toy example, Firm C will need to have the paints used tested for lead content and the toys themselves tested for small parts. Using the costs assumed in the hypothetical toy example, the cost to Firm C for testing each product once to the two applicable requirements would be $102 (4 paints at $13 each and for small parts at $50).

This hypothetical example assumes that it is necessary to conduct each applicable test four times to provide the manufacturer with the necessary high degree of assurance, whether for the initial certification of the product, or to meet the periodic testing requirement. Therefore, the total cost that the manufacturer will be charged by a third party conformity assessment body is $4,456 per product for Firms A and B, and $408 per product for Firm C (Row 7). Because each manufacturer produces more than one product, total third party testing costs (Row 8) is equal to the cost per product times the number of products produced multiplied by the number of products produced (Row 7 × Row 1).

In this hypothetical example, we further assume that, to conduct each test at least once, the manufacturer must submit two units of the toy to the conformity assessment body. In other words, a sample consists of two units of the product. The cost of the samples consumed by testing is the revenue that the manufacturer forgoes because the units were used for testing and not sold. Therefore, the cost of the samples consumed in the testing (given in Row 9) is calculated as the product of the 8 units required to conduct the tests, the revenue per product, and the number of different products (*i.e.,* 8 × Row 4 × Row 1).

Although component part testing has the potential to reduce third party testing costs, component part testing is not considered initially in these examples. One reason we did not consider it is that it has not been determined how extensively component part testing will be used in practice. Component part testing generally might not be an option for component parts that are not used in multiple products, or for which only a small portion of the production is used in children's products. It also might not be applicable to some importers or manufacturers who obtain products from suppliers that do not have the capability for component part testing, or for which the manufacturer or importer, exercising due care, has not yet developed the degree of confidence in the supplier to rely upon test reports and records provided by the supplier.

15. Recordkeeping

Firms will incur costs for preparing and maintaining the records and documentation required by the final rule. In this example, we assume that the recordkeeping will require approximately five hours per toy. Assuming that the total compensation, per hour, for the employees involved in the recordkeeping is $36.43,[8] the recordkeeping cost would be about $182 per product. The total recordkeeping burden (given in Row 10) is the cost per product ($182), multiplied by the number of products (Row 1). This estimate of the recordkeeping burden assumes that the manufacturer will not be required to acquire any additional equipment or software to comply with the recordkeeping requirements of the final rule.

16. Total Testing Cost

The total cost of testing for one year is the sum of the cost of the third party testing, the cost of the samples consumed in the testing, the cost of the recordkeeping, and the cost of developing the sampling plans. This is given in Row 11 of Table 5.

Manufacturers may incur other costs that were not considered above. For example, the proposed rule contained provisions requiring manufacturers to select the samples for periodic testing, using techniques that would result in a statistical simple random sample. There will likely be costs associated with such requirements. These potential costs include: The cost of hiring consultants to design a sampling plan for selecting a sample that meets established requirements and the cost of the added time and effort that might be required in selecting such a sample. However, H.R. 2715 revised section 14(i)(2)(B)(ii) of the CPSIA by replacing the phrase: ''the testing of random samples to ensure continued compliance'' with the phrase: ''the testing of representative samples to ensure continued compliance.'' Because of this change in the statute, we are not finalizing the section of the proposed rule pertaining to random samples. These costs will be addressed in more detail when we consider how to implement section 14(i)(2)(B)(ii) of the CPSA, as amended by the CPSIA and H.R. 2715.

17. Impact on Hypothetical Firms

The impact of the testing costs on each of the hypothetical firms is summarized in Row 12 of Table 5. For the large manufacturer, Firm A, the testing costs could amount to 1.2 percent of the firm's revenue (total testing cost, divided by the total revenue) if the firm received about $4 per product. This could be considered a

[8] This is based on the assumption that about half the labor is management or professional and the other half is sales or office labor. For all workers in private industry, the total hourly compensation for management, professional, and related occupations is $50.08 and $22.78 office and administrative occupations (Bureau of Labor Statistics, Employer Cost for Employee Compensations, March, 2011).

significant impact. (A typical profit is about 5 percent of total revenue. Thus, a 1.2 percent increase in costs could decrease profit for a typical firm by 24 percent.) If the average revenue that this firm received is somewhat higher, however, the impact probably would not be considered significant.

For Hypothetical Firm B, a smaller manufacturer, the testing costs would amount to about 11.8 percent of the firm's revenue, if the firm received an average of $4 for each unit produced. For the small batch manufacturer, Firm C, the testing costs would amount to about 15.6 percent of its revenue. In both cases (*i.e.,* Firms B and C), costs amounting to 11.8 percent and 15.6 percent, respectively, of revenue would be considered a significant impact. These hypothetical examples illustrate the disproportionate impact that the final rule may have on small businesses. As illustrated, the final rule could also have a significant impact on even a large manufacturer. The significance of the impact increases as the production or sales volume of the manufacturer decreases.

The example of Firm C can be used to demonstrate the relief that H.R. 2715 may be able to provide to small batch manufacturers. If Firm C is unable to benefit from the testing exemptions provided by H.R. 2715, then Firm C would have faced the same per-unit testing costs as the other firms in this example: $1,114 instead of $102. Under that scenario, the total testing cost for Firm C would have been more than $46,000, which would have exceeded its revenue of $40,000.

Some small manufacturers probably have average revenues per product that exceed $4. This might be the case especially if it is a specialty or niche market, in which only a few manufacturers participate, or if the product requires a substantial amount of skilled labor to create. Table 6 shows what the impact would be on Firm C, the hypothetical small batch manufacturer, if it received an average of $50 per unit for each unit it sold. Its total revenue would increase to $500,000 per year. The cost of the samples consumed in testing would increase to $4,000 (Row 9), which would increase the cost of testing to $9,902 (Row 11). The testing costs would amount to about 1.9 percent of the firm's revenue, which might be considered significant, but it is much lower than it would have been if its revenue per unit was lower. It should be noted that if the manufacturer receives $50 per unit sold of a product, the retail price is likely substantially higher (unless the manufacturer sells a substantial portion of the product directly to the final consumer).

TABLE 6—IMPACT ON HYPOTHETICAL FIRM C IF REVENUE PER UNIT IS $50

		Hypothetical firm C—very small manufacturer
1	Number of Different Products	10
2	Annual Production Volume per Product	1,000
3	Total Annual Production Volume (Row 1 × Row 2)	10,000
4	Revenue per unit sold	$50
5	Total Annual Revenue (Row 4 × Row 3)	$500,000
6	Cost of testing each product for compliance with all rule once	$102
7	Cost of Testing Each Product 4 Times (Row 6 × 4)	$408
8	Total Third Party Testing Cost (Row 7 × Row 1)	$4,080
9	Cost of Samples (4 samples of 2 units of each product)	$4,000
10	Recordkeeping (5 hours/product at $36.43/hour)	$1,822
11	Total Testing Cost for One Year (Sum of Rows 8 through 11)	$9,902
12	Testing Cost as Percent of Revenue (Row 12/Row 5)	1.9%

There also will be other costs that could be associated with the rule for which no quantification was attempted in the above hypothetical examples. One cost that was not considered is the additional administrative costs that are likely associated with the final rule's requirements; these include the cost of tracking when each product or component part needs to be tested. It also includes the cost of monitoring the suppliers and component parts that are used, the production techniques used, and any changes in product design to determine when products need to be tested due to material changes. There also may be administrative costs in matching up test reports to finished goods and giving the approval to ship products that the manufacturer has certified.

Another cost that could impact manufacturers for which quantification was not attempted is the cost of receiving test reports that indicate inaccurately that the product did not comply with a children's product safety rule. When a manufacturer receives a test report that indicates inaccurately that a product does not meet a standard, the manufacturer could assume that the test was accurate and needlessly dispose of, or attempt to rework, the products covered by the test result; or, it might suspect that the test report was inaccurate and investigate the reason for the test failure. This could involve retesting samples of the product by other conformity assessment bodies and having the conformity assessment body that produced the inaccurate result attempt to determine if any error was made in testing the product. In any case, this could result in delays in shipping product and lost sales.

Component part testing may offer some manufacturers relief from some testing costs. Component part testing may allow the cost of the third party testing to be spread over more units of the component part, which ultimately lowers the cost of third party testing per unit of the finished product. For example, if the hypothetical firms in the above examples were able to reduce the cost of third party testing by a factor of four using component part testing, in several (but not all) of the scenarios examined, the impact on those small firms could be reduced to the point that it would no longer be considered significant. However, component part testing is not likely to be an option for all manufacturers, for all component parts, or for all tests. Moreover, although it can reduce the cost of the third party testing, it may not reduce other costs associated with the final rule, such as the cost of samples, the cost of the recordkeeping, and other administrative costs.

It should be noted that the examples above were for illustration purposes only. The number of times a product may have to be tested for certification purposes or for periodic testing purposes may be more or less than four times. The cost of testing some toys and other children's products could be higher or lower than the cost used in the above examples. The cost would be higher, for example, for products that had more component parts or for which the variability in the test results is greater, which could require more samples to be tested. The cost of testing could be lower for products that are subject to fewer safety rules or that contain fewer component parts. For some articles of apparel, for example, the only tests required might be for flammability and lead content on some component parts, for which component part testing might be possible. Although the examples suggest that some small businesses will be significantly adversely impacted by the final rule, some small businesses may have sufficient volume, sufficiently low testing costs, or sufficiently high revenue that the impact will not be significant.

18. Possible Market Reactions and Caveats

Manufacturers can be expected to react to a significant increase in their costs due to the final rule in several ways. Some manufacturers might attempt to redesign their products to reduce the number of tests required, by reducing the features or the number of component parts used in the products that require testing. Manufacturers and importers could also be expected to reduce the number of children's products that they offer or, in some cases, exit the market for children's products entirely. Some may go out of business altogether.

The requirements of the final rule could be a barrier that inhibits new firms from entering the children's product market, unless they expect to have relatively high-volume products. This could be an important factor for firms that expected to serve a niche market, such as firms with products intended for children with special needs. Although H.R. 2715 may provide significant relief to small batch manufacturers, the requirements could still be a barrier for some small batch manufacturers, home-based manufacturers, and craftspeople. The requirement for third party testing when there is a material change in a product's design or manufacturing process could cause some small or low-volume manufacturers to forgo or delay implementing some improvements to a product's design or manufacturing process in order to avoid the costs of third party testing.

Although component part testing has the potential to reduce the costs of testing, component part testing might not be an option for all products or manufacturers. Component part testing most likely is an option for component parts that are common to multiple products (*e.g.,* paints, bolts of a standard size). The potential for component part testing to reduce the cost of testing would be less for products that have component parts that are unique to the particular product. Component part testing is also not likely to offer significant cost savings for low-volume component parts or for component parts from which the component part manufacturer derives only a small percentage of revenue on regulated or children's products. Moreover, to use component part testing, the manufacturer must be able to trace each component part for which component part testing was used, to the party who procured the test. Maintaining this traceability will involve some administrative and recordkeeping costs, which will reduce the potential benefit of component part testing.

Manufacturers may be able to mitigate the adverse impacts if they are able to raise their prices to cover these costs. However, because few companies have perfectly inelastic demand curves, most firms will likely have to absorb some of the cost increases that result from the final rule.

O. Conclusion

The final rule will have a significant adverse impact on a substantial number of small businesses. The provisions of the rule that are expected to have the most significant impact are provisions related to requirements for the third party testing of children's products and the associated administrative and recordkeeping requirements. The impact is expected to be disproportionate on small and low-volume manufacturers. This is because testing costs are relatively fixed. Therefore, the impact of testing costs, per unit, will be greater on low-volume producers than on high-volume producers.

H.R. 2715 may provide significant relief from the third party testing costs to certain manufacturers who meet the definition of a ''small batch manufacturer.'' However, although the impact will be substantially reduced, some small batch manufacturers may still be significantly impacted by the requirements in the final rule.

The other provisions of the rule related to protections against undue influence over a conformity assessment body and the voluntary consumer product labeling program are likely to have less significant impacts on small businesses.

P. Federal Rules Which May Duplicate, Overlap, or Conflict With the Final Rule

The final rule implements certain provisions of the CPSIA pertaining to the certification and continued testing of children's products for compliance with children's product safety rules. Certain children's product safety rules contain some requirements for certification tests and reasonable test programs. However, any duplication, overlap, or conflict should be minimal. For example, the third party certification tests required by the final rule would satisfy the requirements for certification tests in any existing children's product safety rule. Any production testing required by an existing children's product safety rule can be used to increase the maximum period between periodic tests according to the provisions of the final rule.

Q. Alternatives for Reducing the Adverse Impact on Small Businesses

We recognize that the final rule will have a disproportionate impact on small and low-volume manufacturers. To a large degree, the impact is not avoidable because the CPSA, as amended by the CPSIA, requires that the certification of children's products be based on test results from accredited third party conformity assessment bodies. However, we have incorporated into the final rule, some provisions that are intended to lessen the impact on small businesses. These include: Provisions allowing for longer maximum intervals between periodic testing if the manufacturer conducts certain other testing; allowing manufacturers to use component part testing; and permitting manufacturers and importers to rely upon the certifications issued by other parties as a basis for issuing their own finished product certificates, as provided by 16 CFR part 1109.

We also identified and considered several alternatives that could have reduced the impact on small businesses, but which for reasons discussed below, were not adopted in the final rule. These include: Providing additional testing relief for low-volume products; reducing the number of samples that must be tested by third party conformity assessment bodies; basing the frequency of third party testing on the risk of injury from the product; and allowing

the use of XRF testing for lead content for more materials.

R. Provisions Incorporated in the Final Rule

1. Longer Maximum Periodic Testing Interval if the Manufacturer Conducts Other Testing

The final rule provides for a longer maximum periodic testing interval if the manufacturer implements a production testing plan, as provided for in § 1107.21(c) of the final rule. The manufacturer may consider the information obtained from the production testing in determining the appropriate interval and number of samples required for third party periodic testing, provided that third party periodic testing occurs at least once every two years. If the manufacturer conducts testing in an ISO/IEC 17025:2005-accredited testing laboratory in accordance with § 1107.21(d) of the final rule, the maximum periodic testing interval is three years. However, this provision is expected to be of benefit primarily to larger manufacturers.

2. Component Part Testing

The final rule allows firms to conduct component part testing pursuant to the requirements in 16 CFR part 1109. This can reduce the cost to manufacturers where one component part might be common to more than one product. Such component parts might include paints, polymers used in molding different parts, and fasteners. In these cases, the component parts might be received in larger lots than the production lots of the products in which they are used. Therefore, the testing costs for those component parts will be spread over more units than if they were required to be tested on the final products only.

3. Reliance on Certifications by Other Parties

The final rule allows manufacturers and importers to rely upon testing obtained by or certifications made by another party as the basis for their own certificates, as allowed by 16 CFR part 1109. These certifications can be for component parts or for finished products. This provision would be of value to importers, who may base their own certificate of conformity on the certificate for a finished product issued by a foreign manufacturer, provided that the requirements of 16 CFR part 1109 are met.

S. Alternatives That May Further Reduce the Impact on Small Businesses

Additional Testing Relief for Low-Volume Manufacturers of Children's Products

The proposed rule would include a provision that would provide some relief to low-volume manufacturers of children's products, by exempting products from the periodic testing requirement until 10,000 units of the product have been manufactured or imported. Once 10,000 units have manufactured or imported, the periodic testing requirements would apply to the product. This provision did not relieve the manufacturer or importer from the obligation to have the product tested by a third party conformity assessment body for: (1) Certification purposes, and (2) when there had been a material change in the product's design or manufacturing processes or sourcing of component parts. Thus, the manufacturer would have still been obligated to submit samples to a third party conformity assessment body to demonstrate that the product conforms with the applicable children's product safety rules prior to introducing the product and when there has been a material change. The provision only relieved the manufacturer from the periodic testing requirements until 10,000 units of the children's product had been manufactured or imported.

On August 12, 2011, H.R. 2715 was enacted into law. H.R. 2715 has the potential to provide substantial relief to ''small batch manufacturers,'' which H.R 2751 defines as manufacturers that had no more than $1 million in total gross revenue from sales of all consumer products in the previous calendar year. H.R. 2751 also defines ''covered product'' as a consumer product manufactured by a small batch manufacturer where no more than 7,500 units of the same product were manufactured in the previous calendar year. Because the provisions for small batch manufacturers in H.R. 2715 may provide relief to many of the same manufacturers at which the low-volume exemption in the proposed rule was aimed, we decided to defer action on the low-volume exemption.

For most small batch manufacturers, the relief provided by H.R. 2715 may be greater than the relief that would have been provided by the low volume-exemption from the proposed rule because the H.R. 2715 provides small batch manufacturers with relief from both certification and periodic testing, with some exceptions, while the low volume exemption in the proposed rule only provided some relief from periodic testing. However, the partial exemption from periodic testing that the proposed rule would provide for products where fewer than 10,000 units had been imported or manufactured could provide some relief for some manufacturers of low-volume products that are not categorized as small batch manufacturers by H.R. 2715. There are likely some manufacturers that have low-volume products, but that also have gross sales that exceed $1 million. These manufacturers will receive no relief from the small batch manufacturer exceptions in H.R. 2715, but would have been provided some relief by the low-volume exemption in the proposed rule. Consequently, including the partial exemption from periodic testing for low-volume products from the proposed rule, could provide some relief to manufacturers of low-volume products that do not meet the definition of a small batch manufacturer.

We have decided to reserve the provision of the proposed rule that would provide partial relief from periodic testing for low-volume products. The reason is that H.R. 2715 directed us to seek public comment on opportunities to reduce the cost of third party testing requirements consistent with assuring compliance with any applicable consumer product safety rule, ban, standard, or regulation. It also contains special rules for small batch manufacturers and directs us to consider alternative testing requirements or to exempt small batch manufacturers from certain third party testing requirements. Thus, given these new statutory obligations resulting from H.R. 2715, we are reserving § 1107.21(e) so that we may consider how to address cost, low-volume products, and small batch issues more fully.

1. Reduce the Number of Repeated Third Party Tests Required for Certification

The final rule requires that manufacturers submit samples of children's products to third party conformity assessment bodies to: (1) Certify that they comply with all applicable children's product safety rules before they are distributed; (2) after material changes; and (3) periodically to ensure continued compliance with all applicable children's product safety rules. The number of samples required is not specified, but would be based upon factors, such as the degree to which the manufacturing processes create products that are uniform in composition and quality, the testing interval, and the number of samples required to ensure with a high degree of

assurance that a certified product continues to comply with all applicable children's product safety rules. It is likely that most manufacturers will need to have a product third party tested multiple times for both certification and periodic testing purposes.

An alternative that could provide some relief to small businesses is to require, for purposes of certifying a product, manufacturers to submit sufficient units of the product to conformity assessment bodies to ensure that the product can be tested for compliance with each applicable children's safety rule, at least once, or as many times as required by the specific regulation, if different. The same requirement could apply to periodic testing: At least once during the periodic testing interval established by the rule (*e.g.,* once a year) manufacturers would be required to submit sufficient units of the product to ensure that each applicable children's product safety rule is evaluated at least once. In some cases, all of the required tests could be performed on one unit of the product. In other cases, more than one unit of the product might be required to test the product to all applicable children's product safety rules. For example, more than one unit of a toy might be required to subject the toy to each use and abuse test that is applicable to the toy; the tests specified in the bicycle helmet standard require eight helmets. Nevertheless, each test would only need to be conducted one time. This could reduce the financial burden of the third party testing requirements on small businesses.

Under this alternative, manufacturers could still be required to have a high degree of assurance that their children's products complied with all applicable children's product safety rules. However, the testing or inspections needed to provide the manufacturer with a high degree of assurance of compliance could be first or third party testing, or by other process control means, at the option of the manufacturer. The purpose of the required third party tests would be to provide objective evidence of compliance.

We did not accept this alternative because, although it arguably would provide a greater level of evidence of compliance than what existed before the enactment of the CPSIA, it would not require enough third party testing to provide a high degree of assurance that children's products complied with all applicable children's product safety rules. An analysis of CPSC compliance data for children's shoes found several examples where test results for one sample of an article indicated compliance with the lead content requirements, but tests results for a different sample of the same article showed lead levels that exceeded the standard.[9] This suggests that testing one sample may not always be sufficient to detect noncomplying products.

2. Allow Increased Use of XRF Analysis

XRF analysis is a testing technique that can be used to measure the heavy metal content of materials. The cost of using XRF analysis testing is generally less expensive than using ICP analysis. Currently, we have approved XRF analysis for determining the lead content of homogenous polymer products and one type of XRF analysis (energy dispersive XRF using multiple monochromatic beams using the test method in ASTM F2853–10) for paints. We have not approved the use of XRF analysis for determining the lead content of metal component parts. However, allowing the use of XRF analysis for determining the lead content of metal component parts could substantially reduce the cost of the third party testing. The reduction could be especially significant for manufacturers of children's products that have a lot of metal component parts.

We decided not to allow the expanded use of XRF analysis to determine lead content at this time. However, we are continuing to evaluate the potential use of XRF analysis, and should we determine that XRF analysis can be sufficiently accurate in determining lead content, in a separate rulemaking, we could consider expanding the allowable use of XRF analysis for third party testing. Moreover, H.R. 2715 directed us to seek public comment on opportunities to reduce the cost of third party testing requirements consistent with assuring compliance with any applicable children's product safety rule. Further, H.R. 2715 directs us to seek public comment on the extent to which technology, other than the technology already approved by the Commission, exists for third party conformity assessment bodies to test or to screen for testing consumer products subject to a third party testing requirement. Therefore, we may consider alternatives to reduce the cost of third party testing requirements more fully at a later date.

[9] CPSC Memorandum to the Commission, from John W. Boja, Howard N. Tarnoff, Mary F. Toro, and Marc J. Schoem, ''The Technological Feasibility of Reducing the Lead Content to 100 ppm: Compliance Data'' (29 June 2011).

3. Basing the Frequency of Periodic Testing on Risk of Injury or Illness

The final rule requires that periodic testing be performed at least once every one to three years, depending on the other testing that a manufacturer opts to perform. An alternative that would reduce the burden of the rule on some small businesses is to lengthen the time period between required periodic tests for products, component parts, or rules for which the risk of serious injury or illness from a violation of a children's product safety rule is low. This would reduce the burden on some manufacturers because it could reduce the amount of required third party testing.

This alternative was not accepted because, given the number of children's product safety rules and the large number and wide variety of children's products to which they apply, its administration would be complex and would require a large investment of resources to analyze and rank the risk of serious injury or illness that could result from each product or product category failing to comply with each applicable children's product safety rule and then determining the appropriate periodic testing requirements for the product or product category.

4. Alternatives Not Considered Because They Would Conflict With the Statute

We are aware of some alternatives that could reduce the burden of the rule but that were not considered in this rulemaking because adopting the alternative would conflict with the statute. For example, although we have been able to exempt some materials from the testing requirements that inherently do not contain lead in excess of the limits established by the CPSIA, we are not able to exempt materials from testing that can exceed those limits even if the health hazard associated with the materials or component parts is believed to be minimal. Likewise, we are not be able to exempt from the testing requirements products for which compliance with the applicable safety rule is thought to be very high even without a mandatory third party testing requirement.

V. Paperwork Reduction Act

The final rule contains information collection requirements that are subject to public comment and review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The preamble to the proposed rule contained a discussion of the estimated burden associated with the rule's collection of

information requirements (75 FR at 28360 through 28361).

Several commenters addressed issues relating to the Paperwork Reduction Act discussion.

(Comment 113)—Some commenters noted that the preamble to the proposed rule states that we will likely request access to records only when we are investigating potentially defective or noncompliant products. The commenters concluded that having to integrate multiple systems to compile data should not be needed, as long as companies can provide the data upon request. One commenter noted that proposed § 1107.10 (b)(5)(i)(C) would require not only records of each certification test, but also ''a description of how the product was certified as meeting the requirements, including how each applicable rule was evaluated, the test results and the actual values of the tests.''

One commenter stated that it receives more than a thousand finished good test reports annually from CPSC-accepted third party labs. These reports often run 50 to 125 pages in length and contain hundreds of data points and assessments. The commenter asserted that adding additional descriptive text to explain ''how'' the product was certified, simply adds no value. The commenter concluded that if the test report references an ASTM standard, and the results are acceptable, that should be sufficient without additional explanations.

(Response 113)—The final rule reserves subpart B, which would contain proposed § 1107.10 and requirements for a reasonable test program for non-children's products, including the recordkeeping requirements. Therefore, the final rule does not impose any recordkeeping requirements related to non-children's products.

With respect to children's products, the recordkeeping requirements at § 1107.26 of the final rule do not require descriptive text to explain ''how'' the children's product was certified. The certification test methods are prescribed for children's products. It should only be necessary for the manufacturer or importer to identify and store the new requirements that are not already part of their current recordkeeping systems and to be certain that the remaining documentation can be produced, upon request, in a manner that identifies clearly the requisite parts.

(Comment 114)—Several commenters addressed our estimated resource requirements to manage the general recordkeeping requirements for testing and certification. One commenter stated that the toy industries' experience in meeting the recordkeeping requirements of the interim enforcement policy is that the requirements are extremely burdensome, and the recordkeeping requirements contained in the proposed rule are much more extensive and will be even more costly. The commenter stated that our estimate of 200,000–300,000 hours to manage recordkeeping, equating to no more than 200 people across all industries impacted by the CPSIA, is much too low. Within the toy industry alone, the commenter estimated 10 times that many persons have been engaged along the global supply chain to manage the data and recordkeeping associated with the CPSIA's existing requirements. Although we referenced a calculation of 100,000 to 150,000 products to which the recordkeeping requirements would apply, the commenter stated that companies typically certify each SKU, and there is recordkeeping for every version, even if it is identical in all material respects.

One commenter estimated that the true number of toys and games was closer to 2.5 million. The commenter's estimate was based on a listing of 808,465 toys and games on a popular commercial Web site (on August 3, 2010), plus its estimate that the Web site only lists about one-third of the toys available. Given some specialty and other submarkets, the commenter thought that the final number of items in the *Toys, Games, and Educational* items category could be in excess of 4 to 5 million individual products or stock-keeping units. The commenter also provided an estimate of 8 million apparel items available for children. However, the commenter did not provide the method or data sources it used for the latter estimates. Another commenter noted that its company had about 1,700 individual products annually, requiring testing, certification, and recordkeeping, or more than 1 percent of the CPSC's entire estimated number of products across all affected industries.

(Response 114)—We acknowledge that our original estimate of the number of products that would be impacted was low, and we have increased significantly our estimate of the recordkeeping burden associated with the testing and certification requirements of the final rule. Based on the comments, and other research, we have revised our estimate of the number of children's products. In the categories of toys, art and creative materials, furniture, and jewelry, we estimate that there are perhaps 241,000 different products. There are additional products in other categories, such as nursery or juvenile products, nontraditional toys (*e.g.,* video games), CDs, bicycles, ATVs, party favors, and greeting cards intended for children, and some educational materials that could be affected by the final rule for which specific estimates have not been made. The estimates do not consider that some products might be produced at more than one location or certified by more than one importer. Therefore, we concluded that there could be 300,000 non-apparel products that are covered by the rule.

The original estimate did not account for the very large number of apparel products that would be covered by the final rule. The number of apparel products intended for children, including footwear, is estimated to be about 1.3 million. This would bring the total number of children's products to about 1.6 million.

The final rule has been changed to address some of the burdens mentioned by the commenters, such as not requiring records to be kept in the United States or translated into English, unless requested.

Elsewhere in this issue of the **Federal Register**, we have published a notice seeking public comment on the issues in H.R. 2715, including other methods of lowering the cost of third party testing consistent with assuring compliance with the applicable consumer product safety rules, bans, standards, and regulations.

(Comment 115)—One commenter asserted that its company's testing program has been highly effective for more than 26 years, but it does not maintain the records that would be required by the proposed rules, and it would be very costly to do so. One commenter questioned whether the extensive recordkeeping on every item was necessary for the proper performance of the CPSC's functions.

Another commenter echoed the concern that the cost of the recordkeeping requirements would be high without providing any clear benefit to the agency's mission or product safety. The commenter estimated that a major retailer would need to maintain records on 300,000 distinct products, which would cost the retailer $22 million annually, using the estimated per product recordkeeping burden employed in the notice of proposed rulemaking. Another commenter stated that we should reduce the reporting burden by allowing manufacturers or importers to maintain their own recordkeeping systems if they meet the traceability requirements and ensure

that products are certified properly before they enter into commerce.

(Response 115)—With respect to recordkeeping requirements for reasonable testing programs for non-children's products, we have reserved subpart B, which would contain requirements for reasonable testing programs for non-children's products. Therefore, the final rule does not impose any recordkeeping requirements on manufacturers of non-children's products.

With respect to children's products, we acknowledge that the recordkeeping requirements could require considerable resources to track the data and manage recordkeeping. As a result, the costs associated with the recordkeeping requirements could be a significant expense for some firms. However, as stated in the preamble to the proposed rule, the purpose of the documentation and recordkeeping requirements in the rule is to establish the identity of the product and to demonstrate that each product complies with the applicable rules when it is certified and on a continuing basis thereafter. Additionally, we note that retailers are not required to comply with the recordkeeping requirements of the rule, unless they are also the importer of the product.

We also have revised the final rule to reduce the costs associated with the recordkeeping requirements. For example, the final rule does not require manufacturers to maintain the records at a location in the United States, as long as they can provide the records to us, after receiving a request to do so. Also, with the exception of the certificates of conformity, the records will not have to be maintained in the English language.

Finally, the final rule does not require that the records be in a specific format. The final rule specifies the records or information that is required. However, manufacturers may maintain the records within their own recordkeeping systems if, as suggested by the commenter, they meet the traceability requirements and ensure that products are certified properly before they enter into commerce.

(Comment 116)—Several comments provided estimates on the amount of time required for recordkeeping or information from which estimates could be derived. One commenter (a large toy manufacturer) stated that they had added six full-time employees to manage the data and recordkeeping associated with the CPSIA's existing testing and certification requirements, and they further indicated that they had 1,700 products tested annually for which recordkeeping would be required. The test reports are from 50 to 125 pages in length and require maintaining for all products tested. The commenter estimated that their company accounted for greater than 1 percent of all the hours that the CPSC had estimated for all children's products. The commenter concluded that, based on this estimate, the actual number of hours required for recordkeeping by all companies would be higher than the CPSC's estimate.

Another commenter estimated that the recordkeeping will require about 2.25 hours per test submitted; but due to varying lot sizes and requirements, they estimate that multiple tests per year could be required on a product. They estimate that the burden will be 3 hours for one category of products that it manufactures and 5 hours for another, with an average across their product line of 3.5 hours.

One commenter said that the time required for recordkeeping would be higher for manufacturers that specialize in high quality, but low volume products. The commenter estimated that it would take 6 to 10 employees to track the testing data and compile it into certificates of conformity, or about 6 to 10 times the per-product labor required by the high volume, mass production manufacturers. The commenter estimated about 3 to 7.5 hours of recordkeeping would be required for high-quality, low-volume products.

(Response 116)—Based on these comments, we have determined that for many children's products, substantially more than 2 hours will be required for the associated recordkeeping. For products, such as toys, jewelry, children's furniture and other children's products, which are subject to third party testing to several different standards, we have determined that 5 hours is a reasonable estimate.

More hours will be required for some products to which many rules apply. Simpler products with few, or only one, applicable rule should require fewer hours for recordkeeping. For apparel and footwear products, we have determined that it is reasonable to use a lower estimate of the number of hours required for recordkeeping, such as 3 hours. This estimate recognizes that there could be substantial recordkeeping required for some items, such as those that require testing for flammability and that contain various components (*e.g.,* zippers, snaps, buttons, accessories) while other items, might require little testing.

Title: Testing and Labeling Pertaining to Product Certification.

Description: The final rule implements section 102(b) of the CPSIA, which requires certification of compliance for children's products subject to a children's product safety rule. A certification that a children's product complies with the applicable children's product safety rules must be supported by testing by an approved third party conformity assessment body. The final rule imposes recordkeeping requirements related to those testing and certification mandates. The recordkeeping requirements are intended to allow identification of each product and establish that each product is certified properly, before it enters commerce. In addition, the recordkeeping requirements require certification that a product has been retested properly for conformity with all applicable rules on a continuing basis, including after a material change in the product's design or manufacturing processes, including the sourcing of component parts.

Each manufacturer or importer of a children's product subject to a children's product safety rule would be required to establish and maintain the following records:

- A copy of the Children's Product Certificate (§ 1107.26(a)(1));
- Records of each certification test (§ 1107.26(a)(2));
- Records of the periodic tests (§ 1107.26(a)(3));
- Records of descriptions of all material changes in product design, manufacturing process, and sourcing of component parts, the certification tests run, and the test values (§ 1107.26(a)(5)); and
- Records of undue influence procedures (§ 1107.26(a)(6)).

Description of Respondents: The recordkeeping requirements apply to all manufacturers or importers of children's products that are covered by one or more children's product safety rules promulgated and/or enforced by the CPSC. We reviewed every industry category in the NAICS and selected those industry categories that included firms that could manufacture or sell such children's products. Using data from the U.S. Census Bureau, we determined that there are more than 37,000 manufacturers, almost 80,000 wholesalers, and about 128,000 retailers in these categories. However, not all of the firms in these categories manufacture or import children's products that are covered by children's product safety rules. Therefore, these numbers would constitute a high estimate of the number of firms that are subject to the recordkeeping requirements.

Estimate of the Burden: The hour burden of the recordkeeping

requirements will likely vary greatly from product to product, depending upon such factors as the complexity of the product and the amount of testing that must be documented. We do not have comprehensive data on the universe of products that will be impacted. Therefore, estimates of the hour burden of the recordkeeping requirements are somewhat speculative.

The preamble to the proposed rule (75 FR at 28361) estimated that, on average, approximately 2 hours would be needed for recordkeeping per product; although we recognized that, for some products, particularly those subject to more than one standard or rule, would need a substantial amount of testing, and thus, the recordkeeping burden could be much higher than 2 hours. Conversely, products subject to one standard or that need little testing, could have a recordkeeping burden of less than 2 hours.

Based on the comments we received on the proposed rule, however, we have revised the estimated number of children's products that are affected, as well as the hourly recordkeeping burden estimate. We now estimate that approximately 300,000 non-apparel children's products will be covered by the rule and that an average of 5 hours will be needed for the recordkeeping associated with these products. We also estimate that there are approximately 1.3 million children's apparel and footwear products and that will require an average of 3 hours for the recordkeeping. Thus, the total hour burden of the recordkeeping associated with the final rule is 5.4 million hours (300,000 × 5 hours plus 1,300,000 × 3 hours).

Additionally, for the proposed rule, to calculate the cost of the recordkeeping burden, we used the total hourly compensation for private sector workers in management, professional, and related occupations, which is $48.91 per hour. This is based on the expectation that much of the recordkeeping will be done by chemists, engineers and quality control managers. Most commenters did not mention the occupational mix of the workers that would be involved in the recordkeeping associated with the rule. However, one commenter stated that the rule would result in an increase in his clerical and management staff. Therefore, to recognize that clerical, professional, and management staff will be involved in meeting the recordkeeping requirements of the rule, we will assume that personnel in ''management, professional, and related occupations'' will be responsible for half of the recordkeeping, while personnel in ''office and administrative support'' occupations will be responsible for the other half. As of March 2011, these categories would average $36.43 per hour (*http://www.bls.gov/news.release/ecec.t09.htm*).[10] At $36.43 per hour (*i.e.,* the revised hourly compensation rate), the total cost of the recordkeeping associated with the testing and certification rule is approximately $197 million (5.4 million hours × $36.43 = $196,722,000).

Estimate Limitations: There are some limitations to the above estimates that warrant mentioning.

While the estimates of the number of products are more accurate than the original estimates, they are not based on a well-designed survey or comprehensive database. Additionally, the extent to which some products might be certified by multiple importers, or are manufactured at different sites, has not been established.

Recordkeeping for the flammability of children's sleepwear might be captured in the OMB submission on another rule, but the recordkeeping associated with the lead content rules should be captured here. However, no adjustment for this has been made because we have not tried to separate children's sleepwear from other apparel items.

The recordkeeping considered here is best thought of as the recordkeeping mandated by the testing and certification requirements of section 102 of the CPSIA. It would be impossible to separate the time associated with the initial certification, from the time related to periodic testing and documenting material changes, especially because it often involves issuing a new certificate.

For finished goods manufacturers who also perform their own component testing, it is difficult to separate the recordkeeping burden associated with component part testing from the recordkeeping burden associated with the testing and labeling rule. This could lead to an overestimate of the costs associated with the testing and labeling rule and possibly result in underestimates associated with the component part testing rule. Better estimates may be possible if the recordkeeping burden is reevaluated after the rules are finalized.

In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), we have applied to the U.S. Office of Management and Budget (OMB) for a control number for this information collection, and we will publish a notice in the **Federal Register** providing the number when we receive approval from the OMB.

[10] U.S. Department of Labor, Bureau of Labor Statistics, ''Employer costs for Employee Compensation—March 2011, Table 9'' (8 June 2011). Available at: *http://www.bls.gov/news.release/ecec.t09.htm.* Last accessed 8 July 2011.

VI. Environmental Considerations

This final rule falls within the scope of the Commission's environmental review regulations at 16 CFR 1021.5(c)(2), which provides a categorical exclusion from any requirement for the agency to prepare an environmental assessment or environmental impact statement for product certification rules.

VII. Executive Order 12988

Executive Order 12988 (February 5, 1996), requires agencies to state in clear language the preemptive effect, if any, of new regulations. The final rule is issued under authority of the CPSA and the CPSIA. The CPSA provision on preemption appears at section 26 of the CPSA. The CPSIA provision on preemption appears at section 231 of the CPSIA. The preemptive effect of this rule would be determined in an appropriate proceeding by a court of competent jurisdiction.

VIII. Effective Date

The preamble to the proposed rule indicated that a final rule would become effective 180 days after its date of publication in the **Federal Register** (75 FR at 28361). However, on August 12, 2011, the President signed H.R. 2715 into law. H.R. 2715 revised the CPSIA in several different ways and also affected section 14(i)(2)(B)(ii) of the CPSA. H.R. 2715 also created a new section 14(i)(3)(B) of the CPSA, which requires us, no later than one year after H.R. 2715's date of enactment, to review the public comments (on opportunities to reduce the costs of third party testing requirements) and directs us to ''prescribe new or revised third party testing regulations'' if we determine that ''such regulations will reduce third party testing costs consistent with assuring compliance with the applicable consumer product safety rules, bans, standards, and regulations.'' Consequently, we have finalized those provisions that H.R. 2715 did not affect directly. We also have decided to make the final rule effective on February 8, 2013 so that parties can begin taking steps to develop internal processes, such as recordkeeping, and so that we and interested parties can consider how H.R. 2715 interacts with the final rule.

List of Subjects in 16 CFR Part 1107

Business and industry, Children, Consumer protection, Imports,

Incorporation by reference, Product testing and certification, Records, Record retention, Toys.

Accordingly, 16 CFR part 1107 is added to read as follows:

PART 1107—TESTING AND LABELING PERTAINING TO PRODUCT CERTIFICATION

Subpart A—General Provisions

Sec.
1107.1 Purpose.
1107.2 Definitions.

Subpart B—[Reserved]

Subpart C—Certification of Children's Products

1107.20 General requirements.
1107.21 Periodic testing.
1107.23 Material change.
1107.24 Undue influence.
1107.26 Recordkeeping.

Subpart D—Consumer Product Labeling Program

1107.30 Labeling consumer products to indicate that the certification requirements of section 14 of the CPSA have been met.

Authority: 15 U.S.C. 2063, Sec. 3, 102 Pub. L. 110–314, 122 Stat. 3016, 3017, 3022.

Subpart A—General Provisions

§ 1107.1 Purpose.

This part establishes the protocols and standards for ensuring continued testing of children's products periodically and when there has been a material change in the product's design or manufacturing process and safeguarding against the exercise of undue influence by a manufacturer on a third party conformity assessment body. It also establishes a program for labeling of consumer products to indicate that the certification requirements have been met pursuant to sections 14(a)(2) and (i)(2)(B) of the Consumer Product Safety Act (CPSA) (15 U.S.C. 2063(a)(2) and (i)(2)(B)).

§ 1107.2 Definitions.

Unless otherwise stated, the definitions of the Consumer Product Safety Act and the Consumer Product Safety Improvement Act of 2008 apply to this part. The following definitions apply for purposes of this part:

CPSA means the Consumer Product Safety Act.

CPSC means the Consumer Product Safety Commission.

Due care means the degree of care that a prudent and competent person engaged in the same line of business or endeavor would exercise under similar circumstances. Due care does not permit willful ignorance.

High degree of assurance means an evidence-based demonstration of consistent performance of a product regarding compliance based on knowledge of a product and its manufacture.

Identical in all material respects means there is no difference with respect to compliance to the applicable rules, bans, standards, or regulations between the samples to be tested for compliance and the finished product distributed in commerce.

Manufacturer means the parties responsible for certification of a consumer product pursuant to 16 CFR part 1110.

Manufacturing process means the techniques, fixtures, tools, materials, and personnel used to create the component parts and assemble a finished product.

Material change means any change in the product's design, manufacturing process, or sourcing of component parts that a manufacturer exercising due care knows, or should know, could affect the product's ability to comply with the applicable rules, bans, standards, or regulations.

Third party conformity assessment body means a testing laboratory whose accreditation has been accepted by the CPSC to conduct certification testing on children's products. Only third party conformity assessment bodies whose scope of accreditation includes the applicable required tests can be used for children's product certification or periodic testing purposes.

Subpart B—[Reserved]

Subpart C—Certification of Children's Products

§ 1107.20 General requirements.

(a) Manufacturers must submit a sufficient number of samples of a children's product, or samples that are identical in all material respects to the children's product, to a third party conformity assessment body for testing to support certification. The number of samples selected must be sufficient to provide a high degree of assurance that the tests conducted for certification purposes accurately demonstrate the ability of the children's product to meet all applicable children's product safety rules.

(b) If the manufacturing process for a children's product consistently creates finished products that are uniform in composition and quality, a manufacturer may submit fewer samples to provide a high degree of assurance that the finished product complies with the applicable children's product safety rules. If the manufacturing process for a children's product results in variability in the composition or quality of children's products, a manufacturer may need to submit more samples to provide a high degree of assurance that the finished product complies with the applicable children's product safety rules.

(c) Except where otherwise specified by a children's product safety rule, component part testing pursuant to 16 CFR part 1109 may be used to support the certification testing requirements of this section.

(d) If a product sample fails certification testing to the applicable children's product safety rule(s), even if other samples have passed the same certification test, the manufacturer must investigate the reasons for the failure and take the necessary steps to address the reasons for the failure. A manufacturer cannot certify the children's product until the manufacturer establishes, with a high degree of assurance that the finished product does comply with all applicable children's product safety rules.

§ 1107.21 Periodic testing.

(a) *General requirements for all manufacturers.* All manufacturers of children's products must conduct periodic testing. All periodic testing must be conducted by a third party conformity assessment body. Periodic testing must be conducted pursuant to either paragraph (b), (c), or (d) of this section or as provided in regulations under this title. The testing interval selected for periodic testing may be based on a fixed production interval, a set number of units produced, or another method chosen by the manufacturer based on the product produced and its manufacturing process, so long as the applicable maximum testing interval specified in paragraph (b), (c), or (d) of this section is not exceeded. Component part testing pursuant to 16 CFR part 1109 may be used to support the periodic testing requirements of this section.

(b) A manufacturer must conduct periodic testing to ensure compliance with the applicable children's product safety rules at least once a year, except as otherwise provided in paragraphs (c), and (d) of this section or as provided in regulations under this title. If a manufacturer does not conduct production testing under paragraph (c) of this section, or testing by a testing laboratory under paragraph (d) of this section, the manufacturer must conduct periodic testing as follows:

(1) *Periodic Testing Plan.* Manufacturers must develop a periodic

testing plan to ensure with a high degree of assurance that children's products manufactured after the issuance of a Children's Product Certificate, or since the previous periodic testing was conducted, continue to comply with all applicable children's product safety rules. The periodic testing plan must include the tests to be conducted, the intervals at which the tests will be conducted, and the number of samples tested. At each manufacturing site, the manufacturer must have a periodic testing plan specific to each children's product manufactured at that site.

(2) *Testing Interval.* The testing interval selected must be short enough to ensure that, if the samples selected for testing pass the test, there is a high degree of assurance that the other untested children's products manufactured during the testing interval comply with the applicable children's product safety rules. The testing interval may vary depending upon the specific children's product safety rules that apply to the children's product, but may not exceed one year. Factors to be considered when determining the testing interval include, but are not limited to, the following:

(i) High variability in test results, as indicated by a relatively large sample standard deviation in quantitative tests;

(ii) Measurements that are close to the allowable numerical limit for quantitative tests;

(iii) Known manufacturing process factors which could affect compliance with a rule. For example, if the manufacturer knows that a casting die wears down as the die nears the end of its useful life, the manufacturer may wish to test more often as the casting die wears down;

(iv) Consumer complaints or warranty claims;

(v) Introduction of a new set of component parts into the assembly process;

(vi) The manufacture of a fixed number of products;

(vii) Potential for serious injury or death resulting from a noncompliant children's product;

(viii) The number of children's products produced annually, such that a manufacturer should consider testing a children's product more frequently if the product is produced in very large numbers or distributed widely throughout the United States;

(ix) The children's product's similarity to other children's products with which the manufacturer is familiar and/or whether the children's product has many different component parts compared to other children's products of a similar type; or

(x) Inability to determine the children's product's noncompliance easily through means such as visual inspection.

(c)(1) If a manufacturer implements a production testing plan as described in paragraph (c)(2) of this section to ensure continued compliance of the children's product with a high degree of assurance to the applicable children's product safety rules, the manufacturer must submit samples of its children's product to a third party conformity assessment body for periodic testing to the applicable children's product safety rules at least once every two years. A manufacturer may consider the information obtained from production testing when determining the appropriate testing interval and the number of samples needed for periodic testing to ensure that there is a high degree of assurance that the other untested children's products manufactured during the testing interval comply with the applicable children's product safety rules.

(2) *Production Testing Plan.* A production testing plan describes the production management techniques and tests that must be performed to provide a high degree of assurance that the products manufactured after certification continue to meet all the applicable children's product safety rules. A production testing plan may include recurring testing or the use of process management techniques, such as control charts, statistical process control programs, or failure modes and effects analyses (FMEAs) designed to control potential variations in product manufacturing that could affect the product's ability to comply with the applicable children's product safety rules. A manufacturer may use measurement techniques that are nondestructive and tailored to the needs of an individual product to ensure that a product complies with all applicable children's product safety rules. Any production test method used to conduct production testing must be effective in determining compliance. Production testing cannot consist solely of mathematical methods (such as an FMEA, with no additional components, or computer simulations). Production testing must include some testing, although it is not required that the test methods employed be the test methods used for certification. A manufacturer must document the production testing methods used to ensure continuing compliance and the basis for determining that the production testing plan provides a high degree of assurance that the product being manufactured continues to comply with all applicable children's product safety rules. A production testing plan must contain the following elements:

(i) A description of the production testing plan, including, but not limited to, a description of the process management techniques used, the tests to be conducted, or the measurements to be taken; the intervals at which the tests or measurements will be made; the number of samples tested; and the basis for determining that the combination of process management techniques and tests provide a high degree of assurance of compliance if they are not the tests prescribed for the applicable children's product safety rule;

(ii) At each manufacturing site, the manufacturer must have a production testing plan specific to each children's product manufactured at that site;

(iii) The production testing interval selected for tests must ensure that, if the samples selected for production testing comply with an applicable children's product safety rule, there is a high degree of assurance that the untested products manufactured during that testing interval also will comply with the applicable children's product safety rule. Production testing intervals should be appropriate for the specific testing or alternative measurements being conducted.

(3) If a production testing plan as described in this paragraph (c) fails to provide a high degree of assurance of compliance with all applicable children's product safety rules, the CPSC may require the manufacturer to meet the requirements of paragraph (b) of this section or modify its production testing plan to ensure a high degree of assurance of compliance.

(d)(1) For manufacturers conducting testing to ensure continued compliance with the applicable children's product safety rules using a testing laboratory accredited to ISO/IEC 17025:2005(E), ''General requirements for the competence of testing and calibration laboratories,'' periodic tests by a third party conformity assessment body must be conducted at least once every three years. Any ISO/IEC 17025:2005(E)-accredited testing laboratory used for ensuring continued compliance must be accredited by an accreditation body that is accredited to ISO/IEC 17011:2004(E), ''Conformity assessment—General requirements for accreditation bodies accrediting conformity assessment bodies.'' The test method(s) used by an ISO/IEC 17025:2005(E)-accredited testing laboratory when conducting testing to ensure continued compliance must be the same test method(s) used for certification to the applicable children's product safety rules.

Manufacturers must conduct testing using the ISO/IEC 17025:2005(E)-accredited testing laboratory frequently enough to provide a high degree of assurance that the children's product continues to comply with the applicable children's product safety rules. A manufacturer may consider the information obtained from testing conducted by an ISO/IEC 17025:2005(E)-accredited testing laboratory when determining the appropriate testing interval and the number of samples for periodic testing that are needed to ensure that there is a high degree of assurance that the other untested children's products manufactured during the testing interval comply with the applicable children's product safety rules.

(2) If the continued testing described in paragraph (d)(1) of this section fails to provide a high degree of assurance of compliance with all applicable children's product safety rules, the CPSC may require the manufacturer to meet the requirements of paragraph (b) of this section or modify the testing frequency or number of samples required to ensure a high degree of assurance of continued compliance.

(e) [Reserved]

(f) [Reserved]

(g) The Director of the Federal Register approves the incorporations by reference of the standards in this section in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You may inspect a copy of the standards at the Office of the Secretary, U.S. Consumer Product Safety Commission, Room 820, 4330 East West Highway, Bethesda, MD 20814, telephone (301) 504–7923, or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

(1) International Organization for Standardization (ISO), 1, ch. de la Voie-Creuse, Case postale 56, CH–1211 Geneva 20, Switzerland; Telephone +41 22 749 01 11, Fax +41 22 733 34 30; *http://www.iso.org/iso/home.html.*

(i) ISO/IEC 17011:2004(E), ''Conformity assessment—General requirements for accreditation bodies accrediting conformity assessment bodies,'' First Edition, September 1, 2004 (Corrected version February 15, 2005);

(ii) ISO/IEC 17025:2005(E), ''General requirements for the competence of testing and calibration laboratories,'' Second Edition, May 15, 2005.

(2) [Reserved]

§ 1107.23 Material change.

(a) *General Requirements.* If a children's product undergoes a material change in product design or manufacturing process, including the sourcing of component parts, which a manufacturer exercising due care knows, or should know, could affect the product's ability to comply with the applicable children's product safety rules, the manufacturer must submit a sufficient number of samples of the materially changed children's product for testing by a third party conformity assessment body and issue a new Children's Product Certificate. The number of samples submitted must be sufficient to provide a high degree of assurance that the materially changed component part or finished product complies with the applicable children's product safety rules. A manufacturer of a children's product that undergoes a material change cannot issue a new Children's Product Certificate for the product until the product meets the requirements of the applicable children's product safety rules. The extent of such testing may depend on the nature of the material change. When a material change is limited to a component part of the finished children's product and does not affect the ability of other component parts of the children's product or the finished children's product to comply with other applicable children's product safety rules, a manufacturer may issue a new Children's Product Certificate based on the earlier third party certification tests and on test results of the changed component part conducted by a third party conformity assessment body. A manufacturer must exercise due care to ensure that any component part undergoing component part-level testing is identical in all material respects to the component part on the finished children's product. Changes that cause a children's product safety rule to no longer apply to a children's product are not considered to be material changes.

(b) *Product Design.* For purposes of this subpart, the term ''product design'' includes all component parts, their composition, and their interaction and functionality when assembled. To determine which children's product safety rules apply to a children's product, a manufacturer should examine the product design for the children's product as received or assembled by the consumer.

(c) *Manufacturing Process.* A material change in the manufacturing process is a change in how the children's product is made that could affect the finished children's product's ability to comply with the applicable children's product safety rules. For each change in the manufacturing process, a manufacturer should exercise due care to determine if compliance to an existing applicable children's product safety rule could be affected, or if the change results in a newly applicable children's product safety rule.

(d) *Sourcing of Component Parts.* A material change in the sourcing of component parts results when the replacement of one component part of a children's product with another component part could affect compliance with the applicable children's product safety rule. This includes, but is not limited to, changes in component part composition, component part supplier, or the use of a different component part from the same supplier who provided the initial component part.

§ 1107.24 Undue influence.

(a) Each manufacturer must establish procedures to safeguard against the exercise of undue influence by a manufacturer on a third party conformity assessment body.

(b) The procedures required in paragraph (a) of this section, at a minimum, must include:

(1) Safeguards to prevent attempts by the manufacturer to exercise undue influence on a third party conformity assessment body, including a written policy statement from company officials that the exercise of undue influence is not acceptable, and directing that every appropriate staff member receive training on avoiding undue influence, and sign a statement attesting to participation in such training;

(2) A requirement that upon substantive changes to the requirements in this section regarding avoiding undue influence, the appropriate staff must be retrained regarding those changed requirements.

(3) A requirement to notify the CPSC immediately of any attempt by the manufacturer to hide or exert undue influence over test results; and

(4) A requirement to inform employees that allegations of undue influence may be reported confidentially to the CPSC and a description of the manner in which such a report can be made.

§ 1107.26 Recordkeeping.

(a) A manufacturer of a children's product subject to an applicable children's product safety rule must maintain the following records:

(1) A copy of the Children's Product Certificate for each product. The children's product covered by the certificate must be clearly identifiable

and distinguishable from other products;

(2) Records of each third party certification test. The manufacturer must have separate certification tests records for each manufacturing site;

(3) Records of one of the following for periodic tests of a children's product:

(i) A periodic test plan and periodic test results;

(ii) A production testing plan, production test results, and periodic test results; or

(iii) Testing results of tests conducted by a testing laboratory accredited to ISO/IEC 17025:2005(E) and periodic test results.

(4) [Reserved];

(5) Records of descriptions of all material changes in product design, manufacturing process, and sourcing of component parts, and the certification tests run and the test values; and

(6) Records of the undue influence procedures, including training materials and training records of all employees trained on these procedures, including attestations described at § 1107.24(b)(1).

(b) A manufacturer must maintain the records specified in paragraph (a) of this section for five years. The manufacturer must make these records available, either in hard copy or electronically, such as through an Internet Web site, for inspection by the CPSC upon request. Records may be maintained in languages other than English if they can be:

(1) Provided immediately by the manufacturer to the CPSC; and

(2) Translated accurately into English by the manufacturer within 48 hours of a request by the CPSC, or any longer period negotiated with CPSC staff.

Subpart D—Consumer Product Labeling Program

§ 1107.30 Labeling consumer products to indicate that the certification requirements of section 14 of the CPSA have been met.

(a) Manufacturers and private labelers of a consumer product may indicate, by a uniform label on, or provided with the product, that the product complies with any consumer product safety rule under the CPSA, or with any similar rule, ban, standard or regulation under any other act enforced by the CPSC.

(b) The label must be visible and legible, and consist of the following statement:

Meets CPSC Safety Requirements

(c) A consumer product may bear the label if the manufacturer or private labeler has certified, pursuant to section 14 of the CPSA, that the consumer product complies with all applicable consumer product safety rules under the CPSA and with all rules, bans, standards, or regulations applicable to the product under any other act enforced by the Consumer Product Safety Commission.

(d) A manufacturer or private labeler may use a label in addition to the label described in paragraph (b) on the consumer product, as long as such label does not alter or mislead consumers as to the meaning of the label described in paragraph (b) of this section. A manufacturer or private labeler must not imply that the CPSC has tested, approved, or endorsed the product.

Dated: October 21, 2011.

Todd A. Stevenson,

Secretary, Consumer Product Safety Commission.

[FR Doc. 2011–27678 Filed 11–7–11; 8:45 am]

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Part IV

Consumer Product Safety Commission

16 CFR Parts 1109

Conditions and Requirements for Relying on Component Part Testing or Certification, or Another Party's Finished Product Testing or Certification, To Meet Testing and Certification Requirements; Final Rule

CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Part 1109

[CPSC Docket No. CPSC–2010–0037]

Conditions and Requirements for Relying on Component Part Testing or Certification, or Another Party's Finished Product Testing or Certification, to Meet Testing and Certification Requirements

AGENCY: Consumer Product Safety Commission.

ACTION: Final rule.

SUMMARY: The Consumer Product Safety Commission (''CPSC,'' ''Commission,'' or ''we'') is issuing a final rule regarding the conditions and requirements for relying on testing or certification of either component parts of consumer products, or another party's finished product, or both, to demonstrate, in whole or in part, compliance of a consumer product with all applicable rules, bans, standards, and regulations to support a children's product certificate (''CPC''); as part of the standards and protocols for continued testing of children's products; or to meet the requirements of any other rule, ban, standard, guidance, policy, or protocol regarding consumer product testing that does not already directly address component part testing.

DATES: The final rule is effective on December 8, 2011.[1]

FOR FURTHER INFORMATION CONTACT: Randy Butturini, Project Manager, Office of Hazard Identification and Reduction, Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814; telephone (301) 504–7562; email *rbutturini@cpsc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

A. What is the purpose of the final rule?

Elsewhere in this issue of the **Federal Register,** we are issuing a final rule titled, ''Testing and Labeling Pertaining to Product Certification.'' That rule addresses testing, continuing testing, and labeling requirements for children's products, and creates a new 16 CFR part 1107. It is the hope of the Commission that component part testing will help manufacturers meet their testing, continuing testing, and certification obligations under section 14 of the Consumer Product Safety Act (''CPSA'').

This final rule on component part testing is intended to give all parties involved in testing and certifying consumer products pursuant to sections 14(a) and 14(i) of the CPSA the flexibility to conduct or rely on required certification testing where such testing is the easiest and least expensive. For example, it may be more efficient to test component parts of consumer products before final assembly. Such testing may be done by component part suppliers so that test reports can be provided to multiple manufacturers using such component parts. Alternatively, manufacturers who assemble finished products can test component parts as they are received to reduce costs where, for example, the same component part is used in multiple product lines. The final rule allows for maximum flexibility because a domestic manufacturer or importer who is required to certify consumer products pursuant to 16 CFR part 1110 (''finished product certifier'') can base such certificate upon one or more of the following: (a) Component part testing; (b) component part certification; (c) another party's finished product testing; or (d) another party's finished product certification.

Component part testing as described in this rule is voluntary. While some regulations may require testing a component part of a product to meet a standard, such as the lead content limit in children's products, which must be measured in parts per million per component part, component part testing is never required to be conducted before assembly of a final product. A finished product certifier has the option to contract with its component part suppliers to conduct testing on component parts before assembly; it could procure testing of component parts after receiving them from suppliers but before assembly; or it could provide a sufficient number of finished products to a third party conformity assessment body to test for lead content on a per component part basis.

Although relying on another party's finished product testing or certification, or on component part testing before final assembly of a consumer product, is voluntary, once a party decides to conduct or rely upon either, the requirements in this rule apply. To the extent component part testing is not addressed by another CPSC-enforced rule, regulation, standard, or protocol, the final rule will apply. In general, certifiers should test and certify consumer products, including children's products, based on the most specific regulation that applies to such consumer product.

Except for component part testing for phthalate content, discussed in section II.D.3 of this preamble, this final rule is intended to supersede all policy statements and guidelines as they apply to testing of component parts.

B. What does the law require?

Except as provided in section 14(a)(2) of the CPSA, section 14(a)(1) of the CPSA, 15 U.S.C. 2063(a)(1), requires manufacturers and private labelers of a product that is subject to a consumer product safety rule (defined in section 3(a)(6) of the CPSA), or to any similar rule, ban, standard, or regulation under any other act enforced by the Commission, to issue a certificate of conformity. The certificate: (1) Must certify, based on a test of each product or upon a reasonable testing program, that the product complies with all CPSC requirements; and (2) must specify each rule, ban, standard, or regulation applicable to the product. This certificate is called a General Conformity Certificate (''GCC'') for non-children's products. Although discussed in the proposed rule, the final rule on ''Testing and Labeling Pertaining to Certification'' does not implement requirements for a reasonable testing program for non-children's products. Accordingly, we have not adopted any provisions in this final rule directly related to a reasonable testing program or a GCC. It should be noted, however, that although we are not implementing requirements for a reasonable testing program for non-children's products, manufacturers of non-children's products that are subject to a product safety rule, ban, standard, or regulation are still obligated by the CPSA, as amended by the CPSIA, to certify that their products comply with all applicable safety rules based on a test of each product or a reasonable testing program. Nothing in this rule is intended to preclude a certifier from using component part testing as part of a reasonable testing program to certify non-children's products.

Section 14(a)(2) of the CPSA, 15 U.S.C. 2063(a)(2), requires manufacturers and private labelers of any children's product that is subject to a children's product safety rule to submit samples of the product, or samples that are identical in all material respects to the product, to a third party conformity assessment body whose

[1] The Commission voted 3–2 to publish this final rule, with changes, in the **Federal Register.** Chairman Inez M. Tenenbaum, Commissioners Robert S. Adler and Thomas H. Moore voted to publish the final rule with changes. Commissioners Nancy A. Nord and Anne M. Northup voted against publication of the final rule. Chairman Tenenbaum, Commissioner Adler, and Commissioner Moore issued a joint statement. Commissioner Nord and Commissioner Northrup issued statements. The statements can be found at *http://www.cpsc.gov/pr/statements.html.*

accreditation has been accepted by the CPSC to be tested for compliance with such children's product safety rule. Based on that testing, the manufacturer or private labeler must issue a certificate that certifies that such children's product complies with the children's product safety rule based on the assessment of a third party conformity assessment body accredited to conduct such tests. 15 U.S.C. 2063(a)(2)(B). The manufacturer or private labeler of the children's product must issue either a separate certificate for each applicable children's product safety rule or a combined certificate that certifies compliance with all applicable children's product safety rules and specifies each such rule. This certificate is called a Children's Product Certificate (''CPC'').

Section 14(i)(2)(B) of the CPSA, 15 U.S.C. 2063(i), requires the Commission, by regulation, to establish protocols and standards for ensuring that a certified children's product that has been tested for compliance with all applicable children's product safety rules is subjected to additional testing periodically and when there has been a material change in the product's design or manufacturing process, including the sourcing of component parts. The final rule on ''Testing and Labeling Pertaining to Product Certification,'' 16 CFR part 1107, implements sections 14(a) and (i) of the CPSA. (On August 12, 2011, the President signed H.R. 2715 into law. Among other things, H.R. 2715 corrected an editorial error in section 14 of the CPSA, by renumbering a second section 14(d) of the CPSA on ''Additional Regulations for Third Party Testing'' to section 14(i) of the CPSA. Accordingly, throughout this preamble, including comment summaries and responses, we have replaced references to section 14(d) of the CPSA with section 14(i) of the CPSA to be consistent with this renumbering.)

Section 14(g) of the CPSA contains additional requirements for certificates. 15 U.S.C. 2063(g). Each certificate must identify the manufacturer or private labeler issuing the certificate and any third party conformity assessment body on whose testing the certificate depends. The certificate must include, at a minimum, the date and place of manufacture, the date and place where the product was tested, each party's name, full mailing address, telephone number, and contact information for the individual responsible for maintaining records of test results. Every certificate must be legible, and all required content must be in the English language. A certificate also may contain the same content in any other language.

Section 14(g) of the CPSA also states that every certificate must accompany the applicable product or shipment of products covered by the same certificate, and a copy of the certificate must be furnished to each distributor or retailer of the product. Upon request, the manufacturer or private labeler issuing the certificate must furnish a copy of the certificate to the Commission. CPSC regulations, at 16 CFR part 1110, limit the parties responsible for issuing certificates to domestic manufacturers and importers. Part 1110 also specifies the form and content of certificates, and other requirements, including that certificates can be provided in electronic form.

Finally, we note that H.R. 2715 requires us to seek public comment on the extent to which manufacturers with a substantial number of different components subject to third party testing may be evaluated to show compliance with an applicable rule, ban, standard, or regulation by third party testing of a subset of such components selected by a third party conformity assessment body. This final rule allows finished product certifiers to use component part testing to meet certification requirements under certain circumstances. Elsewhere in this issue of the **Federal Register,** we have published a notice seeking comment on the issues specified in H.R. 2715, including the testing of a subset of components.

C. What comments did we receive about the proposed rule?

In the **Federal Register** of May 20, 2010 (75 FR 28208), we published a proposed rule that would establish a new part 1109, titled, ''Conditions and Requirements for Testing Component Parts of Consumer Products.'' Proposed part 1109 would consist of two subparts: Subpart A—General Conditions and Requirements, and Subpart B—Conditions and Requirements for Specific Consumer Products, Component Parts, and Chemicals. The proposed rule was intended to set out the conditions under which a party certifying a product under section 14 of the CPSA would be able to rely on tests of component parts of the product, including materials used to produce it, as all or part of the basis for a valid certificate verifying that the product complies with all applicable requirements enforced by the Commission.

We received 26 comments on the proposed rule, discussing 58 different issues. Most commenters supported the proposed rule. For example, one commenter suggested that the testing and certification of component parts can be cost effective. Other commenters stated that the proposed rule, along with the proposed rule on testing and labeling, which appeared in the same issue of the **Federal Register,** were well thought out and wholly appropriate. Another commenter said that component part testing was more practical and protective of consumers than requiring all tests to be performed on the finished product. Another commenter stated that the rule appropriately placed the final responsibility for ensuring that only certified component parts are used in the finished product on the finished product certifier. Another commenter liked the strong chain of custody and expressed the belief it would encourage manufacturers to use suppliers who have good practices.

Other commenters expressed general concerns about the proposed rule. For example, one commenter thought that the rule's complexity would limit the willingness of some suppliers to certify their component parts voluntarily and therefore, limit the relief that the rule would provide to small businesses.

We discuss these comments, and our responses, in part II of this preamble.

II. Comments on the Proposed Rule, CPSC's Responses, and Explanation of the Final Rule

A. Introduction

The final rule establishes a new 16 CFR part 1109, setting forth the conditions and requirements for relying on component part testing or certification, or another party's finished product testing or certification, to meet testing and certification requirements. The new part 1109 consists of three subparts: Subpart A—General Conditions and Requirements; Subpart B—Conditions and Requirements for Specific Consumer Products, Component Parts, and Chemicals; and Subpart C—Conditions and Requirements for Composite Testing.

In this section, we describe each section of the proposed rule, summarize the comments we received for each section, and respond to the comments. We also discuss what changes we made to the final rule. A summary of each of the commenters' topics is presented, and each topic is followed by the Commission's response. For ease of reading, each topic will be prefaced with a numbered ''Comment''; and each response will be prefaced by a corresponding numbered ''Response.'' Each ''Comment'' is numbered to help distinguish between different topics. The number assigned to each comment

is for organizational purposes only and does not signify the comment's value or importance or the order in which it was received. Comments on similar topics are grouped together.

B. General Comments

1. Should the final rule include finished products?

In the preamble to the proposed rule, we invited comment on whether the final rule should allow finished product certifiers to rely on tests or certifications on finished products as well as on component parts:

> The Commission invites comment on whether finished product certifiers should be permitted to rely on other types of certifications from other persons (in addition to component part certifications). The proposed rule only would allow a finished product certifier to rely on certificates relating to the performance of individual component parts; it would not authorize a finished product certifier to rely on a certificate from another party certifying that the finished product itself complies with an applicable rule. For example, it would not allow certification by others in the case of standards, such as the small parts ban at 16 CFR 1500.19, which require testing of the entire product as opposed to an individual component. Should this limitation be modified so that the importer of a product would be able to base its own certification on what might be termed a ''subordinate'' certificate from a foreign manufacturer or other interested party to the effect that the product complies with one or more of these standards? What are the risks and benefits of allowing such an arrangement?

75 FR at 28209.

(Comment 1)—Some commenters asked whether an importer can accept a finished product certificate from a foreign manufacturer to certify the product. Some commenters stated that, occasionally, two certified products are bundled together for retail sale as a single unit. The commenters stated that the retailer or importer should be able to rely upon the certificates for each of the two bundled products, rather than have to follow the process of certifying the bundled product.

(Response 1)—The preamble to the proposed rule invited comment on whether we should allow finished product suppliers to issue finished product certificates upon which importers or other certifiers receiving such products from the suppliers could use as the basis for issuing their finished product certificates (75 FR 28209). The final rule allows this practice because no practical difference exists between relying on another party's component part testing or certification and relying on another party's finished product testing or certification, provided the same due care and documentation requirements are followed for both types of testing and certification. Just as with component part testing and certification, certifiers may be able to achieve efficiencies by using this approach and still ensure compliance to applicable safety standards.

For example, under the final rule, an importer can rely on finished product testing or certification provided by a foreign supplier, as suggested by the commenter. Where multiple parties import the same product, a foreign supplier could provide finished product testing reports or certifications to all importers, removing the necessity for each importer to conduct certification testing. Likewise, a party who ''bundles'' one or more finished products can rely on finished product testing or certifications from another party to issue a finished product certificate for the bundled product. In cases where a finished product certifier combines more than one certified finished product, it has several options in certifying such bundled product. Based on the certificates received for each product in the bundle, the finished product certifier can: (a) Issue a new certificate for each product in the bundle; (b) issue a new certificate for the bundled product; or (c) pass along the finished product certificates provided by another party. If the certifier chooses option (b), the certificate should indicate what information required by section 14(g)(1) of the CPSA and 16 CFR part 1110 is applicable to each product.

Our intent is that children's products introduced into commerce in the United States are certified as compliant with all applicable children's product safety rules by a party required to issue such certificate pursuant to 16 CFR part 1110, a domestic manufacturer or an importer. There are multiple ways that this can be achieved by a party required to certify a children's product. The party required to certify a children's product may use one or more of the following:

- Procure component part testing (for those tests for which component part testing is allowed) or finished product testing from a CPSC-accepted third party conformity assessment body and issue a finished product certificate based on those passing test results;
- Rely upon component part testing or finished product testing, procured by another party using a CPSC-accepted third party conformity assessment body, as a basis for issuing a finished product certificate; or
- Rely upon component part certification or finished product certification from another party as a basis for issuing a finished product certificate. If the supplier providing a certificate is also a required certifier (a domestic manufacturer or importer), then the party receiving a certificate does not need to reissue a certificate. If the supplier providing a certificate is doing so voluntarily, and is not required to provide a certificate, then the domestic manufacturer or importer must issue the finished product certificate. It may do so based on the certificates provided.

We also have revised the title for part 1109 from, ''Conditions and Requirements for Testing Component Parts of Consumer Products,'' to ''Conditions and Requirements for Relying on Component Part Testing or Certification, or Another Party's Finished Product Testing or Certification, to Meet Testing and Certification Requirements.'' The revised title reflects more accurately the fact that the rule sets forth conditions and requirements for relying on testing and certification of component parts, as well as for relying on another party's testing and certification of finished products, to meet the testing and certification requirements in section 14 of the CPSA. We also revised the following sections to reflect that a finished product certifier may rely on finished product testing or certification, in addition to component part testing or certification, from another party who is not required to conduct testing or issue certifications: § 1109.1; § 1109.2; § 1109.3; §§ 1109.4(c), (i), and (m); §§ 1109.5(b), (d), (f), (g), (h), and (i).

2. Can there be a ''master certificate'' relied upon by multiple manufacturers?

(Comment 2)—One commenter encouraged us to allow importers to reference a ''master certificate'' issued by another interested party, such as the manufacturer. The commenter stated that in many cases, multiple importers will import identical finished products. Often, these are nationally branded products that simply are imported separately by multiple retailers for convenience. Without the ability to reference another ''master'' certificate, each importer/retailer would have to generate its own certificate independently, the commenter asserted.

(Response 2)—As set forth in response to Comment 1 in section II.B of this preamble, if a foreign manufacturer certifies its product and sells that product to many importers, each importer may use the manufacturer's certificate (and other required records) to issue its own certificate. Importers may rely on a ''master certificate'' issued by another interested party, such

as a foreign manufacturer, to eliminate redundant testing, but only if the importer issues its own certificate. Requiring the importer to generate its own certificate means that the importer must exercise due care to make certain that the foreign manufacturer's testing and certification procedures are sufficient to ensure compliance with CPSC regulations, as well as aid the CPSC's enforcement of certification requirements.

If the importer makes a material change in the product, the importer may be able to use the manufacturer's certificate, plus tests pertaining only to the material change, as a basis for issuing its own certificate. Importers remain responsible for the recordkeeping requirements of products they certify.

3. Must component part manufacturers test their components?

(Comment 3)—One commenter stated that we should clarify that component part testing is entirely voluntary for parties supplying component parts or finished products to a finished product certifier (''upstream suppliers''). The commenter further stated that raw material or component part producers, who voluntarily certify their components parts, should be able to include relevant limitations on the certification form to avoid any confusion about the scope of the certification and should not have to furnish certificates in connection with the finished consumer product.

(Response 3)—We agree that component part testing by component part suppliers is voluntary. To reduce any possible confusion about whether the CPSA requires component part manufacturers or suppliers to provide component part certificates, we have added clarifying language regarding the voluntary nature of providing component part test reports or component part certifications by parties other than those who are required to certify pursuant to 16 CFR part 1110. The clarifying language appears in the following sections: (1) Scope—§ 1109.1; (2) Applicability—§ 1109.3; (3) definition of ''component part certifier''—§ 1109.4(c); and (4) the definition of ''finished product certifier''—§ 1109.4(h). For example, § 1109.1 now states: ''Component part manufacturers and suppliers may certify or test their component parts, but are not required to do so.'' As another example, the definition of ''component part certifier'' in § 1109.4(c) now states that a component part certifier is a party who voluntarily issues a certificate, even though they are not required to do so. Further, in the first sentence of § 1109.5(a) of the final rule, we have clarified that ''[a]ny party, including a component part manufacturer, a component part supplier, a component part certifier, or a finished product certifier, may procure component part testing as long as it complies with the requirements in this section and subparts B and C of this part.''

With regard to limiting the scope of a certificate, the scope of a certificate is dictated by statute and regulation. Sections 14(a)(1)(B) (for non-children's products) and 14(a)(2)(B) (for children's products) of the CPSA state that a certificate must list each safety rule applicable to the product. This requirement is mirrored in 16 CFR 1110.11(b). Pursuant to proposed § 1109.5(g) (renumbered to § 1109.5(h) in the final rule), component part certificates also must meet the content requirements in 16 CFR 1110.11. Thus, a component part supplier who voluntarily certifies component parts must list all safety standards and regulations to which the certificate applies. Unlike a finished product certificate, however, a component part certifier may not know all of the rules and regulations that a component part ultimately may be subject to, or may not choose to certify a component part to every applicable rule and regulation, depending upon what type of finished product incorporates the component part. The requirement to list the safety standards and regulations being certified should allow component part certifiers to state unambiguously the scope of the certification.

Finished product manufacturers should be mindful of the scope of component part certifications and of how such component parts are integrated into finished products to ensure that any additional testing required to certify the finished product is met. For example, a component part supplier of colored bolts may certify to the lead paint and lead in substrate standards. A finished product certifier using such bolts in a children's product would not need to retest for these standards. However, a finished product certifier likely still would need to conduct additional small parts testing on the finished product because small parts testing is something that only can be conducted on finished products.

Finally, under § 1109.5(g), component part certifiers must provide certificates to the finished product certifier who is relying on such certification. A component part certifier, however, does not have to furnish certificates to accompany a finished product; only the finished product certifier must do this, pursuant to 16 CFR part 1110.

C. Subpart A—General Conditions and Requirements

1. Proposed § 1109.1—Scope

Proposed § 1109.1 would describe the scope of part 1109 as: ''applying to all tests of component parts of consumer products where the test results are used to support a certificate of compliance issued pursuant to section 14(a) of the CPSA or where the tests are otherwise required or permitted by section 14 of the CPSA.''

As stated earlier in our response to Comment 3 in section II.B of this preamble, we have revised § 1109.1 to clarify that component part manufacturers and suppliers may certify or test their component parts, but they are not required to do so. Parties who are not required to test finished products or to issue finished product certificates pursuant to 16 CFR part 1110 may also voluntarily test such finished products or issue finished product certificates.

Additionally, because the final rule extends to finished products, we have reorganized § 1109.1 to include finished products. As revised, § 1109.1(a) describes the overall scope of part 1109. Section 1109.1(b) clarifies that component part testing and certification and finished product testing and certification under part 1109 are voluntary. We also have added, on our own initiative, a new § 1109.1(c) to summarize the three subparts in part 1109, and we have revised the reference to section 14(d) of the CPSA to section 14(i) of the CPSA due to renumbering arising out of H.R. 2715.

2. Proposed § 1109.2—Purpose

Proposed § 1109.2 would discuss the rule's purpose, which is to set forth the conditions and requirements under which the Commission will require or accept the results of testing of component parts of consumer products, instead of the entire consumer product, to meet, in whole or in part, the testing and certification requirements of sections 14(a), 14(b), and 14(d) of the CPSA.

We received no comments related directly to the purpose of the proposed rule. As stated earlier in our response to Comment 1 in section II.B of this preamble, we revised the purpose in the final rule to incorporate the concept that a finished product certifier may rely upon finished product testing or certification from another party, in addition to component part testing or certification, to meet the testing and

certification requirements in sections 14(a) and 14(i) of the CPSA. Likewise, we removed the concept that a component part could be tested ''instead of the entire consumer product,'' as stated in the proposed rule because the final rule also allows a finished product certifier to rely on testing or certification of a finished product conducted by another party. On our own initiative, we removed the reference to section 14(b) of the CPSA in the last sentence, which now states that component part testing or finished product testing can be used to meet the testing and certification requirements of sections 14(a) and 14(i) of the CPSA. While nothing prohibits certifiers from using component part testing as part of a reasonable testing program, section 14(b) of the CPSA does not itself contain a certification or testing requirement. Section 14(b) of the CPSA allows the Commission to prescribe a reasonable testing program by rule. Elsewhere in this issue of the **Federal Register**, we have issued a final rule on ''Testing and Labeling Pertaining to Product Certification.'' The final rule on ''Testing and Labeling Pertaining to Product Certification'' reserves, rather than finalizes, provisions pertaining to a ''reasonable testing program.'' Thus, we removed the reference to section 14(b) of the CPSA. We also revised the reference to section 14(d) of the CPSA to cite section 14(i) of the CPSA throughout the rule as a result of renumbering arising out of H.R. 2715.

3. Proposed § 1109.3—Applicability

Proposed § 1109.3 would specify that the rule applies to all manufacturers, importers, or private labelers and to the manufacturers or suppliers of component parts that are responsible for: (1) Certifying products under section 14(a) of the CPSA or for continued compliance testing under section 14(d) of the CPSA; or (2) testing component parts of consumer products to support a certification of compliance under section 14(a) of the CPSA, or to comply with continuing testing requirements under section 14(d) of the CPSA.

We received no comments related directly to the applicability of the proposed rule. As stated earlier in our response to Comment 1 and Comment 3 in section II.B of this preamble, we revised, on our own initiative, the final rule to incorporate the concept that a finished product certifier may rely upon finished product testing or certification from another party and to clarify, as well, that component part testing is voluntary. We also simplified the final rule's language to establish more clearly that the rule applies to manufacturers and importers who are required to issue finished product certificates pursuant to 16 CFR part 1110, as well as to manufacturers and suppliers of component parts or finished products who are not required to certify products, but who choose voluntarily to undertake certification testing or issuing certificates. We revised the reference to section 14(d) of the CPSA to cite section 14(i) of the CPSA, as a result of renumbering arising out of H.R. 2715.

4. Proposed § 1109.4—Definitions

Proposed § 1109.4 would define various terms used in the rule.

a. Proposed § 1109.4(a)—Certifier

Proposed § 1109.4(a) would define a ''certifier'' as a firm that is either a finished product certifier or a component part certifier, as defined in the final rule.

We received no comments on the proposed definition. However, on our own initiative, we have made a nonsubstantive editorial change to replace the word ''firm'' with the word ''party.'' We made this change in several places in the rule to be consistent internally and to clarify that the term includes organizations and individuals.

b. Proposed § 1109.4(b)—Component Part

Proposed § 1109.4(b) would define a ''component part,'' in part, as ''any part of a consumer product, including a children's product, that either must or may be tested separately from a finished consumer product, to assess the consumer product's ability to comply with a specific rule, ban, standard, or regulation enforced by the CPSC.''

(Comment 4)—Some commenters suggested that the definition of ''component part'' should include raw materials. The commenters said that, in many cases, a supplier might use the same raw materials in different combinations to make various component parts. For example, a button manufacturer may use various combinations of five different colored dyes and one type of plastic to manufacture a hundred different colored buttons. If each raw material met the requirements of a chemical content rule, then any component manufactured from the materials also would comply.

(Response 4)—Raw materials, such as the colored dyes mentioned by the commenter, could be component parts if they meet the conditions in § 1109.5(a). However, if the compliance characteristics of raw materials could be affected adversely by subsequent processing or contamination, tests of the raw materials would not be suitable to show compliance of component parts made out of such raw materials. The language in the definition is broad enough to encompass raw materials as ''any part of a consumer product.'' Thus, we decline to amend the rule as suggested by the commenters.

However, on our own initiative, we have revised the definition of ''component part'' to clarify that the type of test performed on each part may vary, depending upon the applicable regulation. For example, each painted plasticized component part of a children's toy must be tested to the lead paint limit and the phthalate content limit, while painted wooden component parts of a children's toy would need to be tested to the lead paint limit only. The proposed definition would state, in part, that ''[w]ithin the same consumer product, which component parts will have to be tested may vary, depending on the test being conducted.'' We revised the sentence to state: ''[w]ithin the same consumer product, the component parts to be tested and the tests to be conducted may vary, depending on the applicable regulations and required test methods, if any.''

c. Proposed § 1109.4(c)—Component Part Certifier

Proposed § 1109.4(c) would define a ''component part certifier'' as: ''a firm that certifies component parts to be used in consumer products as complying with one or more rules, bans, standards, or regulations enforced by the CPSC pursuant to part 1109.''

We did not receive any comments about the definition. However, because the final rule allows a finished product certifier to rely on finished product testing or certification from another party, and it reemphasizes that testing and certification of component parts is voluntary, we revised the definition of ''component part certifier'' on our own initiative. The final rule clarifies that a ''component part certifier'' is a ''party who, although not required to do so pursuant to part 1110 of this chapter, voluntarily certifies the following as complying with one or more rules, bans, standards, or regulations enforced by the CPSC, consistent with the content requirements for certification in part 1110 of this chapter: (1) Component parts to be used in consumer products; or (2) finished products.''

d. Proposed § 1109.4(d)—CPSA

Proposed § 1109.4(d) would define ''CPSA'' to mean the Consumer Product Safety Act.

We received no comments on the definition, and we have finalized it without change.

e. Proposed § 1109.4(e)—CPSC

Proposed § 1109.4(e) would define ''CPSC'' to mean the Consumer Product Safety Commission.

We received no comments on the definition, and we have finalized it without change.

f. Proposed § 1109.4(f)—CPSIA

Proposed § 1109.4(f) would define ''CPSIA'' to mean the Consumer Product Safety Improvement Act of 2008.

We received no comments on the definition, and we have finalized it without change.

g. Proposed § 1109.4(g)—Due Care

Proposed § 1109.4(g) would define ''due care'' to mean ''the degree of care that a prudent and competent person engaged in the same line of business or endeavor would exercise under similar circumstances.''

We did not receive any comments about the definition of ''due care.'' On our own initiative, we have clarified the definition by adding one sentence. The new sentence states: ''[d]ue care does not permit willful ignorance.'' This is not intended to be a substantive change because any party who is willfully ignorant of material facts, by definition, would not be exercising due care. However, we wanted the final rule to emphasize that a party cannot, and should not, purposely avoid knowing a business partner's testing and certification practices to benefit from an exception contained in section 19(b) of the CPSA.

Section 19(b) of the CPSA provides that a person who holds a certificate issued in accordance with section 14(a) of the CPSA is not subject to the prohibitions in section 19(a)(1) of the CPSA (regarding distributing noncomplying products) and section 19(a)(2) of the CPSA (regarding distributing products subject to certain voluntary corrective actions, mandatory recall orders, or that are banned hazardous substances) unless such person knows that such consumer product does not conform. Even those who can take advantage of the exception in section 19(b) of the CPSA may still violate section 19(a)(6) of the CPSA if the products that are the subject of any certificate issued by that person, in fact, do not comply with the applicable standard(s) and such person, in the exercise of due care, would have reason to know that their certificate is false or misleading in any material respect. Certifiers and testing parties have an obligation to resolve known or knowable (in the exercise of due care) problems with testing or certification by another party before relying upon or passing on test reports or certifications.

h. Proposed § 1109.4(h)—Finished Product Certifier

Proposed § 1109.4(h) would define a ''finished product certifier'' as ''a firm responsible for certifying compliance of a consumer product with all applicable rules, bans, standards, and regulations pursuant to part 1110 of this chapter.''

We received no comments on this definition. However, on our own initiative, we made several minor changes. We replaced the word ''firm'' with ''party'' to be consistent internally within the rule and to clarify that the term includes organizations and individuals. We also added the word ''finished'' before ''consumer product'' to distinguish between voluntary component part certifiers and the requirement in 16 CFR part 1110 to certify finished products. This change arises out of the response to Comment 1 in section II.B of this preamble. Finally, we moved the phrase ''pursuant to part 1110 of this chapter'' from the end of the sentence and placed it after ''consumer product'' to clarify that the requirement to certify finished consumer products is contained in part 1110.

i. Proposed § 1109.4(i)—Identical in All Material Respects

Proposed § 1109.4(i) would define ''identical in all material respects'' to mean that ''there is no difference with respect to compliance to the applicable rules between the samples and the finished product.''

We received no comments on this definition. However, on our own initiative, we revised the definition to make several changes that correspond to the change in the final rule that allows a finished product certifier to rely on finished product testing or certification from another party, as discussed in response to Comment 1 in section II.B above. As revised, the definition states: ''identical in all material respects'' requires that there be no difference with respect to compliance to the applicable rules between the ''samples to be tested for compliance and the component part or finished product distributed in commerce.''

We also revised the phrase ''to the applicable rules'' with the phrase ''to the applicable rules, bans, standards, or regulations.'' The inclusion of ''bans, standards, or regulations'' reflects more accurately the language in section 14(a) of the CPSA. This is intended to be a nonsubstantive editorial change.

j. Proposed § 1109.4(j)—Paint

Proposed § 1109.4(j) would define ''paint'' to mean ''any type of surface coating that is subject to part 1303 of this chapter or section 4.3.5.2 of ASTM F 963.''

We received no comments on this definition. However, on our own initiative, we revised the reference to ASTM F 963 to read: ''ASTM F 963–08 (or any successor standard of section 4.3.5.2 of ASTM F 963–08 accepted by the Commission).'' This change clarifies that successor standards for ASTM F 963 will apply if the Commission accepts them, so that we will not need to update the rule upon adoption of successor standards to ASTM F 963.

k. Proposed § 1109.4(k)—Testing Party

Proposed § 1109.4(k) would define ''testing party'' to mean: ''the firm (including, but not limited to, domestic manufacturers, foreign manufacturers, importers, private labelers, third party conformity assessment bodies, or component part suppliers) who tests a consumer product, or any component part thereof, for compliance, in whole or in part, with any applicable rule, ban, standard, or regulation enforced by the CPSC.''

(Comment 5)—Some commenters noted that the definition of a ''testing party'' includes third party conformity assessment bodies. The commenters also noted that proposed § 1109.5(f)(4) (renumbered § 1109.5(g)(4) in the final rule) specifies that testing parties must provide documentation of the sampling protocols used to the finished product certifier. The commenters stated that third party conformity assessment bodies are responsible only for the samples submitted to them by suppliers or manufacturers and generally are not responsible for the sampling process. Therefore, the commenters stated that they cannot always provide sampling protocols to the certifier. The commenters suggested that we delete or modify the requirement that third party conformity assessment bodies provide documentation of the sampling protocols.

(Response 5)—The commenters are correct that the proposed definition of ''testing party'' would include a third party conformity assessment body who may not be involved in sample selection or the batch/lot identification of the product and may not be able to provide documentation of these steps. Therefore, we have revised the definition of ''testing party'' to encompass parties who procure testing, and we exclude

specifically from the definition testing laboratories and third party conformity assessment bodies. The definition also explains that ''procure'' means a party who either conducts testing themselves, when such testing is allowed, or arranges for another party to conduct testing. While they are not required to select samples, third party conformity assessment bodies and testing laboratories still must provide an attestation to a testing party or certifier who procures a test from them, which states that all testing was performed in compliance with applicable provisions of section 14 of the CPSA, and 16 CFR part 1107, or any more specific rules, bans, standards, or regulations. This requirement is in § 1109.5(g)(7).

l. Proposed § 1109.4(l)—Third Party Conformity Assessment Body

Proposed § 1109.4(l) would define ''third party conformity assessment body'' as: ''a third party conformity assessment body recognized by the CPSC to conduct certification testing on children's products.''

We received no comments on this definition. However, on our own initiative, we made several changes to the definition. First, we removed ''third party conformity assessment body'' in the definition's text because the phrase was not helpful. The revised definition states that a ''third party conformity assessment body'' means ''a testing laboratory whose accreditation has been accepted by the CPSC to conduct certification testing on children's products.'' This is a nonsubstantive change that is meant to clarify the definition.

We also added a new sentence to clarify that when the term ''third party conformity assessment body'' is used throughout the rule, we mean only those laboratories whose scope of accreditation includes the applicable required tests. Only such laboratories can be used to support certification of children's products pursuant to section 14(a) of the CPSA and to ensure continued compliance pursuant to section 14(i) of the CPSA. This change also is nonsubstantive and is meant to clarify the definition.

m. Proposed § 1109.4(m)—Traceable

Proposed § 1109.4(m) would define ''traceable'' to mean: ''the ability of a certifier to identify the source of a component part of a consumer product, including the name and address of the supplier of a component part and, if different, the manufacturer or the component part.''

(Comment 6)—Some commenters asked for clarification of component part traceability. Several commenters suggested that traceable means traceability to the part that was tested and not to the constituent components of that part. One commenter stated that it would be extremely difficult to track resin used in plastic parts and suggested deleting the traceability requirements. Another commenter stated that many component manufacturers are, in fact, assemblers of components received from other suppliers. The commenter recommended that the requirements for traceability extend through the supply chain to include the manufacturers of the subcomponents used in component parts.

(Response 6)—After consideration of all of the comments received on traceability, including Comments 12 through 14, discussed in section II.C.5.e of this preamble and in this comment, we amended the definition of ''traceability'' in the final rule to mean: ''the ability of a certifier to identify all testing parties of a component part of a consumer product or a finished product, including the name and address of each testing party and any party that conducted testing on the component part or finished product. Parties who conduct testing may include a manufacturer, a supplier, a testing laboratory, or a third party conformity assessment body.''

Traceability extends to the level at which a component part or finished product is tested for compliance to the applicable rule(s). For example, some component part suppliers make parts that may be used eventually in both children's and non-children's products, and a supplier does not necessarily know what the final use may be. This supplier may decide against conducting certification testing on its products. A distributor or subassembly fabricator who purchases such products, however, may procure third party testing to be able to sell the products to a children's product manufacturer. A finished product certifier who relies on test reports provided by such distributor or subassembly fabricator must be able to trace the component parts back to the party who had the parts tested for compliance.

If a subassembly was tested for compliance to a chemical standard (*e.g.,* lead or phthalates), the testing would have to show that each subcomponent of the subassembly met the required concentration limits. The traceability requirement would extend to the subassembly and not to the supplier of each subcomponent. If the certificate for a subassembly is based on test reports or certificates of subcomponents (such as resin and other constituents), the traceability extends to the subcomponents. We decline to delete traceability requirements from the final rule because the concept of traceability arises out of section 14(g)(1) of the CPSA and because traceability provides the ability to determine where in the testing and certification process, errors occurred that allowed the certification of noncomplying products.

On our own initiative, we also revised the definition to include the concept that a certifier can rely on both component part testing and finished product testing conducted by another party. This change arises out of the response to Comment 1 in section II.B.1 of this preamble.

n. Additional Definitions Suggested by Commenters

(Comment 7)—One commenter suggested that we add several definitions to § 1109.4 to clarify which inks are subject to 16 CFR 1303.2 (b)(2) and, therefore, could be subject to § 1109.11 (component part testing for paint). The commenter suggested the following definitions:

Ink: a pigmented, liquid or paste used for printing on children's products.

Base Colors: A range of stock colors with which, by intermixing in prescribed combination and amounts, an ink mixer can obtain a wide range of tints, tones, shadings, and intermediate hues.

Scrapeable: Ink products that do not bond with the substrate and can be removed from the substrate without causing undue harm or damage to the underlying substrate. These inks are subject to the provisions of part 1303 of this chapter.

Unscrapeable: Ink products that bond with the substrate and cannot be removed from the underlying substrate. Unscrapeable inks are not subject to the provisions of part 1303 of this chapter.

(Response 7)—Pursuant to section 14(i)(5)(A)(i) of the CPSA, as amended by H.R. 2715, third party certification testing no longer applies to ordinary books or to ordinary paper-based printed materials. The exception does not apply to books or other printed materials that contain components that are printed on material other than paper or cardboard, non-paper components like metal or plastic parts, or to accessories that are not part of the binding and finishing materials. The exception also does not apply to books with inherent play value, books designed or intended for a child 3 years of age or younger, and does not include any toy or other article that is not a book that is sold or packaged with an ordinary book.

Given the exception created by H.R. 2715, we do not have to consider the commenter's suggestion regarding inks

used in ordinary books. With regard to the non-excepted products and inks applied to other substrates, we decline to revise the rule as suggested by the commenter. Our existing regulation defines paint and other similar surface-coating materials to be:

> A fluid, semi-fluid, or other material, with or without a suspension of finely divided coloring matter, which changes to a solid film when a thin layer is applied to metal, wood, stone, paper, leather, cloth, plastic, or other surface. This term does not include printing inks or those materials which actually becomes part of the substrate, such as the pigment in a plastic article, or those materials which are actually bonded to the substrate, such as by electroplating or ceramic glazing.

16 CFR 1303.2(b)(1). Therefore, inks that are not printing inks or that do not actually become part of the substrate would be considered to be paints or other similar surface coatings. These inks could be tested or certified according to § 1109.11. Although not covered by § 1109.11, component part testing or certification can be used with printing inks and inks that actually become part of the substrate if § 1109.5 is met. For example, if an ink is manufactured wholly from a combination of different base colors, and each base color is tested and found to be compliant with the lead content requirements, then the finished ink can be certified based on the testing of the base colors.

In conducting component part testing on printing inks or inks that do become part of the substrate, testing parties and certifiers should ensure that the tests are applicable to the form in which the ink will be in the finished product. For example, if there are volatile components in the ink that will evaporate during the manufacturing process, the volatile components should not be considered in calculating the lead concentration.

We also note that we have made a determination that CMYK process printing inks (excluding spot colors, other inks that are not used in CMYK process, inks that do not become part of the substrate under 16 CFR part 1303, and inks used in after-treatment applications, including screen prints, transfers, decals, or other prints) inherently do not contain lead in excess of the allowed limits and are excluded from the testing requirements of the CPSIA (16 CFR § 1500.91(d)(6)).

5. Proposed § 1109.5—Conditions and Requirements Generally

Proposed § 1109.5 would set out conditions and requirements that apply generally to all types of component part testing and certification, as well as to finished product testing and certification by another party.

a. Proposed § 1109.5(a)—Component Part Testing Allowed

Proposed § 1109.5(a) would allow certification of a consumer product with all applicable rules, bans, standards, and regulations as required by section 14(a) of the CPSA, and may be used to ensure continued compliance of children's products pursuant to section 14(d) of the CPSA, based, in whole or in part, on testing of a component part of the consumer product conducted by the certifier or a testing party if several requirements are met.

We received no comments specifically on proposed § 1109.5(a). However, we have finalized this section with several changes arising out of the response to Comment 3 in section II.B above. Comment 3 requested that we clarify that component part testing by suppliers is voluntary. We agree. Consistent with this fact, on our own initiative, we added a new opening sentence to § 1109.5(a), clarifying that component part testing is not only voluntary, any party can conduct such testing: ''[A]ny party, including a component part manufacturer, a component part supplier, a component part certifier, or a finished product certifier, may procure component part testing, as long as it complies with the requirements in this section and subparts B and C of this part.'' The list of parties in this sentence is intended to be illustrative and not exhaustive. On our own initiative, we also clarified that a finished product certifier can rely on either passing component part test reports or certification of one or more component parts of a consumer product, to serve as the basis for issuing a finished product certificate, if the requirements in section (a) are met. Finally, we revised the reference to section 14(d) of the CPSA to cite section 14(i) of the CPSA as a result of renumbering arising out of H.R. 2715.

(1) Proposed § 1109.5(a)(1)

Proposed § 1105.5(a)(1) would state that finished product certifiers may rely on testing of a component part of a consumer product only where testing of the component part is required or sufficient to assess the consumer product's compliance, in whole or in part, with an applicable rule, ban, standard, or regulation. For example, section 101 of the CPSIA requires testing an accessible component part of a children's product for lead content because the lead content requirement is measured per part. On the other hand, testing a component part of a consumer product for compliance with the small parts requirements of 16 CFR part 1501 will rarely, if ever, be appropriate, because the test procedure described at 16 CFR 1501.4 generally requires that the finished product be tested to determine whether small parts can be detached during the use or abuse test of the finished product. Proposed § 1109.5(a)(1) also would specify that any doubts about whether testing one or more component parts of a consumer product can help to assess whether the finished product complies with applicable rules, bans, standards, and regulations should be resolved in favor of testing the finished product.

We received no comments on this provision. However, on our own initiative, we have revised § 1109.5(a)(1) by making several minor changes. We replaced the phrase ''can help'' in the second sentence with the phrase ''is sufficient,'' to be consistent with the first sentence that establishes when component part testing can be used; this change also reflects more accurately our expectation of when component part testing is appropriate. Throughout the final rule, we also changed any references to the ''entire product'' to refer instead to the ''finished product'' to be consistent with the wording used to describe a product ready for distribution to consumers.

(2) Proposed § 1109.5(a)(2)

Proposed § 1109.5(a)(2) would require that the component part that is tested be identical in all material respects to the component used in the finished consumer product. Under this section, to be identical in all material respects to a component part for purposes of supporting certification of a children's product, means a sample need not necessarily be of the same size, shape, or finish condition (such as polished, deburred, *etc.*) as the component part of the finished product; rather, the sample may consist of any quantity that is sufficient for testing purposes and may be in any form that has the same content as the component part of the finished product. Proposed § 1109.5(a)(2) also would state that manufacturers must exercise due care in the proper management and control of all raw materials, component parts, subassemblies, and finished goods for any factor that could affect the finished product's compliance with all applicable rules. The manufacturer must exercise due care that the manufacturing process does not add a prohibited chemical from an untested source, such as the material hopper, regrind equipment, or other equipment used in

the assembly of the finished product. Proposed § 1109.4(g) would define ''due care'' to mean the degree of care that a prudent and competent person engaged in the same line of business or endeavor would exercise under similar circumstances.

(Comment 8)—Multiple commenters expressed concern that a finished product certifier would not be able to ensure that a tested component part was not changed or degraded after testing in a way that could affect compliance. One commenter wrote: ''[i]t is beyond the importer's ability to reach back into the supplier's and sub-supplier's manufacturing and transport processes to detect whether there was a substitution or a material change in a component.'' Another commenter wrote: ''[t]o take advantage of this rule, a manufacturer must take responsibility at the sub-micro-level for manufacturing quality.''

Several commenters requested that the final rule state that the finished product certifier must ''attest that due care was taken'' to ensure that no action subsequent to component part testing changed or degraded the product, rather than require the finished product certifier to ''certify'' that no action was taken subsequent to component part testing that changed or degraded the product. The commenter asserted that this change should be made because a finished product certifier does not have control over the actions of other parties after testing occurs. One commenter noted that the due care requirement applies only to a few specific provisions of the proposed rule, such as proposed § 1109.5(h)(1) (renumbered to § 1109.5(i)(1) in the final rule), which pertains to reliance by finished product certifiers on a component part certificate or a component part test result. The commenter suggested that the due care standard generally should be applicable to all elements of the proposed rule so that manufacturers will not be left to wonder whether more than their exercise of reasonable judgment and practice, based upon their manufacturing experience and sound knowledge of the product, is required for those aspects of the rule that do not reference explicitly the due care standard.

One commenter quoted the following statement from the proposal: ''[t]he manufacturer must exercise due care that the manufacturing process does not add a prohibited chemical from an untested source, such as the material hopper, regrind equipment, or other equipment used in the assembly of the finished product.'' The commenter went on to state: ''[o]ur company has several hundred vendors producing thousands of SKUs—do you honestly believe we could possibly manage how all these independent companies wash out their molding machines or manage their regrinding operations?''

(Response 8)—We agree that finished product certifiers cannot always attest that no action was taken subsequent to component part testing that could affect compliance adversely. In a practical sense, all the finished product certifier can do to ensure the continued compliance of the component part is to exercise due care toward that end. Accordingly, we revised the rule to ensure that after a product is tested, certifiers and testing parties who are in custody of the product or component part, exercise due care to prevent contamination or degradation of the component parts or finished products to which the testing applies.

First, we moved the last three sentences of proposed § 1109.5(a)(2) into a new § 1109.5(b), now called *Test result integrity.* Sections 1109.5(b)(1) through (b)(3) of the final rule track the last three sentences in proposed § 1109.5(a)(2), with some modifications. In the proposed rule, each of the last three sentences in § 1109.5(a)(2) would refer to different entities, *i.e.,* ''[a] certifier,'' ''[m]anufacturers of finished consumer products,'' and ''[t]he manufacturer.'' Use of these varying terms may be confusing to stakeholders, and they do not convey accurately that we intend all of these provisions to apply to both testing parties and certifiers. Thus, on our own initiative, we added an opening sentence to § 1109.5(b) to clarify that the provisions in (b)(1) through (b)(3) apply to both certifiers and testing parties. Moreover, to address the commenters' concern that certifiers will not always have knowledge or control over the actions of other parties, we added that the requirements apply only while a component part or finished product is in each party's custody. Finally, the opening sentence in § 1109.5(b) provides that it applies to both component parts and finished products, to incorporate the concept that a finished product certifier also can rely on finished product testing or certification from another party, as set forth in section II.B.1, above.

Second, to maintain test result integrity in the supply stream, we added a new attestation to § 1109.5(g)(10), as suggested by the commenters. This section requires certifiers and testing parties to attest to the exercise of due care to ensure compliance with the requirements set forth in the revised § 1109.5(b) on *Test result integrity.*

With respect to the commenter's suggestion that the due care standard be applied to all elements of the proposed rule, we assume that prudence and competence will be exercised by all parties involved in component part testing and certification. Due care in the context of this rule, as explained in § 1109.4(g) of the final rule, ''means the degree of care that a prudent and competent person engaged in the same line of business or endeavor would exercise under similar circumstances. Due care does not permit willful ignorance.'' Due care is stressed in sections where a certifier relies on component part or finished product test reports or certificates supplied by another party, and in sections that ensure that a product is not altered in a manner that could affect compliance, such as contamination or degradation, after certification testing.

With respect to the commenter with several hundred vendors producing thousands of SKUs, it would not be necessary for the finished product certifier to know ''how all these independent companies wash out their molding machines or manage their regrinding operations.'' If these vendor companies are providing component part or finished product testing reports or certificates, they will have attested that due care has been taken to ensure that actions subsequent to component part testing have not adversely affected the part. A finished product certifier should receive and review such attestations. Moreover, a finished product certifier may rely upon test reports or component part certificates from another party, provided that such certifier exercises the degree of care that a prudent and competent person in the same line of business would exercise in accepting their validity and is not being willfully ignorant of information suggesting that a supplier is providing noncompliant products, invalid test reports, or falsified certifications. If the importer is unwilling to assume this burden of exercising due care, it can always decide to procure third party testing of children's products from a third party conformity assessment body whose accreditation has been accepted by the CPSC, as set forth in 16 CFR part 1107, because this is a voluntary rule.

We did not receive any comments related to the first two sentences in proposed § 1109.5(a)(2) on samples for component part testing. Section 1109.5(a)(2) has been finalized with these first two sentences only, in order to focus on the sample selection requirements for component part testing. We made several minor editorial changes. We moved the phrase ''in all

material respects'' from the end of the first sentence and placed it in the middle of the sentence, to clarify that the sample must be ''identical in all material respects,'' as defined in § 1109.4(i). We also removed the phrase ''to the applicable content limit'' from the second sentence because it was unnecessary and because testing component parts, depending on the product, may involve testing something other than a content limit.

As set forth in response to Comment 8 immediately above, the remaining requirements in proposed § 1109.5(a)(2), regarding ensuring that a component part is not contaminated or degraded after testing but prior to distribution, have been renumbered to § 1109.5(b) in the final rule. Aside from the changes outlined in response to Comment 8, sections 1109.5(b)(1) and (b)(2) of the final rule have been finalized from the last two sentences in proposed § 1109.5(a)(2) with minor editorial changes. For example, on our own initiative, we revised the phrase ''finished goods'' in § 1109.5(b)(1) to ''finished products'' to avoid introducing a new term and to use consistent language throughout the final rule.

Similarly, on our own initiative, we revised the language in § 1109.5(b)(2) of the final rule. We replaced proposed language requiring the exercise of due care to ensure that ''the manufacturing process does not add a prohibited chemical from an untested source * * *'' with language in the final rule stating that ''the manufacturing process does not add or result in a prohibited level of a chemical from any source * * *.'' This revision clarifies that the rule covers actively adding a chemical to a product to create a noncompliance, as well as passive addition of a prohibited chemical arising out of the manufacturing process, regardless of whether the source is tested or untested. For example, passive contamination could occur if a product is manufactured in close proximity to another product or component, where lead paint that exceeds the allowed lead content limit is being sprayed. This circumstance may allow a children's product to become contaminated with the lead paint. Another scenario may arise where the ink or paint being applied to children's clothing meets the lead paint standard, but the stamps or screens used to apply the paint result in an unallowable amount of lead being transferred to the children's product.

Finally, we renumbered the third sentence in proposed § 1109.5(a)(2) to § 1109.5(b)(3) in the final rule and made one modification. On our own initiative, we revised the phrase: ''no change * * * after testing'' and replaced it with the phrase: ''[n]o action or inaction subsequent to testing,'' to clarify that the regulation covers circumstances that involve passive actions, such as storage of consumer products or components, as well as affirmative actions taken by a testing party or certifier.

b. Proposed § 1109.5(b)—Limitation

Under proposed § 1109.5(b) (renumbered to § 1109.5(c) in the final rule), a finished product certifier would not be able to rely on testing of a component part of a consumer product for any rule, ban, standard, or regulation that requires testing the entire consumer product to assess compliance.

We received no comments on this provision, but have renumbered it as § 1109.5(c) in the final rule. On our own initiative, we have rephrased this limitation to state that a certifier ''must not use tests of a component part of a consumer product for any rule, ban, standard, or regulation that requires testing the finished product to assess compliance with that rule, ban, standard, or regulation.'' This change is intended to clarify the limitation.

c. Proposed § 1109.5(c)—Test Method and Sampling Protocol

Proposed § 1109.5(c) (renumbered to § 1109.5(d) in the final rule) would require that regardless of which entity performs component part testing or selects samples for component part testing, both certifiers and testing parties must ensure that the required test methods and sampling protocols, as set forth in part 1107, as well as any more specific applicable rules, bans, standards, regulations, or testing protocols, are used to assess the compliance of the component part.

(Comment 9)—Several commenters requested clarification of proposed § 1109.5(c) (renumbered to § 1109.5(d) in the final rule). One commenter stated that the provision that ''certifiers and testing parties must ensure that the required test methods and sampling protocols, as set forth in part 1107, * * * are used to assess compliance of the component part,'' could be read as charging testing parties with ensuring that certifiers comply with the provisions * * *.'' This commenter stated that it assumes this is not the Commission's intention. It requested clarification and suggested replacing ''both certifiers and testing parties'' with ''certifiers.''

One commenter suggested adding: ''(and, as to test methods for tests they conduct, testing parties).'' One commenter observed that the proposed rule ''appears to clearly provide that the certifying party, including a finished product certifier, must fulfill all the requirements of Section 1107 in sampling and testing of the certified component.'' The commenter requested that the rule address more specifically issues particular to component parts, such as how requirements for periodic testing and random sampling are to be applied in the context of components or raw material inputs.

(Response 9)—We did not intend that testing parties ensure that finished product certifiers comply with proposed § 1109.5(c). Accordingly, we have clarified the final rule to reflect that when either party, a certifier or a testing party, procures a test, each is responsible for exercising due care to ensure that any required sampling protocols are followed, that the test is conducted using the required test method, if any, and that all other applicable requirements in section 1107, or any other more specific rule, ban, standard, or regulation, are met. We also incorporated the concept that a testing party or certifier may be testing or certifying either a finished product or a component part. Further, the concept of ''due care'' is incorporated into this provision, in recognition of the fact that, for children's products, certification testing must be performed by a third party conformity assessment body. Testing parties and certifiers should use due care to ensure that the third party conformity assessment body follows all applicable test methods.

A component part supplier who manufactures and certifies a component part for a children's product is subject to periodic testing and any sampling protocols that may be defined in 16 CFR part 1107, or any more specific rule, standard, ban, or regulation. Finished product certifiers who purchase the component part from a supplier who does not certify or test the component part, must sample and test the batch or lot of the supplied component, or submit samples of the finished products in which the components are used, for testing for compliance with all applicable safety rules, in accordance with 16 CFR part 1107.

(Comment 10)—One commenter stated that the definitions and the requirements imposed on a component part certifier and a testing party regarding their testing and reporting duties appear to be the same. The commenter concluded that the only significant difference between a component part certifier and a testing party appears to be that a certifier assumes legal liability under the law, and a testing party does not. The

commenter asked: (1) What additional benefits would component part certifiers expect to receive for taking on the additional liabilities; and (2) what kinds of enforcement actions, if any, would a testing party be subject to if it failed to comply with the reporting and recordkeeping requirements described in the proposed rules? The commenter suggested that the rule define more specifically and differentiate clearly the roles and duties of these two parties.

(Response 10)—The commenter is correct that the testing and reporting duties of component part certifiers and testing parties in the proposal were similar. This is because either a component part certificate or a test report from a testing party can serve as the basis for a finished product certificate. As the commenter noted, however, a person who elects to be a component part certifier, thereby assumes the responsibilities of a manufacturer under 16 CFR part 1107. These responsibilities include: Third party certification testing, third party periodic testing, and recordkeeping. A party may choose to assume these responsibilities in the hope of increasing sales to customers who desire to have their component parts certified. Also, some customers may insist on certification of such parts, as a condition of buying the party's products.

As to the commenter's second question, component part testing and certification are voluntary. However, any party who undertakes such testing or certification, and who fails to comply with an obligation imposed by part 1109, has committed a prohibited act under section 19(a)(6) of the CPSA and may be subject to civil or criminal penalties, pursuant to sections 20 and 21 of the CPSA.

(Comment 11)—One commenter stated that it would be useful for the CPSC to specify what aspects of the reasonable testing program under 16 CFR part 1107 are required of a component part testing party. The commenter stated that proposed § 1109.5(c) (renumbered to § 1109.5(d) in the final rule) seems to require a testing party to maintain all aspects of a reasonable testing program, including the recordkeeping and reporting requirements. Part 1109, however, has its own recordkeeping requirements for testing parties, as well as its own disclosure/reporting requirements.

(Response 11)—The final rule on ''Testing and Labeling Pertaining to Product Certification,'' published elsewhere in this **Federal Register,** reserves, rather than finalizes, the section on a reasonable testing program [2]. Regardless, even under the proposed rule, component part suppliers would not be required to test their products, and therefore would not need a reasonable testing program. With regard to children's products, component part suppliers who choose to become component part testing parties or component part certifiers, must follow testing standards and protocols under part 1107, as well as any more specific rules that apply to the products manufactured. For example, under part 1107, a component part testing party who procures periodic testing may rely on a production testing plan to increase the maximum amount of time between required third party tests to meet the continued compliance provision of section 14(i) of the CPSA. Moreover, testing parties must provide the documentation listed in § 1109.5(g) of the final rule to a certifier relying on such documentation as the basis for issuing a certificate.

In addition to the changes discussed in response to comment 9, on our own initiative we made several formatting and editorial changes to § 1109.5(d) intended to clarify the rule. We altered the format to separate out the requirements related to test methods and sampling protocols into three numbered paragraphs. The proposed rule had contained the concepts in the three paragraphs, but had organized them differently. In § 1109.5(d)(3), we added language to include the concept that testing and certification of both component parts and finished products under this part 1109 rule must follow all applicable requirements in part 1107 of this chapter, as well as section 14 of the CPSA, and any more specific rule, ban, standard, or regulation. Finally, we removed the phrase ''testing protocols'' from § 1109.5(d)(3) because it is duplicative of the requirement to use applicable test methods, if any, presented in § 1109.5(d)(1).

d. Proposed § 1109.5(d)—Timing

Proposed § 1109.5(d) (renumbered to § 1109.5(e) in the final rule) would state that, subject to any more specific rule, ban, standard, or regulation, component part testing may occur before final assembly of a consumer product provided that nothing in the final assembly of the consumer product can cause the component part or the consumer product to become noncompliant.

We received no comments about this section of the proposed rule, and have finalized with it with one editorial change, the addition of a comma after the word ''product.'' Also, we renumbered this section in the final rule to § 1109.5(e).

e. Proposed § 1109.5(e)—Traceability

Proposed § 1109.5(e) (renumbered to § 1109.5(f) in the final rule) would specify that finished product certifiers may not rely on component part testing conducted by another testing party unless such component parts are traceable.

(Comment 12)—One commenter noted that finished product manufacturers may receive discrete component part shipments that may be commingled with similar components from other sources ordered at different times. Since component parts generally do not carry identifying manufacturing data, the commenter said the traceability requirement will be understood better if they specifically include instructions to maintain inventories to avoid commingling component parts from different sources or even commingled component parts ordered from the same source at different times. The commenter stated that commingling can threaten the integrity of component testing as a viable alternative testing procedure and that mixing a batch of noncompliant component parts with a batch of compliant component parts contaminates the entire lot without any way to sort them out again. The commenter stated that we could discourage this by requiring finished product manufacturers to manage their component part inventories in ways that will avoid the use of commingled lots in a single finished production lot.

(Response 12)—Section 1109.5(f) of the final rule (renumbered from proposed § 1109.5(e)) states: ''[a] certifier must not rely on component part and/or finished product testing procured by a testing party or another certifier unless such component parts or finished products are traceable.'' This provision addresses the commenter's concerns. The final rule defines traceability as: ''the ability of a certifier to identify all testing parties of a component part of a consumer product or a finished product, including the name and address of each testing party and any party that conducted testing on the component part or finished product. Parties who conduct testing may include a manufacturer, a supplier, a

[2] It should be noted that although we are not implementing requirements for a reasonable testing program for non-children's products, manufacturers of non-children's products that are subject to a product safety rule, ban, standard, or regulation are still obligated by the CPSA, as amended by the CPSIA, to certify that their products comply with all applicable safety rules based on a test of each product or a reasonable testing program.

testing laboratory, or a third party conformity assessment body.'' Accordingly, finished product certifiers who rely on certified component parts from another party must ensure that the component parts are traceable to the party who had the component parts tested for compliance. This requirement means that indistinguishable tested or certified component parts covered by different test reports or certificates should not be comingled. Further, § 1109.5(b)(1) requires that all testing parties and certifiers exercise due care to ensure ''[p]roper management and control of all raw materials, component parts, subassemblies, and finished products is established and maintained for any factor that could affect the finished product's compliance with all applicable rules.'' Although § 1109.5 does not address expressly comingling, comingling component parts can adversely affect the traceability of the component parts of the finished product. Comingling is not allowed if traceability is lost. The final rule gives manufacturers the flexibility to manage inventories in a manner that suits them, as long as compliance is established and maintained.

With respect to the commenter's concern about comingling lots from the same manufacturer that might have been received at different times, if the component part supplier has not identified a shipment as belonging to a previously tested or certified lot or batch, then the finished product manufacturer should not comingle the lots. This is because the finished product manufacturer does not know if the component part supplier has made a material change in the component part after the previous lot was received, and so the finished product manufacturer should conduct certification tests on the new lot (or submit samples of all finished products in which the component part is used for testing for compliance with all applicable safety rules). Alternatively, if the component part supplier has certified or provided testing data on the component part, the component parts could be comingled, as long as the same certificate or testing data covered both batches.

(Comment 13)—One commenter said that the rule should allow a finished product certifier to issue a single certificate covering a set of related products that may be composed of various combinations of a set of component parts. The commenter said that each of the various products covered by the certificate may not necessarily include every component part. The commenter suggested that the rule allow flexibility for a certificate to be over inclusive of the component parts (and component part certifications) that may be used on that actual product, as long as all component parts in a product are covered by at least one of the certifications, and all other conditions of the rule are met.

(Response 13)—If traceability is not maintained between the final products and their constituent component parts, this practice would not be allowed under the rule. For example, if multiple suppliers provide identical component parts, only one of which is included in the final product, traceability is not maintained to a testing party of a component part found to be noncompliant. However, if multiple suppliers provide distinct component parts, and not every component part is included in the final product, traceability to a component part's testing party can be maintained, and that circumstance is allowed. The traceability requirements in the final rule allow manufacturers and the CPSC to trace testing and certification problems back to the party that had the product tested for compliance. Also, such requirements may help manufacturers identify products that are noncompliant, should a recall become necessary.

The final rule does not contain any requirements regarding the content of certificates. Certificate content requirements are set forth in 16 CFR part 1110, which currently does not require a finished product certificate to list component parts.

(Comment 14)—One commenter suggested that the traceability provisions allow for flexibility, where there may be multiple sources for a single component, but each source is certified independently and listed separately on the certificate. Thus, for a particular product covered by the certificate, a single component may be from Source A, Source B, or Source C, but the components from all three sources have been certified and all are listed on the finished product certificate.

(Response 14)—The final rule does not contain a requirement to list component parts on a certificate. The regulation on certificate contents, 16 CFR part 1110, also does not require a certificate to list component parts. The final rule requires that each component part ultimately can be traced to the party who had the component part tested. Thus, documentation that merely contains the names of various suppliers, without sufficient information to determine which testing party or certifier procured certification testing on each component part, would not comply with the traceability requirement in the final rule.

However, on our own initiative, we finalized § 1109.5(f) with several changes. The final requirement states: ''[a] certifier must not rely on component part and/or finished product testing procured by a testing party or another certifier unless such component parts or finished products are traceable.'' We added the phrase ''finished product'' in two places to incorporate fully the concept that a finished product certifier may rely on finished product testing or certification from another party, as long as the finished product is traceable. This change arises out of our response to Comment 1 in section II.B.1 of this preamble. Additionally, we clarified that certifiers can rely on testing or certification from both testing parties and certifiers. The proposed rule would have used only the term ''testing party.'' Because certifiers can also be testing parties, we included both terms in the final rule to prevent any confusion. Finally, we made one editorial change, replacing the word ''conducted'' with the word ''procured'' to be consistent with use of these terms in the definition of ''testing party'' in § 1109.4(k).

f. Proposed § 1109.5(f)—Documentation by Testing Party

Proposed § 1109.5(f) (renumbered to § 1109.5(g) in the final rule) would require testing parties who are not certifying a component part themselves to provide the following documentation to the component part certifier, either in hard copy or electronically:

(1) Identification or a description of the component part tested;

(2) Identification of a lot or batch number for which the testing applies;

(3) Identification of the applicable rules, bans, standards, and regulations for which each component part was tested;

(4) Identification or a description of the testing methods and sampling protocols used;

(5) The date or date range when the component part was tested;

(6) The results of each test on a component part; and

(7) If the product was tested by a third party conformity assessment body, regardless of whether such third party testing was required because the product is a children's product or whether the testing party chose to use such third party conformity assessment body, identification of such conformity assessment body, a copy of the original test results, and a certification that all testing was performed in compliance

with section 14 of the CPSA and proposed part 1107 of this title.

The preamble to the proposed rule explained that the information listed is needed so that, if noncomplying products are found, we can use this information to determine whether a finished product certifier, component part certifier, or third party conformity assessment body is not complying with the appropriate requirements. (75 FR 28210)

(1) Proposed § 1109.5(f)(1)

On our own initiative, we finalized proposed § 1109.5(f)(1) (renumbered to § 1109.5(g)(1) in the final rule) with one change to include the concept that a testing party or certifier may test or certify both component parts and finished products, as explained in response to Comment 1 in section II.B.1 of this preamble.

(2) Proposed § 1109.5(f)(2)

(Comment 15)—Some commenters took exception to proposed § 1109.5(f)(2) (renumbered to § 1109.5(g)(2) in the final rule), which would require identification by lot or batch numbers. One commenter noted that, for ink systems, lot and batch numbers are assigned each time a color is mixed, which could amount to a large number of tests per year, depending upon production schedules. The commenter recommended that for printing ink systems, ink manufacturers should be allowed to group-test, and certify ''product families'' for component testing because product families represent the same ''core formula.'' The commenter added that certification of any given component should be allowed, as long as the formula, composition, and manufacturing process does not change. The commenter remarked that the date or date range of when a component part is tested serves the same purpose as a batch or lot number, and thus, suggested that identification by lot or batch numbers be deleted from the final rule.

Another commenter suggested that identification of a lot or batch number should be understood to allow a component part certificate to apply to all of the same materials (rather than a lot or batch) from a supplier, unless and until a material change in the tested materials requires further testing. The commenter noted that the certification would represent the product line as produced by the manufacturer, rather than just the units produced for a particular lot or batch.

(Response 15)—The intent of the proposed requirement to identify the lot or batch number for which the testing applies was to allow for the identification of the particular set of component parts to which the testing applies. The commenters pointed out correctly that this may be done in ways other than by lot or batch numbers. Accordingly, we changed § 1109.5(g)(2) of the final rule to require documentation of ''a lot or batch number, or other sufficient information to enable the identification of the component parts or finished products to which the testing applies.'' This information could include, but would not be limited to, lot or batch numbers, a production date range, or a particular shipment or purchase.

Pursuant to section 14(i)(5)(A)(i) of the CPSA, as amended by H.R. 2715, third party certification testing no longer applies to ordinary books or to ordinary paper–based printed materials. The exception does not apply to non-paper components like metal or plastic parts, or to accessories that are not part of the binding and finishing materials. The exception also does not apply to books with inherent play value, books designed or intended for a child 3 years of age or younger, and does not include any toy or other article that is not a book that is sold or packaged with an ordinary book. Thus, it is unnecessary for us to address this comment as it relates to inks used in ordinary books because, as a result of H.R. 2715, ordinary books do not need to be component part tested for certification purposes. With regard to the non-excepted products and inks applied to other substrates, inks may be certified based upon tests of their component parts that show that any combination of the component parts will meet all applicable requirements, provided that no material change has occurred in the component parts since they were tested. This aspect of component part testing should allow the commenter to certify ''product families'' or ''core formulas.''

We disagree that the date of testing, or the date range over which testing is conducted, always will have a logical relationship to identification of the products to which the testing applies, as required by § 1109.5(g)(2). For example, a manufacturer could have many different types of component parts tested on the same date. A date or date range may be insufficient to identify each component part tested. However, for those products where the date of testing or the date range over which testing was conducted is the same as ''other sufficient information to enable the identification of the component parts or finished products to which the testing applies,'' such date information can be used to meet the requirement of § 1109.5(g)(2).

(3) Proposed § 1109.5(f)(3)

On our own initiative, we finalized proposed § 1109.5(f)(3) (renumbered to § 1109.5(g)(3) in the final rule) with a revision incorporating the concept that a testing party or certifier may test both component parts and finished products, as explained in response to Comment 1 in section II.B.1 of this preamble.

(4) Proposed § 1109.5(f)(4)

We finalized proposed § 1109.5(f)(4) (renumbered to § 1109.5(g)(4) in the final rule) with a minor editorial revision. On our own initiative, we changed the words ''method'' and ''protocol'' to be plural because products and parts may be tested for more than one standard.

(5) Proposed § 1109.5(f)(5)

On our own initiative, we finalized proposed § 1109.5(f)(5) (renumbered to § 1109.5(g)(5) in the final rule) with a revision incorporating the concept that both component parts and finished products may be tested, as explained in response to Comment 1 in section II.B.1 of this preamble.

(6) Proposed § 1109.5(f)(6)

We finalized proposed § 1109.5(f)(6) (renumbered to § 1109.5(g)(6) in the final rule) with several changes. We broadened the rule to include finished products, as discussed in response to Comment 1 in section II.B.1 of this preamble. On our own initiative, we clarified that the Commission expects certifiers and testing parties to provide both the test results and the test values, if any, to a certifier who intends to rely upon such tests to certify a component part or finished product.

(7) Proposed § 1109.5(f)(7)

(Comment 16)—One commenter suggested that the terminology in proposed § 1109.5(f)(7) refer to ''all testing of component parts by that body,'' instead of ''all testing,'' to emphasize that the manufacturer, and not the testing laboratory, is responsible for obtaining samples that are identical in all material respects to the components used in the finished product.

(Response 16)—The issue raised by this commenter affects proposed § 1109.5(c), and 1109.5(f)(7) (renumbered to §§ 1109.5(d) and 1109.5(g)(7), respectively, in the final rule). The commenter is correct that, unless parties contract otherwise, a third party conformity assessment body is not responsible for the selection of

samples. Accordingly, we have revised the final rule to relieve testing laboratories of any responsibility under either of these sections, by redefining a testing party to exclude testing laboratories and third party conformity assessment bodies in § 1109.4(k). *See* section II.C.4.k in this preamble. In addition, we have revised § 1109.5(g)(7) to incorporate the commenter's suggestion to clarify who has the responsibility to attest to compliance with 16 CFR part 1107. The final rule states that the attestation is by ''the party conducting the testing,'' meaning the third party conformity assessment body, in the case of a children's product.

Furthermore, on our own initiative, we streamlined the requirement by deleting the following text: ''regardless of whether it was required because the product is a children's product or whether the testing party chose to use such third party conformity assessment body, identification of such third party conformity assessment body. * * * Removal of this text is editorial, and it is not intended to be a substantive amendment. It remains true that identification of the party conducting the testing is required, regardless of the reason for using a particular type of testing laboratory, including a third party conformity assessment body. We also removed the requirement for original test results in this section on our own initiative because test results are already discussed in § 1109.5(g)(6). Finally, we broadened the rule to include finished products, as discussed in response to Comment 1 in section II.B.1 of this preamble.

(Comment 17)—Another commenter stated that proposed § 1109.5(f)(7) seems to require a testing party to ''certify'' that third party testing results meet the requirements of section 14 of the CPSA. The commenter said that the provision appears to conflict with other provisions in the proposed rule that establish testing parties as entities that conduct proper testing, but who do not have to ''certify'' under the CPSA.

(Response 17)—We agree that use of the word ''certify'' in proposed § 1109.5(f)(7) (renumbered to § 1109.5(g)(7) in the final rule) may be confused with a product certification requirement. Accordingly, we changed the word ''certify'' to ''attest'' in § 1109.5(g)(7). Pursuant to § 1109.5(g)(7), the party who conducts testing, including a manufacturer or supplier who conducts testing, a testing laboratory, or a third party conformity assessment body, must attest (state in writing) that such testing was performed in compliance with section 14 of the CPSA and 16 CFR part 1107, or any more specific applicable rule, ban, standard, or regulation. Moreover, the party signing the attestation is only responsible for attesting to following the requirements that are applicable to them. Thus, a third party conformity assessment body that merely conducts testing will attest to the testing protocol that was followed. Such a third party conformity assessment body would not need to attest to following applicable sampling protocols, if they were not the party responsible for sample selection.

We finalized proposed § 1109.5(f) (renumbered to § 1109.5(g) in the final rule) with several changes. On our own initiative, we changed the title of this section from ''Documentation by testing party'' to ''Documentation by certifiers and testing parties,'' to reflect more accurately that both certifiers and testing parties are required to provide the documentation listed in this section. We also clarified that each certifier and testing party is responsible for providing the documentation to a certifier who is relying on such documentation to issue a certificate: ''[e]ach certifier and testing party must provide the following documentation, either in hard copy or electronically, to a certifier relying on such documentation as a basis for issuing a certificate.'' For example, a component part testing party or certifier must provide the documentation to a finished product certifier who is relying on such documentation to issue a finished product certificate. A testing party must provide this documentation to a component part supplier relying on such documentation to certify a component part.

(8) New §§ 1109.5(g)(8) Through (g)(10)

On our own initiative, we added three documentation requirements in the final rule in §§ 1109.5(g)(8), (g)(9), and (g)(10). We based two requirements on other sections in the proposed rule, and the third results from comments we received on the proposed rule.

New § 1109.5(g)(8) requires that a testing party or certifier provide: ''[c]omponent part certificate(s) and/or finished product certificate(s), if any * * *'' to a certifier relying upon such documentation as the basis for a certificate. The proposed rule contemplated that finished product certifiers could rely upon component part certificates, but the requirement that a component part certifier provide access to the actual certificate was not listed in the documentation section in proposed the proposed rule. For example, proposed § 1109.5(h)(1) would state: ''[a] finished product certifier must exercise due care in order to rely, in whole or in part, on a component part certificate issued by a component part certifier * * *.'' We corrected the omission of component part certificates in the final rule by adding § 1109.5(g)(8). Moreover, we included both component part certificates and finished product certificates, if any, because a finished product certifier could rely upon either component part certificates or finished product certificates from another party.

New § 1109.5(g)(9) requires that a testing party or certifier provide: ''[r]ecords to support traceability as defined in § 1109.4(m) * * *'' to a certifier relying upon such documentation as the basis for a certificate. This requirement was moved from proposed § 1109.5(i) on recordkeeping, which would require that ''all certifiers must maintain records to support the traceability of component part suppliers * * *.'' On our own initiative, we decided to move this requirement to maintain traceability records to the documentation section in the final rule, so that all documentation requirements are in one section. Also, the slightly rephrased requirement to maintain traceability records is more accurate, in that it recognizes that such records can originate from both testing parties and certifiers, and it informs that the details of what is meant by ''traceability records'' can be found in § 1109.4(m). Section 1109.4(m) clarifies that traceability records include: ''the name and address of each testing party and any party that conducted testing on the component part or finished product. * * * Traceability extends to the component part of the product that was tested for compliance, such that if a subassembly is tested, that subassembly must be traceable, not each component part of the subassembly, if those parts were not individually tested for other rules, bans, standards, or regulations.''

New § 1109.5(g)(10) requires that a testing party or certifier provide: ''[a]n attestation by each certifier and testing party that while the component part or finished product was in its custody, it exercised due care to ensure compliance with the requirements set forth in subparagraph (b) of this section.'' Subparagraph (b) refers to § 1109.5(b) on *Test result integrity.* The rationale for this addition is set forth in response to Comment 9, discussed above in section II.B.5.a.2 of this preamble.

g. Proposed § 1109.5(g)—Effect of Voluntary Certification by Component Part Certifiers

On our own initiative, we shortened the section titled, ''Effect of voluntary certification'' in the final rule. We

removed the phrase ''by component part certifiers'' from the title to reflect the fact that a testing party or certifier may test voluntarily or certify finished products as well, as set forth in response to Comment 1 in section II.B.1 of this preamble.

(1) Proposed § 1109.5(g)(1)

Proposed § 1109.5(g)(1) (renumbered to § 1109.5(h)(1) in the final rule) would consider any certificate issued by a component part certifier in accordance with this part to be a certificate issued in accordance with section 14(a) of the CPSA, and would further require component part certificates to contain all of the information required by part 1110 of this chapter. The preamble to the proposed rule (75 FR at 28210) stated that this provision would allow finished product certifiers to rely on section 19(b) of the CPSA, which provides that a person who holds a certificate issued in accordance with section 14(a) of the CPSA (to the effect that a consumer product conforms to all applicable consumer product safety rules) is not subject to the prohibitions in section 19(a)(1) of the CPSA (regarding distributing noncomplying products) and section 19(a)(2) of the CPSA (regarding distributing products subject to certain voluntary corrective actions, mandatory recall orders, or that are banned hazardous substances), unless such person knows that such consumer product does not conform. The preamble to the proposed rule (75 FR at 28210 through 28211) further stated that certifiers may violate section 19(a)(6) of the CPSA if the products that are the subject of any certificate issued by that person, in fact, do not comply with the applicable standard(s) and such person, in the exercise of due care, would have reason to know that their certificate is false or misleading in any material respect. Proposed § 1109.5(h)(1) (renumbered to § 1109.5(i)(2) in the final rule) would address how this duty of due care applies to finished product certifiers.

Section 1109.5(h)(1) of the final rule has been finalized with one revision. On our own initiative, we modified the second sentence in § 1109.5(h)(1) to remove: ''[a] component part certificate,'' and replace it with: ''[a]ll certificates,'' to reflect the fact that this section can relate to both a component part certificate and a finished product certificate, as explained in response to Comment 1 in section II.B.1 of this preamble. All certificates should meet the content requirements set forth in sections 14(g) of the CPSA, as well as the content requirements in our regulation set forth in part 1110. We note, however, that the only certificate required to accompany a finished product is the finished product certificate issued by an importer or domestic manufacturer, as set forth in part 1110. Otherwise, certificates must be provided to a certifier relying on such documentation to certify a product, and certificates must be provided to the Commission, upon request, pursuant to §§ 1109.5(g) and 1109.5(j) of the final rule.

(2) Proposed § 1109.5(g)(2)

Proposed § 1109.5(g)(2) (renumbered to § 1109.5(h)(2) in the final rule) would provide that any person who elects to certify compliance of a component part with an applicable rule must assume all responsibilities of a manufacturer under part 1107 of this chapter with respect to that component part's compliance with the applicable rule.

(Comment 18)—A commenter stated that because the word ''certify'' or ''certification'' is so prevalent in business communications in a variety of different contexts, it would be quite simple for a component part supplier to be deemed a component part certifier when it did not intend to become one. To avoid this, the commenter would modify the rule to require any party seeking to be a component part certifier under proposed § 1109.5(g) (renumbered to § 1109.5(h) in the final rule), or a testing party under proposed § 1109.4(k), to state specifically, in writing, that it is providing a certification or supplying testing data as a certifier or testing party (as the case may be) under those regulations.

(Response 18)—We do not believe that the prevalence of the terms ''certify'' and ''certification'' in business forms and communications will cause the confusion feared by the commenter. As noted in proposed § 1109.5(g) (now renumbered as § 1109.5(h) in the final rule), component part certificates must contain all of the information required by part 1110 of this chapter. That unique combination of information, together with the required express certification that the part or product complies with the identified requirements, should make it clear when a party is issuing a certificate pursuant to section 14(a) of the CPSA.

However, we have changed the word ''certify,'' used in proposed § 1109.5(f)(7) (now renumbered to § 1109.5(g)(7) in the final rule) to ''attestation.'' We made this change to clarify and distinguish that the ''attestations'' required in §§ 1109.5(g)(7) and (10) of the final rule are not the same as product certifications. The words ''certify'' and ''certification,'' as used in this rule, refer to the product certifications required by section 14(a) of the CPSA.

(Comment 19)—One commenter stated that any obligation to provide a component part or raw material certificate of conformity to the CPSC should rest with the consumer product manufacturer and not with the component part or raw material supplier.

(Response 19)—The CPSIA does not require component part suppliers or raw material suppliers to certify their products. Testing or certification of component parts are entirely voluntary activities for component part manufacturers or component part suppliers. Parties that have no requirement to test or certify their products, and who have not undertaken such tasks, are not expected to provide the CPSC with a certificate. However, we have clarified in § 1109.5(h)(2) that any party who elects to certify compliance of a component part or a finished product with an applicable rule, standard, ban, or regulation, must assume all responsibilities of a manufacturer under sections 14(a) (requiring issuance of a General Conformity Certificate and/or a Children's Product Certificate) and 14(i) (requiring continuing third party testing of children's products) of the CPSA and 16 CFR part 1107 with respect to that component part or finished product's compliance to the applicable rules, standards, bans, or regulations. Moreover, § 1109.5(j) of the final rule requires certifiers and testing parties to make documentation required by § 1109.5(g) available to the CPSC for inspection, upon request. Such documentation includes certifications, if any. Once a party undertakes testing or certification of a component part or finished product, they are expected to adhere to the requirements of this rule.

Finally, with respect to providing certificates to the CPSC, we also note that section 14(g)(3) of the CPSA states that, upon request, a manufacturer or private labeler must provide a copy of a certificate to the CPSC.

Section 1109.5(h)(2) has been finalized with several changes. On our own initiative, we changed the word ''person'' to ''party'' to make it clear that a certifier can be either a person or an entity, and to be consistent with similar language throughout the final rule. We also replaced the phrase ''applicable rule'' in both places it is used with ''applicable rules, standards, bans, or regulations,'' to track the statutory language of section 14(a) of the CPSA and to be consistent with similar language throughout the final rule.

Finally, we added a reference to sections 14(a) and 14(i) of the CPSA for the reasons set forth in response to Comment 19 immediately above.

h. *Proposed § 1109.5(h)—Certification by Finished Product Certifiers*

(1) Proposed § 1109.h(1)

Proposed § 1109.5(h)(1) (part of which has been renumbered to § 1109.5(i)(2) in the final rule) would require a finished product certifier to exercise due care in order to rely, in whole or in part, on a component part certificate issued by a component part certifier or on component part testing by a testing party as the basis for a finished product certificate. The proposal also would require that, if a finished product certifier fails to exercise due care in its reliance on a certificate for a component part, we would not consider the finished product certifier to hold a component part certificate issued in accordance with section 14(a) of the CPSA. Proposed § 1109.5(h)(1) would add that exercising due care means taking the steps a prudent and competent person would take to conduct a reasonable review of a component part certificate and to address any concern over its validity.

We did not receive any comments on this section of the proposed rule. On our own initiative, we revised § 1109.5(i)(1) to clarify the four different types of documentation that a finished product certifier can rely upon to certify a finished product. We revised the first sentence in proposed § 1109.5(h)(1) to state: ''[a] finished product certifier must exercise due care in order to rely, in whole or in part, on one or more of the following as a basis for issuing a finished product certificate: (i) Finished product certificate(s) issued by another party; (ii) finished product test report(s) provided by another party; (iii) component part certificate(s); or (iv) component part test report(s).'' The phrase ''by another party'' is associated only with finished product testing and certification in this section because component part testing can be done by the finished product certifier or another party. While finished product certification also can be done by the finished product certifier, part 1109 would not come into play in that circumstance. Part 1109 is relevant only when: (a) Any certifier relies on component part testing or certification, regardless of who conducts the testing or provides certification; and (b) a finished product certifier is relying on finished product testing or certification provided by another party. We moved the remaining text in proposed § 1109.5(h)(1) to § 1109.5(i)(2). This revision to clarify the four types of documentation that a finished product certifier can rely on to certify a finished product arises out of the changes made throughout the final rule to incorporate the concept that a finished product certifier can rely upon a finished product certificate provided by another party, as discussed in response to Comment 1 in section II.B.1 of this preamble.

Because the concept that was included in the first sentence of proposed § 1109.5(h)(1), now comprises § 1109.5(i)(1), § 1109.5(i)(2) begins with the second sentence from what was proposed § 1109.5(h)(1). On our own initiative, we removed the phrase regarding the requirement to exercise due care in reliance on ''a certificate for a component part'' and replaced it with ''another party's certifications or test reports.'' This phrase broadens § 1109.5(i)(2) so that it incorporates all four of the options for certifying a finished product under part 1109, now described in § 1109.5(i)(1), including finished product testing and certification. We also revised the phrase ''a component part certificate'' in the first sentence to ''a certificate'' because the finished product certifier may be relying on component part or finished product certificates. We made a similar change in the second sentence to broaden ''a component part certificate'' to ''another party's certification and/or test reports'' to reflect the range of documentation that a finished product certifier may rely on to certify a product. These changes arise out of the concept that a testing party or certifier may test or certify both component parts and finished products in the final rule, as explained in response to Comment 1 in section II.B.1 of this preamble. Further, on our own initiative, we inserted the phrase: ''Before relying on such documents to issue a finished product certificate,'' to set forth our expectation that a finished product certifier should exercise due care in relying upon another party's documentation before issuing its own certificate. Finally, we updated the definition of ''due care'' to track the revised definition in § 1109.4(g).

Section 1109.5(i)(2) in the final rule is intended to limit a finished product certifier from relying on section 19(b) of the CPSA when they know or should know that a certificate is invalid, or based on faulty data or test procedures. Section 19(b) of the CPSA provides that a person who holds a certificate issued in accordance with section 14(a) of the CPSA (to the effect that a consumer product conforms to all applicable consumer product safety rules) is not liable for a violation under section 19(a)(1) of the CPSA (regarding distributing noncomplying products) and section 19(a)(2) of the CPSA (regarding distributing products subject to certain voluntary corrective actions, mandatory recall orders, or that are banned hazardous substances), unless such person knows that such consumer product does not conform. Willful ignorance of testing or certification violations committed by suppliers will not shield finished product certifiers. Parties may also violate section 19(a)(6) of the CPSA if the products that are the subject of any certificate issued by that person, in fact, do not comply with the applicable standard(s) and such person, in the exercise of due care, would have reason to know that their certificate is false or misleading in any material respect.

(2) Proposed § 1109.5(h)(2)

Proposed § 1109.5(h)(2) (renumbered to § 1109.5(i)(3) in the final rule) would state that a finished product certifier must not rely on component part testing by a testing party or component part certifier, unless it receives the documentation under proposed § 1109.5(f) from the component part certifier or testing party. The provision also would state that we may consider a finished product certifier who does not obtain such documentation before certifying a consumer product to have failed to exercise due care.

(Comment 20)—A commenter stated we should clarify that it is sufficient if the finished product certifier ''identifies'' (instead of ''receives'') the testing party's compliance with proposed § 1109.5(f) by reference to the testing party's having provided the required documentation to the finished product manufacturer issuing a certificate for the finished product.

(Response 20)—We interpret the commenter's suggestion as allowing a certifier to provide access (such as through an Internet Web site) to the records, rather than by requiring physical possession of those records. We agree with the commenter and have revised the rule to state: ''The finished product certifier may receive such documentation either in hard copy or electronically, or access the documentation through an Internet Web site.'' Electronic access to records can take other forms as well, such as via flash drive, as an email attachment, or by display on a monitor. The final rule does not require any particular format for the transmission or receipt of electronic records.

In addition, we have, on our own initiative, made two changes to the first sentence in § 1109.5(i)(3). We revised the first sentence to state: ''[a] Finished product certifier must not rely on another party's certificates or test reports unless the finished product certifier receives the documentation under paragraph (g) of this section from the certifier or testing party.'' We also replaced the proposed rule's phrase: ''Must not rely on component part testing by a testing party or component part certifier,'' to state: ''Must not rely on another party's certificates or test reports'' in the final rule. The revised language broadens the section to incorporate the concept that a finished product certifier can rely on another party's finished product test reports or certification, as well as rely on their component part test reports or certificates, as discussed in response to Comment 1, in section II.B.1 of this preamble. We also revised the reference to § 1109.5(f) to § 1109.5(g) in the final rule, where the documentation requirements are now stated.

(3) Proposed § 1109.5(h)(3)

Under proposed § 1109.5(h)(3), any certification of a consumer product based, in whole or in part, on component part testing performed by a component part certifier or a testing party must:

- Identify both the corresponding documentation required in proposed § 1109.5(f) and any report provided by a third party conformity assessment body on which the consumer product's certification is based; and
- Certify that nothing subsequent to component part testing, for example, in the process of final assembly of the consumer product, changed or degraded the consumer product such that it affected the product's ability to meet all applicable rules, bans, standards, and regulations.

(Comment 21)—Multiple commenters stated that adding detailed component part information on the certificate would inject enormous complexity to the certification process; they further asserted that we should not require component part test results to be listed on the certificate. One commenter added that, as long as the testing and traceability requirements are met, the method of such documentation should be determined by the certifier. One commenter would revise proposed § 1109.5(h)(3)(i) to state expressly that only component parts (not subcomponents of components or raw materials of components) need to be listed on the final product certification. For example, a zipper is composed of several subcomponents; each of these subcomponents would be required to be listed on the conformity certificate of the zipper. However, the commenter said that it would be burdensome to require that each zipper subcomponent be listed again on the finished product certificate. The commenters said that traceability of the subcomponents would be preserved because the finished product certificate could refer to the certificate for the zipper, which would list the subcomponents. Another commenter argued that if all of the component part certification information is required on a finished product certificate, the certificate would be long and complex. The commenter asked for clarification on the requirements for certificates and suggested a change in the rule as follows:

> * * * Thus, the Commission should clarify that it is sufficient for the finished-product certification to ''identify'' the testing party's compliance with § 1109.5(f) by generally referring to the testing party's having provided the required documentation to the finished-product certifier * * *

(Response 21)—The information required on certificates is specified in section 14(g)(1) of the CPSA and 16 CFR part 1110. Section 14(g)(1) of the CPSA requires the certificates to include the date and place where the product was tested. We interpret this to require references to every test performed to support the certificate of the product being certified, including tests of component parts. However, references can be indirect, such as by referring readers of the certificate to a source for the underlying certificates or test reports. In addition, to avoid duplication or inconsistency in requirements for certificates between this rule and 16 CFR part 1110, we have deleted sections containing requirements for certificates from the final rule. Thus, we have deleted proposed § 1109.5(h)(3), which would require certificates to identify documentation in proposed § 1109.5(f) and certify that no change occurred after testing that could affect adversely a product's ability to comply with all applicable rules, and proposed §§ 1109.12(d) and 1109.13(d), which would concern certificates for products tested for the lead in paint limit and the phthalate content limit.

(Comment 22)—A commenter stated that, in proposed § 1109.5(h)(3)(i), the word ''identify'' is ambiguous when it is applied to requiring supporting documentation for a certificate. The commenter suggested that it should be sufficient ''for the finished product certification to 'identify' the testing party's compliance with § 1109.5(f) of the proposed rule by generally referring to the testing party's having provided the required documentation to the finished product certifier.''

(Response 22)—As noted immediately above in our response to Comment 21, we deleted § 1109.5(h)(3)(i) in the final rule, as well as all other requirements for finished product certificates. Accordingly, it is unnecessary for us to act on the commenter's suggestion.

Proposed § 1109.5(h)(3) has been deleted in the final rule for the reason set forth in response to Comment 21 and because proposed § 1109.5(h)(3)(ii) is redundant to § 1109.5(b) in the final rule. Section 1109.5(b) requires certifiers, including finished product certifiers, among other things, to exercise due care to ensure that while a component part or finished product is in its custody, no action or inaction subsequent to testing and before distribution in commerce occurs that would affect compliance, including contamination or degradation.

i. Proposed § 1109.5(i)—Recordkeeping Requirements

Proposed § 1109.5(i) (renumbered to § 1109.5(j) in the final rule) would require testing parties to maintain the documentation that would be required in proposed § 1109.5(f) for five years. Additionally, the proposal would require all certifiers to maintain records to support the traceability of component part suppliers for as long as the product is produced or imported by the certifier, plus five years. The proposal also would require test records to be kept for five years and that all records are available in the English language. The preamble to the proposed rule explained that the record retention period would be set at five years because the statute of limitations under 28 U.S.C. 2462 allows the Commission to bring an action within that time. The proposal also would require certifiers to maintain the records at the location within the United States specified in 16 CFR 1110.11(d), or, if the records are not maintained at the custodian's address, at a location specified by the custodian. The proposal also would require manufacturers to make these records available, either in hard copy or electronically, for inspection by the CPSC, upon request.

(Comment 23)—Several commenters declared that maintaining records for the ''life of the product, plus five years'' is excessive. One commenter stated that they have been selling a product for more than 30 years and that keeping

records for that period of time would be very expensive.

(Response 23)—We have revised the final rule to state that a maximum records retention period of five years will be sufficient for all records required in § 1109.5(g) of the final rule. If a product has a significant noncompliance, it seems likely that the noncompliant aspect of the product would become apparent within that period. Thus, § 1109.5(j) (renumbered from proposed § 1109.5(i)), now requires that records be kept for a period of five years. Certifiers and testing parties may wish to consider maintaining records for durable products, such as furniture or some infant products, for more than five years. In the event of a recall, such records may be useful in determining the number of affected products and limiting the recall's scope.

(Comment 24)—Some commenters stated that the recordkeeping requirements of proposed § 1109.5(i) (renumbered to § 1109.5(j) in the final rule) seem burdensome in requiring that records be in English and kept in a location in the United States. With much manufacturing occurring outside of the United States and in non-English speaking countries, the commenters said that allowing offshore storage in the local language would make the records most usable to local compliance (*e.g.,* quality assurance) staff. One commenter suggested allowing production of those records in English to CPSC staff, upon request. A commenter suggested that instead of requiring that finished product certifiers maintain the records at a location within the United States, as proposed § 1109.5(i) would require, we should allow the records to be maintained outside the United States, as long as the records can be accessed from the location in the United States that is specified on the certificate.

(Response 24)—We agree that it could be burdensome to maintain all records in the United States. To reduce this burden and still maintain prompt access to records, when needed, § 1109.5(j) (renumbered from proposed § 1109.5(i)) allows required records to be maintained outside the United States, as long as the records can be provided to us upon request, either in hard copy or electronically, such as through an Internet Web site.

We also agree that, in many cases, it could be burdensome for the records to be maintained in English. Therefore, § 1109.5(j) allows records to be maintained in languages other than English, if the records can be provided immediately by the certifier or testing party to the CPSC, and if an accurate English translation can be provided by the certifier or testing party within 48 hours of our request, or within such longer period as may be negotiated with CPSC staff. Note, however, that section 14(g) of the CPSA and our regulation at 16 CFR part 1110 require that certificates be in the English language. Accordingly, all certificates, including component part certificates, must be in English.

(Comment 25)—One commenter said that in the preamble to the proposed rule (75 FR 28361), the CPSC states that it will: ''* * * likely request access to these records *only* when it is investigating potentially defective or noncomplying products.'' (Emphasis added). The commenter expressed the belief that this indicates that collection of this information on every item is not necessary for the proper performance of the CPSC's functions.

Some commenters asked for more flexibility in developing the recordkeeping requirements so that different industries and companies can tailor recordkeeping to their products, processes, and materials used. The commenters added that we should avoid provisions in the final rule that would require companies to integrate multiple systems in order to compile data points across hundreds of thousands to millions of product component parts in order to meet the recordkeeping requirements of the rule, as long as companies, upon request, can provide reasonable data customary in a particular industry to verify that certified components were used in the finished product.

(Response 25)—The commenter's citation to 75 FR at 28361 is contained in the proposed rule, ''Testing and Labeling Pertaining to Product Certification,'' and we have addressed it in the response to comments memorandum and preamble for the final rule on part 1107. Thus, this portion of the comment is out of scope for the proposed rule on ''Conditions and Requirements for Testing Component Parts of Consumer Products.''

The remainder of the comment discusses the proposed rule on component part testing. The commenters did not elaborate on what type of flexibility is desired in the recordkeeping provisions. However, the requirements listed in § 1109.5(g) and (j) (formerly proposed § 1109.5(f) and (i)) indicate only what information is expected to be collected, not the format for collection. Therefore, it should be necessary for the manufacturer or importer to identify and store only the required elements that are not already part of their current recordkeeping system and be certain that the remaining documentation can be produced, upon request, in a manner that clearly identifies the requisite parts. Section 1109.5(j) requires the records to be made available to us, upon request, either in hard copy or electronically, such as through an Internet Web site. This requirement does not oblige the certifier to implement any specific records management system, and so a certifier is free to structure its recordkeeping systems to meet its needs and to capture the information required by the rule. No change to the final rule was made based on this comment.

(Comment 26)—One commenter stated that the traceability recordkeeping requirements are unnecessary, given the minimal risk to the public's health from the health hazards being addressed, as demonstrated by the CPSC's injury data regarding lead exposure.

(Response 26)—Congress has determined the allowable lead levels and requires that products subject to such requirements be tested and certified. The traceability recordkeeping requirements are intended to make it possible to identify the parties who procured and conducted testing on products that are not in compliance with the applicable rules, bans, standards, and regulations, and to determine why the testing and certification system did not prevent such noncompliance.

(Comment 27)—One commenter asserted that the proposed rule ''makes it abundantly clear that the CPSC is perfecting a myriad of claims to be made against any and all manufacturers when it suits the purpose of the agency.'' The commenter expressed its fear that the agency could make charges based on missing records or paperwork.

(Response 27)—Component part testing before final assembly of a finished product is voluntary. A finished product certifier is not required to rely on component part certificates or test reports. Even when a test method requires testing of component parts, a finished product certifier can test finished products by disassembling for testing. In some cases, it may be more economical for the finished product to be certified based on tests of the finished product itself, instead of relying on component part certificates or test reports. The main purposes of the documentation requirements in part 1109 are to maintain the integrity of the testing and certification process and to provide traceability to the testing of component parts and finished products on which certification is based.

(Comment 28)—One commenter stated that the Commission needs to

provide more guidance to finished product or component part certifiers on how to trace the component parts or how to manage the lot/batch details in their recordkeeping systems. The commenter stated that while some certifiers have sophisticated tracking systems, many certifiers do not and will require a template to guide them.

(Response 28)—Given the range of consumer products, certifiers, and testing parties affected by this rule, we decided to give parties the flexibility to devise recordkeeping systems that are appropriate to their operations. In particular, the breadth of component part types, their manufacturing methods, and their uses make it impractical to attempt to design a universal recordkeeping template. The final rule specifies the documentation to be provided and its retention period. Certifiers and testing parties should use their knowledge of manufacturing specific products and component parts and tailor their recordkeeping systems to the products, processes, and materials they use.

(Comment 29)—Some commenters expressed concern that the recordkeeping, documentation, and traceability requirements are too complex and are likely to undercut any benefits from component part testing. One commenter stated that using component part testing for some rules, while finished product testing is required for other rules, would be overly complex. One commenter stated that the complex procedures might be appropriate for materials or products that pose a risk of acute toxicity or a serious risk of injury but asserted that they are ''overkill'' with regard to lead content, lead in paint concentration, and phthalate concentration rules, which the commenter apparently perceives as addressing lesser risks.

(Response 29)—The requirement in the final rule that the component parts tested be traceable, arises out of the requirement in section 14(g)(1) of the CPSA, which requires the finished product certificate to contain some specific information, including the date and place of manufacture, the name and address of any third party laboratory on whose testing the certification depends, the date of the testing, and contact information for the individual responsible for maintaining records of test results. Thus, if we allow parties other than the finished product certifier, such as component part suppliers, to test and certify products, the regime must have elements of traceability, as well as ensure the integrity of the testing and certification process. For example, specific information about testing and certification of component parts will not necessarily appear on the face of a certificate if such testing and certification is done by component part suppliers. However, we still need to be able to trace the product or component parts back to the parties responsible for testing and certification if a noncompliance is found.

The complexity of the testing and certification process to which the commenter alluded, stems, in part, from the variety of methods available to test or certify component parts and finished products. This flexibility is built into the requirements to allow those who voluntarily test or certify component parts or finished products, to choose the methods that are best suited to their circumstances. How a product is tested or certified, meaning whether the finished product certifier relies on component part testing or certification, or finished product testing or certification, depends upon the product and the applicable safety standards being tested. For example, the same product may involve testing of component parts, such as lead in substrate; and it also might require that some tests, such as small parts testing, be performed on the finished product.

The documentation requirements in proposed § 1109.5(f) (renumbered in the final rule to § 1109.5(g)) and the traceability requirements of proposed § 1109.5(e) (renumbered to § 1109.5(f) of the final rule) are needed to ensure that the finished product certifier has the required information to issue a finished product certificate. These data must be available to the finished product certifier for each component part used in the finished product that was tested separately from the finished product. The statute applies certification requirements to all consumer product safety rules under the CPSA and to any similar rule, ban, standard, or regulation under any other act enforced by the Commission; we do not have the discretion to relax these requirements for products subject to any particular one of these rules. Therefore, we will not relax the recordkeeping requirements in the final rule, as suggested by these commenters.

D. Subpart B—Conditions and Requirements for Specific Consumer Products, Component Parts, and Chemicals

Subpart B, § 1109.11 through 1109.13 of the proposed rule, would set forth conditions and requirements for specific chemical content regulated by the CPSC. These would include the limits for lead content of paint and similar surface-coating materials in 16 CFR part 1303; the limitation of the amounts of compounds of antimony, arsenic, barium, cadmium, chromium, lead, mercury, or selenium in paints or other surface coatings in toys in section 4.3.5.2 of ASTM F 963 (''Standard Consumer Safety Specification for Toy Safety''); the limits for lead content in children's products in section 101(a) of the CPSIA; and the prohibition against more than 0.1 percent of certain phthalates in children's toys and child care articles in section 108 of the CPSIA. (Section 106(a) of the CPSIA states that the requirements of ASTM F 963 must be considered consumer product safety standards issued by the Commission under section 9 of the CPSA.)

1. Proposed § 1109.11—Component Part Testing for Paint and Other Surface Coatings

Proposed § 1109.11 would address component part testing for the levels of specified chemicals in paints or surface coatings. This aspect of the proposed rule was based on the Commission's previously published enforcement policy for testing products for compliance with lead limits. 74 FR 68593 (December 28, 2009).

Section 101(f)(1) of the CPSIA required us to revise our preexisting regulation (at 16 CFR 1303.1) so that paints and similar surface coating materials having a lead content in excess of 0.009 percent of the weight of the total nonvolatile content of the paint or the weight of the dried paint film are banned hazardous products. (To simplify this discussion, we use the term ''paint'' broadly to include any type of surface coating that is subject to 16 CFR part 1303 or section 4.3.5.2 of ASTM F 963.) The new lower limit in 16 CFR part 1303 applies not only to paint sold to consumers, as such (for example, a gallon of paint sold at a hardware store), but also to any paint on toys or other articles for children and to any paint on certain household furniture items (not limited to children's furniture). *See* 16 CFR part 1303. The principles for testing paint subject to 16 CFR part 1303 also apply to the testing of paint and surface coatings for toys in section 4.3.5.2 of ASTM F 963.

We received several comments about component part testing of paint, which were unrelated to any particular provision of the proposed rule.

(Comment 30)—A commenter stated that the presumption that only the CPSC (or Congress) can make sound judgments when considering safety issues is simply not supported by the data. The commenter added that the concept of using component parts supported by General Conformity

Certificates (GCCs) is simple enough. The commenter asked that, given that the restrictions on lead in paint and lead content of children's products are clear under the CPSIA, why not let businesses exercise their judgment on how to meet those requirements and then measure businesses on their success in doing so?

(Response 30)—The proposed rule did not make any presumptions regarding who can make sound judgments about safety issues. The restrictions on lead mentioned by the commenter pertain to the lead in paint requirements under 16 CFR part 1303 and lead content restrictions on children's products in section 101 of the CPSIA. Section 14(a)(2) of the CPSA requires that children's products be tested by a third party conformity assessment body before a children's product can be certified. Therefore, component part tests used as a basis for issuing a children's product certificate must also be conducted by a third party conformity assessment body.

GCCs, issued pursuant to section 14(a)(1) of the CPSA, do not require third party conformity assessment body testing, and therefore, reliance on such certificates is not permissible as the basis for issuing a Children's Product Certificate. However, GCCs of component parts can be used as a basis for issuing a finished product certificate for a non-children's product.

Part 1109 is intended to give businesses the flexibility to use component part tests in whole, or in part, as the basis for issuing a finished product certificate. Businesses must determine whether component part testing is allowed or required, based on any applicable standard or test method, and they also must decide whether to use component part testing when certifying finished products.

(Comment 31)—One commenter noted that the proposed rule seemed to address paints as if they were components of finished products. The commenter noted that components of finished products, such as fasteners, are often painted, and it would be useful to clarify whether the rule would apply to certifiers of components, as well as to certifiers of finished products.

(Response 31)—By noting in § 1109.4(b) of the final rule that "* * * a component part means any part of a consumer product * * *," it is possible that a component part may be both a component part of a finished product and a component part of another component part. Paints are component parts, in addition to being subject to 16 CFR part 1303. The rule applies to component part certifiers and finished product certifiers.

(Comment 32)—A commenter requested that we specifically approve testing and certification to the lead paint standard of finished product components prior to their incorporation into the finished product because specific allowance of this finished component testing method for children's products would enhance the likelihood that such testing would be embraced by importers, retailers, and private labelers.

(Response 32)—The commenter correctly interpreted that the proposed rule would allow paints used in products subject to a rule to be tested as component parts without the need to be tested on the finished product. Specifically, "paint" clearly fits into the definition of "component part" in § 1109.4(b) of the final rule. On our own initiative, we shortened the name of § 1109.11 to "Component part testing for paint." The phrase "and other surface coatings" was removed because the word "paint" is a defined term in the rule, at § 1109.4(j), which includes other surface coatings.

a. Proposed § 1109.11(a)—Generally

Proposed § 1109.11(a) would state that the Commission will permit certification of a product as being in compliance with the lead paint limit of part 1303 of this chapter or the content limits for paint on toys of section 4.3.4.2 of ASTM F 963 if, for each paint used on the product, the party that certifies the product either has obtained a test report or holds a paint certificate, as described below, and meets the requirements in §§ 1109.11(a)(1) through (a)(3).

We received no comments on proposed § 1109.11(a). On our own initiative, we finalized this section with several changes. First, we revised the language to include both finished products and component parts, consistent with changes throughout the rule to incorporate finished product testing or certification, as discussed in response to Comment 1 in section II.B.1 of this preamble. Second, we amended the reference to section 4.3.5.2 of ASTM F 963 to include "ASTM F 963–08 or any successor standard of this section accepted by the Commission * * *." This revision is consistent with a change made to the definition of "paint" in § 1109.4(j) of the final rule, and allows us to rely on revised versions of ASTM F 963 without revising part 1109 whenever we accept a successor standard to any particular version of ASTM F 963. Finally, we deleted the phrase which required that for each paint used on the product, the "party that certifies the product either has obtained a test report or holds a paint certificate as described below" and replaced it with a statement that the requirements "in § 1109.5 and paragraph (b) of this section are met." Although the deleted language is an accurate statement of the Commission's expectation, it is duplicative of the general requirements already set forth in § 1109.5. Throughout Subpart B we simplified the rule by removing language that is duplicative of general requirements for component part testing, and we replaced such language with a requirement that the general requirements in § 1109.5 be met, in addition to any more specific requirements set forth in Subpart B.

(1) Proposed § 1109.11(a)(1)

Because compliance of a paint to its content limits is a function of the paint and not the component part or substrate to which it is applied, proposed § 1109.11(a)(1) (renumbered to § 1109.11(b)(1) in the final rule) would require that all testing be performed on dry paint that is scraped off of a substrate for testing (the substrate used need not be of the same material as the material used in the finished product or have the same shape or other characteristics as the part of the finished product to which the paint will be applied).

(Comment 33)—One commenter urged us to make an explicit statement allowing the use of spray sampling/multiple stamping (where one sample of a product is painted or stamped with a surface coating over a larger area than on the actual product in order to ensure enough paint or other surface coating is available for testing) as an alternative to requiring the destruction of many samples to obtain a sufficient quantity of a paint or surface coating for testing when the paint appears only on a small part of the product.

(Response 33)—As explained in proposed § 1109.11(a)(1) and (2) (renumbered to § 1109.11(b)(1) and (2) in the final rule), paint to be tested can be applied to any suitable substrate. The substrate need not be of the same material as the material used in the finished product. Further, a larger quantity of paint may be tested than the quantity used on the finished product. The commenter seemed to believe that the paint must be scraped off an example of the finished product; however, this is not the case. The techniques described by the commenter are acceptable under the rule, but other techniques also could be used.

However, on our own initiative, we moved § 1109.11(a)(1) to § 1109.11(b)(1) in the final rule, and added explanatory

language regarding the two requirements for component part testing of paint in this new section (b) as follows: ''(b) Requirement. For each paint used on the product: * * *'' We also removed the text in brackets regarding the fact that ''the substrate used need not be of the same material as the material used in the finished product * * *'' and made this information a separate sentence. We made these changes simply for formatting purposes, and we do not consider them to be substantive changes. Finally, on our own initiative, we clarified in § 1109.11(b)(1) that it is unnecessary to scrape dried paint off of a substrate for testing when using Energy Dispersive X–Ray Fluorescence Spectrometry as described in the ASTM F 2583–10 test method to test for lead in paint. Although the paint must be dry, it does not need to be scraped off of a substrate when using this technology. We made this change to acknowledge that on April 5, 2011, we published in the **Federal Register**, a Notice of Requirements for accreditation of third party conformity assessment bodies for lead in paint (76 FR 18645). In that Notice of Requirements, the use of ASTM F2583–10, ''Standard Test Method for Determination of Lead in Paint Layers and Similar Coatings or in Substrates and Homogeneous Materials by Energy Dispersive X–Ray Fluorescence Spectrometry Using Multiple Monochromatic Excitation Beams,'' is allowed for testing the lead content in paint.

(2) Proposed § 1109.11(a)(2)

Proposed § 1109.11(a)(2) (renumbered to § 1109.11(b)(2) in the final rule) would provide that the tested paint must be identical in all material respects to that used in production of the consumer product. The paint samples tested must have the same composition as the paint used on the finished product. However, a larger quantity of the paint may be tested than is used on the consumer product, in order to generate a sufficient sample size. The paint may be supplied to the testing laboratory either in liquid form or in the form of a dried film of the paint on any suitable substrate.

We received one comment related to proposed § 1109.11(a)(2), which we have summarized above in Comment 33. Additionally, on our own initiative, we renumbered proposed § 1109.11(a)(2) to § 1109.11(b)(2) in the final rule. We also revised the last sentence to state that paint may be supplied to the testing laboratory ''for testing'' either in liquid form or in the form of a dried film of the paint on any suitable substrate. This revision is intended to clarify the reason why such paint is supplied to a testing laboratory.

(3) Proposed § 1109.11(a)(3)

Proposed § 1109.11(a)(3) would require that the documentation required by a testing party and the certificate required of finished product certifiers under section 14(a) of the CPSA identify each paint tested by color, location, specification number or other characteristic, the manufacturer of the paint, and the supplier of the paint (if different).

(Comment 34)—One commenter stated that proposed § 1109.11(a)(3) would specify that the documentation required by a testing party and the certificate required by certifiers shall identify each paint tested by location and formulation. The commenter stated that paint formulations involve commercial and technical secrets and that the requirement to identify paint formulations is beyond the scope of the CPSIA. The commenter suggested deleting the requirement to identify paint formulations.

(Response 34)—The commenter has misinterpreted proposed § 1109.11(a)(3), which would require that documentation identify each paint tested ''by color, location, formulation, *or* other characteristic'' (emphasis added). Nevertheless, we deleted this section in the final rule because it is duplicative of the general requirement for all products in § 1109.5(g)(1). Section 1109.5(g)(1) of the final rule requires identification of the component part to which the test report or certificate applies. Any characteristic sufficient to identify the paint that was tested will satisfy this requirement (*e.g.,* ''red paint on coat of doll,'' or ''red paint #1234''). The final rule does not require a certifier to provide formulation data. No change has been made to the final rule in response to this comment.

(Comment 35)—One commenter stated that the requirement in proposed § 1109.11(a)(3) for the documentation to identify the location on the finished product where each paint is used would be too difficult to identify each accurately before its use. The commenter suggested deleting this requirement or making it voluntary.

(Response 35)—As noted above in the response to Comment 34, we deleted proposed § 1109.11(a)(3) from the final rule. Section 1109.5(g)(1) of the final rule requires that a certifier or testing party identify the component part tested. This includes paint. This identification may be, for example, by color, location, formulation, or other characteristic. At least one characteristic is necessary to identify which paint component part on the product is tested or certified. The final rule does not require specifying more than one of these characteristics, but certifiers and testing parties should do so if it is necessary to identify the applicable paint. Therefore, the documentation does not necessarily have to specify the location of the paint on the part. Further, when the test report or certification is solely for the paint, as opposed to a component part with paint applied to it, the location where the paint ultimately might be used is irrelevant to the paint's certification.

b. Proposed § 1109.11(b)—Test Reports

Proposed § 1109.11(b) would state that, as part of its basis for certification of a children's product to the lead paint limit or other paint limit, a certifier may rely on a test report showing passing test results for one or more paints used on the product, based on testing performed by a third party conformity assessment body. The manufacturer of the children's product must ensure that each paint sample sent to a third party conformity assessment body is identical in all material respects to the paint used on the finished product. Test reports must identify each paint tested, by color, formulation, or other characteristic, and identify the manufacturer of the paint and the supplier of the paint (if different).

We received no comments on proposed § 1109.11(b). However, on our own initiative we deleted this section from the final rule because it is duplicative of other regulations regarding paint, as well as the general requirements for component part testing or certification that have already been set forth in § 1109.5. For example, the fact that paint on a children's product must meet the lead paint limit is already set forth in 16 CFR part 1303. Additional limits on heavy metals in paint for children's products are set forth in section 4.3.5.2 of ASTM F 963. The fact that a children's product must be tested by a third party conformity assessment body is required by section 14(a)(2) of the CPSA and our regulation at 16 CFR part 1107, published elsewhere in this **Federal Register.** The fact that component part samples tested must be identical in all material respects to the component parts used in the finished product is required by § 1109.5(a)(2) of the final rule, as well as § 1109.11(b)(2). Finally, identification of the paint tested is required by § 1109.5(g)(1) of the final rule.

c. Proposed § 1109.11(c)—Paint Certificates

(1) Proposed § 1109.11(c)(1)—Children's Products

Proposed § 1109.11(c)(1) would state that, as part of its basis for certification of a children's product to the lead paint limit or other paint limit, a component part certifier or finished product certifier may rely on a certificate from another person certifying that paint complies with the applicable limit. The paint certificate for a children's product must be based on testing by a third party conformity assessment body of samples of paints that are identical in all material respects to the paints used on the finished product. The paint certificate must identify all test reports underlying the certification.

We received no comments on proposed § 1109.11(c)(1). However, on our own initiative, we deleted this section from the final rule because the requirements are duplicative of other regulations and the general requirements for component part testing or certification in § 1109.5 of the final rule. For example, the fact that a finished product certifier can rely on component part testing or certification is duplicative of § 1109.5(a) and 1109.5(i)(1) of the final rule. The fact that a Children's Product Certificate must be based on testing by a third party conformity assessment body is duplicative of section 14(a)(2) of the CPSA and our regulation at 16 CFR part 1107, published elsewhere in this **Federal Register.** The fact that component part samples tested must be identical in all material respects to the component parts used in the finished product is required by § 1109.5(a)(2) of the final rule, as well as § 1109.11(b)(2). Finally, as described in response to Comment 21 in section II.C.5.h.(3) of this preamble, content requirements for certificates have been removed from the final rule. Certificate content requirements are set forth in section 14(g) of the CPSA and our regulation at 16 CFR part 1110.

(2) Proposed § 1109.11(c)(2)—Non-Children's products

Proposed § 1109.11(c)(2) would provide that for non-children's products that are subject to lead paint limits (such as certain furniture items), a finished product certifier may base its certification to the lead paint limit on its own testing of each paint used on the product, on testing by any third party conformity assessment body, on paint certification(s) from any person, or on a combination of these methods.

We received no comments on proposed § 1109.11(c)(2). On our own initiative, however, we deleted this section from the final rule because it is a restatement of the law on non-children's products and the general requirements for component part testing or certification in § 1109.5 of the final rule. Moreover, pursuant to § 1109.5(a) of the final rule, a finished product certifier may rely on component part testing to certify its product.

(3) Proposed § 1109.11(c)(3)—Traceability

Proposed § 1109.11(c)(3) would provide that any finished product certifier who certifies a children's product as complying with the lead paint limit or other paint limit should be able to trace each batch of paint that is used on the product to the supplier and, if different, the paint manufacturer.

(Comment 36)—A commenter stated that our position on the testing of paint (*Traceability,* proposed § 1109.11(c)(3)), should not be interpreted literally, so long as the manufacturer can show the source of that batch, consistent with the more general definition and requirement of traceability.

(Response 36)—We agree with the commenter. Similar to other component parts, the traceability of paint to the lead content requirements or other rules should extend to the level at which the paint was tested for compliance. We amended § 1109.4(m) to define traceability to extend to the component part of the product tested. In the commenter's example, if the paint was tested at the batch level (as opposed to the constituent components of the paint), the traceability extends to the batch. We also deleted the traceability requirement specifically for paint in proposed § 1109.11(c)(3), because it was duplicative of the traceability requirements in §§ 1109.4(m) and 1109.5(f) in the final rule, which applies to all products and component parts, including paint.

(Comment 37)—One commenter sought clarification of the traceability requirement for testing paint (proposed § 1109.11(c)(3)). The commenter stated that requiring a finished product manufacturer to trace a batch of paint to its source would be reasonable. However, the commenter added, if the intent of the provision is to require the manufacturer to be able to trace back from a particular item of a finished product to the batch of paint used on that product, then the requirement would be onerous and serve no clear purpose.

(Response 37)—We deleted § 1109.11(c)(3) from the final rule because it is duplicative of the general traceability requirements that apply to all component parts in §§ 1109.4(m) and 1109.5(f) of the final rule. One reason for the traceability requirement is to be able to identify the testing party and the third party conformity assessment body if a noncomplying paint is found on a children's product distributed in commerce. Traceability from the finished product to the party who tested the paint is required to help determine why the testing and certification scheme embodied in parts 1107 and 1109 failed to prevent the use of a noncomplying paint on a children's product. Moreover, if a noncompliant paint is found, traceability information can help us and a manufacturer to determine the scope of any resulting recall.

(4) Proposed § 1109.11(c)(4)—Prevention of Contamination Subsequent to Testing

Proposed § 1109.11(c)(4) would require that the finished product manufacturer must ensure that paint meeting the applicable limits when tested and certified is not contaminated later with lead from other sources before or during application to the product.

We received no comments regarding this section. However, on our own initiative, we deleted § 1109.11(c)(4) from the final rule because it is duplicative of § 1109.5(b) on test result integrity that applies to all certifiers and testing parties.

2. Proposed § 1109.12—Component Part Testing for Lead Content of Children's Products

On August 14, 2011, the general limit for lead in any accessible part of a children's product was reduced from 300 parts per million (''ppm'') to 100 ppm (*see* section 101(a)(2)(B) of the CPSIA). On August 12, 2011, the President signed H.R. 2715 into law. The new law revised section 101 of the CPSIA to state that the lead content limits apply only to children's products that are manufactured after the effective date of each limit; thus, the 100 ppm lead content limit applies only to children's products manufactured after August 14, 2011.

Currently, testing and certification is required for metal component parts of children's metal jewelry. 73 FR 78331 (December 22, 2008); 74 FR 6396 (February 9, 2009). The certification must be based on testing by a third party conformity assessment body whose accreditation to test for lead in children's metal jewelry has been accepted by the CPSC. Such entities are listed on the CPSC's Web site (see *http://www.cpsc.gov/cgi–bin/*

labapplist.aspx). If the children's metal jewelry bears paint, it must also be certified as in compliance with the 90 ppm lead paint limit in 16 CFR part 1303. The requirement for testing and certification of other children's products for lead content (except paint) currently is stayed until December 31, 2011.

Children's products, other than children's metal jewelry, or products made of materials which, by their nature, will never exceed the lead content limits, must be certified as being in compliance with the 100 ppm lead content limit, only if they are manufactured after December 30, 2011, and only as to accessible parts that are not subject to a Commission determination, as described in 16 CFR 1500.91. Pursuant to section 14(a)(2) of the CPSA, the certification must be based on testing by a third party conformity assessment body whose accreditation to test for lead in children's products has been accepted by the CPSC.

This section of the final rule is based on our previously published enforcement policy for testing products for compliance with lead limits. 74 FR 68593, 68595 (December 28, 2009). Section 1109.12 on component part testing for lead content of children's products is intended to supersede the enforcement policy with regard to component part testing of lead content in children's products contained in section V of the enforcement policy.

We received several general comments, summarized below, about component part testing for lead content in children's products that do not relate directly to a proposed section of the rule.

(Comment 38)—One commenter requested that we make an explicit statement about component part testing, given that certain types of component part materials are exempt from testing and certification requirements. The commenter is concerned that, without specific language, the final customer will not accept component testing if exempt parts are not tested. The commenter placed the comment on the docket for the proposed 16 CFR part 1107 rule, and recommended revising proposed § 1107.20(c) as follows:

(c) Except where otherwise specified by a children's product safety rule, a manufacturer may substitute component part testing for complete product testing pursuant to 16 CFR [part] 1109 if the component part, without the remainder of the finished product, is sufficient to determine compliance for the entire product. *Component part testing can be used to substantiate compliance for those children's products where part of the product has been exempted from testing pursuant to Section 1500.91.* (Italics indicate proposed language.)

(Response 38)—This comment concerns the component part testing rule; accordingly, we are responding to this comment here. If the suggested change were to be made, the appropriate place to make the change would be to the component part testing for lead content section, proposed 16 CFR 1109.12. We agree that component part testing is appropriate to substantiate compliance for children's products in which part of the product has been exempted for testing. However, we do not believe that it is necessary to revise the final rule to add the language suggested by the commenter. The commenter's suggested language would be duplicative of what already is stated in other rules on exceptions from testing. Lead content, in particular, must be tested part-by-part under section 101 of the CPSIA. Because the statute and the regulations already specify that exempted materials do not require testing, we decline to repeat those exemptions in part 1109.

(Comment 39)—One commenter stated that the proposed rule on component part testing was stricter than necessary and that Congress did not require such a complicated regulatory scheme. The commenter stated that the CPSC's recall data from 1999–2010, show only one death and three purported injuries from lead. The commenter further states that incidents of fraud in testing are infrequent and are already addressed by other statutes. The commenter also mentioned its own record of a single recall of a total of 130 pieces since 1985.

(Response 39)—Section 14(a)(2) of the CPSA requires manufactures of children's product subject to an applicable children's product safety rule to submit sufficient samples to a CPSC-accepted third party conformity assessment body for testing. Based on such third party testing, a children's product manufacturer must issue a certificate that such product complies with the applicable children's product safety rules. Section 14(d)(2)(B) of the CPSA requires the Commission, by regulation, to establish protocols and standards for ensuring that a children's product tested for compliance with an applicable children's product safety rule is subject to test periodically and when there has been a material change in the product's design or manufacturing process, including the sourcing of component parts. Additionally, section 101 of the CPSIA establishes new lead content limits for children's products, and it lowers the lead paint requirement to 90 ppm.

Our implementation of the statute for component part testing is intended to reduce the statutorily required testing burden, by allowing considerable flexibility for component part suppliers and finished product certifiers. Component part suppliers may choose voluntarily to have their component parts tested or certified. Finished product suppliers may use voluntarily a combination of component part certificates, component part test reports, or test reports or certificates of the finished product to show compliance with the applicable product safety rules. Component part testing may be used voluntarily to reduce the economic burden associated with testing and certification, by taking advantage of component part tests that can be used for multiple products. Because the CPSA requires third party testing of children's products, and because the commenter did not suggest ways in which the rule on component part testing could be made less strict and still comply with the law, nor did the commenter provide any explanation on how a regulation based on risk assessment would comply with the CPSIA, we have no basis to revise the final rule in response to this comment.

(Comment 40)—One commenter suggested that, because there have not been recalls or reports of illness or injury due to the presence of lead in ordinary books, they should be excluded from the requirements of the CPSIA. The commenter added that there should be a much more reduced testing regimen for books and other products that have a very low potential for risk, followed by their removal from the testing requirement altogether.

(Response 40)—Pursuant to section 14(i)(5)(A)(i) of the CPSA, as amended by H.R. 2715, third party certification testing no longer applies to ordinary books or to ordinary paper-based printed materials. The exception does not apply to non-paper components like metal or plastic parts, or to accessories that are not part of the binding and finishing materials. The exception also does not apply to books with inherent play value, books designed or intended for a child 3 years of age or younger, and does not include any toy or other article that is not a book that is sold or packaged with an ordinary book. Thus, given how H.R. 2715 has amended section 14(i) of the CPSA, it is unnecessary for us to address the commenter's issues and concerns.

(Comment 41)—One commenter stated that it cost $3,700 for the third party testing required for one of his

products. The commenter also said the 90 ppm lead concentration limit is not realistic. The standard aluminum die-cast alloy, A380, allows a lead content of up to 500 parts per million, the commenter observed. A380 is used for cooking and baking ware, and according to the commenter, it does not make sense that a child cannot play with a die-cast toy but can eat food baked in a die-cast cake pan. The commenter asserted that because his facility is ISO 9001:2008 compliant, it documents all receipts of raw materials, and conducts a metal analysis for each production run with a spectrometer, there is no need for a third party test.

(Response 41)—The CPSIA altered the lead concentration limit in paint and other surface coatings to 90 ppm (16 CFR part 1303). Such limit does not apply to lead content in children's products. As of August 14, 2011, section 101 of the CPSIA specifies a maximum limit of 100 ppm lead content in children's products; it does not impose a comparable limit on non-children's products (such as the cooking and baking ware named by the commenter). The 100 ppm limit is set by statute and is not based on a hazard analysis of the particular product under consideration. Section 14(a) of the CPSA states that manufacturers of children's products must have third party conformity assessment body testing to provide a basis for issuing a Children's Product Certificate. The CPSA contains no provision for excluding products made by companies that are ISO 9001:2008 compliant, that document their receipts, or that use first party testing techniques during production. H.R. 2715 establishes a process by which a functional purpose exception to the lead content limit may be granted to a product, class of product, material, or component part if the Commission makes certain determinations, after a notice and hearing. To date, we have not granted any functional purpose exceptions. Because the statute is clear on the lead limits and the requirement for third party testing, and in the absence of functional exceptions, we decline to revise the rule based on this comment.

a. Proposed § 1109.12(a)—Generally

Proposed § 1109.12(a) would explain that a certifier may rely on component part testing of each accessible part of a children's product for lead content, where such component part testing is performed by a third party conformity assessment body, provided that:

(1) The determination of which, if any, parts are inaccessible pursuant to section 101(b)(2) of the CPSIA is based on an evaluation of the finished product; and

(2) For each accessible component part of the product, the certifier either has a component part test report or a component part certificate.

We received no comments on proposed § 1109.12(a). On our own initiative, however, we finalized this section with several revisions. Section 1109.12 now states:

> A certifier may rely on component part testing of each accessible component part of a children's product for lead content, where such component part testing is performed by a third party conformity assessment body, provided that the requirements in § 1109.5 are met, and the determination of which, if any, parts are inaccessible pursuant to section 101(b)(2) of the Consumer Product Safety Improvement Act of 2008 (CPSIA) and part 1500.87 of this chapter is based on an evaluation of the finished product.

We do not consider the revisions to be substantive; they are instead intended to remove statements that are unnecessary in this rule on component part testing, and to add helpful citations to other relevant statutes and regulations. We deleted proposed § 1109.12(a)(2) from the final rule because it is duplicative of the general requirements for component part testing set forth in §§ 1109.5(g) (documentation requirements) and (i) (requirements for finished product certifiers) of the final rule. We also added a citation to § 1109.5 to clarify that all of the general requirements in that section for component part testing must be met for lead content component part testing. Proposed § 1109.12(a) was renumbered to § 1109.12, and we moved the language that was in proposed § 1109.12(a)(1) into § 1109.12. This formatting change was done to streamline the rule; by deleting subparagraph (a)(2), it was no longer necessary to number the remaining paragraphs as paragraph (a) or subparagraph (a)(1). Finally, we incorporated citation references to both the CPSIA and our regulation at 16 CFR 1500.87, which discuss the determination of inaccessible parts of a children's product, to clarify how testing parties and certifiers should determine what is an inaccessible part of a finished product for lead content testing purposes.

b. Proposed § 1109.12(b)—Component Part Test Reports

Proposed § 1109.12(b) would state that, as part of its basis for certification of a children's product to the lead content limit, a finished product certifier could rely on a test report showing passing test results for one or more component parts used on the product, based on testing by a third party conformity assessment body. The proposal would require the component part test reports to identify each component part tested, by part number or other specification, as well as the manufacturer of the component part and the supplier (if different).

We received no comments on proposed § 1109.12(b). However, on our own initiative we deleted this section from the final rule because it is duplicative of other regulations and the general requirements for component part testing in § 1109.5. For example, the fact that a certification to the lead content limit for children's products must be based on testing conducted by a third party conformity assessment body is already a requirement pursuant to section 14(a)(2) of the CPSA and part 1107 of this chapter, published elsewhere in this **Federal Register.** The fact that a finished product certifier can rely on passing test reports or a certification of one or more component parts of a consumer product to certify a finished product is provided for in § 1109.5(a) and 1109.5(i) of the final rule. Finally, documentation requirements for reliance on test reports or certifications, including product identification, are set forth in § 1109.5(g) of the final rule.

c. Proposed § 1109.12(c)—Component Part Certificates

Proposed § 1109.12(c) would state that, as part of its basis for certification of a children's product to the lead content limit, a finished product certifier could rely on a certificate from another person certifying that a component part complies with the lead limit. The component part certificate would have to be based on testing by a third party conformity assessment body of a sample identical in all material respects to the component part(s) used in the finished product. The certificate pertaining to the component part must identify all test reports underlying the certification consistent with section 14 of the CPSA.

We received no comments on proposed § 1109.12(c). However, on our own initiative, we deleted this section from the final rule because it is duplicative of other regulations and the general requirements for component part testing in § 1109.5. For example, the fact that a finished product certifier can rely on a certification of one or more component parts of a consumer product to certify a finished product is provided for in § 1109.5(a) and 1109.5(i) of the final rule. The fact that a certification to the lead content limit for children's products must be based on testing

conducted by a third party conformity assessment body is already a requirement pursuant to section 14(a)(2) of the CPSA and part 1107, published elsewhere in this **Federal Register.** The requirement that sample component parts tested on which certification is based must be identical in all material respects to the component part(s) used in the finished product is required by section 14(a)(2) of the CPSA and § 1109.5(a)(2) of the final rule. Finally, documentation requirements for reliance on certifications are set forth in § 1109.5(g) of the final rule. As described in response to Comment 21 in section II.C.5.h.(3) of this preamble, all requirements for the contents of certificates have been deleted from the final rule. All certificate content requirements are set forth in section 14(g) of the CPSA and our regulation at 16 CFR part 1110.

d. Proposed § 1109.12(d)—Certificates for the Finished Product

Proposed § 1109.12(d) would require the certificate accompanying the children's product to list each component part tested, by part number or other specification, and for each such component part, identify the corresponding test report, paint certificate, or component part certificate on which certification for the finished product is based.

We received several comments regarding certificate requirements for component parts, which are summarized in Comment 21 in section II.C.5.h.(3) of this preamble. As set forth in the response to Comment 21, we decided to delete all content requirements for certificates to avoid duplication in or inconsistency with the requirements in 16 CFR part 1110. Accordingly, we deleted proposed § 1109.12(d) from the final rule. All certificate content requirements are set forth in section 14(g) of the CPSA and our regulation at 16 CFR part 1110.

3. Proposed § 1109.13—Component Part Testing for Phthalates in Children's Toys and Child Care Articles

Section 108 of the CPSIA permanently prohibits the sale of any children's toy or child care article containing concentrations of more than 0.1 percent of three specified phthalates (di-(2-ethylhexyl) phthalate, dibutyl phthalate, or benzyl butyl phthalate). Section 108 of the CPSIA also prohibits, on an interim basis, the sale of any children's toy that can be placed in a child's mouth or child care article containing concentrations of more than 0.1 percent of three additional phthalates (diisononyl phthalate, diisodecyl phthalate, or di-n-octyl phthalate), pending the recommendation of a Chronic Hazard Advisory Panel.

The Commission approved a ''Statement of Policy: Testing of Component Parts with Respect to Section 108 of the Consumer Product Safety Improvement Act'' on August 7, 2009. On August 17, 2009, a Notice of Availability regarding the Statement of Policy was published in the **Federal Register** (74 FR 41400). The Statement of Policy can be viewed and downloaded from the CPSC Web site at: *http://www.cpsc.gov/about/cpsia/componenttestingpolicy.pdf.* In brief, we believe that only those plastic parts or other product parts which could conceivably contain phthalates (''plasticized component parts'') should be tested for phthalates. We consider it to be unnecessary to test and certify materials that are known not to contain phthalates or to certify that phthalates are absent from materials that are known not to contain phthalates.[3] In addition, we believe that when testing covered products, the assessment of the concentration of phthalates is to be based on testing of the plasticized component parts, rather than testing of the entire product, to avoid dilution of the concentrations of phthalates that can occur when the entire product is considered. The Statement of Policy remains in effect until further notice (except that the CPSC Test Method referenced in the Statement of Policy, CPSC–CH–C1001–09.2, has been superseded by CPSC–CH–C1001–09.3).

On August 12, 2011, the President signed H.R. 2715 into law. Among other things, H.R. 2715 amended section 108 of the CPSIA by adding a new section 108(d)(1) of the CPSIA which states, in part, that the phthalate content limits ''shall not apply to any component part of a children's toy or child care article that is not accessible to a child through normal and reasonably foreseeable use and abuse of such product, as determined by the Commission.'' Pursuant to section 108(d)(3) of the CPSIA, we must promulgate a rule within one year of enactment of this revision to provide guidance on inaccessibility.

Phthalate content limits outlined in section 108 of the CPSIA became effective on February 10, 2009. However, the requirement for testing and certification for the phthalate content requirements is stayed until December 31, 2011 (76 FR 49288). Accordingly, third party testing and certification requirements for products subject to the phthalates content limits apply to products manufactured on or after January 1, 2012.

a. Proposed § 1109.13(a)—Generally

Proposed § 1109.13(a) would state that a finished product certifier may rely on component part testing of appropriate component parts of a children's toy or child care article for phthalate content if the certifier is provided with a copy of the original test results obtained from the third party conformity assessment body or a component part certificate.

We received no comments directly related to proposed § 1109.13(a). On our own initiative, we have finalized this section with two changes. We broadened the first sentence to clarify that any certifier, not just a finished product certifier, can rely on component part testing of children's toys or child care articles for phthalate content. We also amended the end of the sentence that required a finished product certifier to be provided a copy of the original test results obtained from a third party conformity assessment body. This statement is duplicative of the documentation requirements already set forth in § 1109.5(g) of the final rule. Accordingly, this section now states that a certifier can rely on component part testing of appropriate component parts of a children's toy or child care article for phthalates provided that the requirements for component part testing in § 1109.5 are met.

b. Proposed § 1109.13(b)—Component Part Test Reports

Proposed § 1109.13(b) would state that, as part of its basis for certification of a children's product to the phthalate content limit, a finished product certifier may rely on a test report showing passing test results for one or more component parts used on the product, based on testing by a recognized third party conformity assessment body. Component part test reports must identify each component part tested, by part number or other specification, and the component part's supplier, and if different, the component part's manufacturer.

We received no comments on proposed § 1109.13(b). However, on our own initiative, we deleted this section from the final rule because it is duplicative of other regulations and the general requirements for component part testing in § 1109.5 of the final rule.

[3] Untreated/unfinished wood, metal, natural fibers, natural latex and mineral products are not expected to inherently contain phthalates and need not be tested or certified, provided that these materials have neither been treated nor adulterated with the addition of materials that could result in the addition of phthalates into the product or material.

For example, the fact that a certification to the phthalate limit for children's toys and child care articles must be based on testing conducted by a third party conformity assessment body is already a requirement pursuant to section 14(a)(2) of the CPSA and part 1107, published elsewhere in this **Federal Register.** The fact that a finished product certifier can rely on passing test reports or a certification of one or more component parts of a consumer product to certify a finished product is provided for in § 1109.5(a) and 1109.5(i) of the final rule. Finally, documentation requirements for reliance on test reports or certifications are already set forth in § 1109.5(g) of the final rule.

c. Proposed § 1109.13(c)—Component Part Certificates

Proposed 1109.13(c) would state that, as part of its basis for certification of a children's product to the phthalate content limit, a finished product certifier may rely on a certificate from another person certifying that a component part complies with the limit. The component part report must be based on testing by a third party conformity assessment body of a samples that are identical in all material respects to the component parts used in the finished product. The component part certificate must identify all test reports underlying the certification required by section 14 of the CPSA. Any person who certifies a children's product as complying with the phthalate content limits must be able to trace each component part of the product to the component part's supplier and, if different, the component part's manufacturer.

We received no comments on proposed § 1109.13(c). On our own initiative, however, we deleted this section from the final rule because it is duplicative of other regulations and the general requirements for component part testing in § 1109.5 of the final rule. For example, the fact that a finished product certifier can rely on a component part certificate for one or more component parts of a consumer product to certify a finished product is provided for in § 1109.5(a) and 1109.5(i) of the final rule. The fact that a certification to the phthalate limit for children's toys and child care articles must be based on testing conducted by a third party conformity assessment body is already a requirement pursuant to section 14(a)(2) of the CPSA and part 1107, published elsewhere in this **Federal Register.** The requirement that the tested component part samples on which certification is based must be identical in all material respects to the component part(s) used in the finished product is required by section 14(a)(2) of the CPSA and § 1109.5(a)(2) of the final rule. Documentation requirements for reliance on another party's test reports or certificates are already set forth in § 1109.5(g) of the final rule. Further, as described in response to Comment 21 in section II.C.5.h.(3) of this preamble, we deleted all requirements for the contents of certificates from the final rule. All certificate content requirements are set forth in section 14(g) of the CPSA and our regulation at 16 CFR part 1110. Finally, traceability requirements for all component parts are set forth in §§ 1109.4(m) and 1109.5(f) of the final rule.

d. Proposed § 1109.13(d)—Certificates for the Finished Product

Proposed § 1109.13(d) would require that the certificate accompanying the children's product list each component part required to be tested by part number or other specification and, for each such part, identify the corresponding test report from a third party conformity assessment body on which the product's certification is based.

We received several comments regarding certificate requirements for component parts, which are summarized in Comment 21 in section II.C.5.h.(3) of this preamble. As set forth in response to Comment 21, we decided to delete all content requirements for certificates, to avoid duplication or inconsistency in content requirements that have already been codified in 16 CFR part 1110. Accordingly, we deleted proposed § 1109.13(d) from the final rule. All certificate content requirements are set forth in section 14(g) of the CPSA and our regulation at 16 CFR part 1110.

4. Proposed § 1109.14—Composite Part Testing

Composite part testing is where more than one paint or surface coating, or more than one component part, are combined and the combination is tested for the level of the target chemical. This can reduce the number of tests required or the number of products needed to obtain a sample large enough to test.

a. Proposed § 1109.14(a)—Paint and Other Surface Coatings

Proposed § 1109.14(a) (renumbered to § 1109.21(a) in the final rule) would state that, in testing paints for compliance with chemical content limits, testing parties may test a combination of different paint samples so long as they follow procedures ensuring that no failure to comply with the lead limits will go undetected, as described in proposed § 1109.14(c). Testing and certification of composite paints must comply with proposed § 1109.11.

(Comment 42)—One commenter stated that many manufacturers have multiple paint colors that are mixed from base colors and that testing all marketed colors for lead, including custom colors, imposes a hardship. The commenter said that if each of the base colors complied with the 90 parts per million lead in paint standard, then all of the resulting colors would also meet the standard. The commenter stated that it would be useful if the final rule specifically allowed manufacturers to certify all of their paint colors on the basis of tests on the base colors only, provided that there is no contamination in the manufacturing process that could cause the paint colors to violate the standard.

(Response 42)—The commenter is correct that if each base paint complies with the standard, then the final mixed paints will comply with the standard, provided there is no contamination in the manufacturing process. The constituent components of paint may be considered component parts. If each constituent component complies with the lead in paint standard, then any combination of those components will also be compliant. In the commenter's example, if the constituent components are tested or certified, those test results and certificates can be used as the basis for issuing test reports or certificates for any paint that is a combination of those constituent components.

To make this explicit, we added the following language to § 1109.21 (a):

> A certificate may be based on testing each component part of the paint according to the requirements of § 1109.11 and certifying that each component part in the mixture individually complies with the lead in paint limit or other paint limit.

(Comment 43)—Some commenters noted that the effect of composite testing is to lower the acceptable lead-in-paint level in a component to a very small parts per million value. In other words, because composite testing considers all the lead in the composite to be in each component part of the composite, composite testing may not be useful where the component parts contain significant, but permissible, levels of lead. One commenter considered this a ''gamble.'' The commenters recommended that the 90 ppm limit be applied to composite samples. One commenter based this recommendation on an argument that lead poses a minimal risk.

(Response 43)—In composite testing, different paint samples are tested together. The test result received represents the total chemical content (lead in paint in this case) in the mixture. The total chemical content is completely allocated to each paint in proportion to the composite. If the computation of total lead divided by the weight of each paint does not exceed the lead-in-paint limits, then no paint in the mixture exceeds the lead content limits. If this computation exceeds the lead limits, it still may be possible that no paint in the composite individually exceeds the lead limit. This is especially likely if the paint with the largest proportion in the composite has some lead and there are only small amounts of other paints in the composite.

For example, if different parts of a doll are painted with small amounts of different paints, the paints could be mixed together and tested for lead content. Assume the doll has three different paints, A, B, and C. Composite testing of a mixture of 50% A, 30% B, and 20% C are tested for lead content. The lead content of the composite is 40 ppm. When the total lead content is applied to each paint, the potential concentration of lead in each paint is the measured amount divided by the percentage of the composite, or:

- Potential lead content of paint A = 40 ppm/50% or 80 ppm.
- Potential lead content of paint B = 40 ppm/30% or 133 ppm.
- Potential lead content of paint C = 40 ppm/20% or 200 ppm.

In this example, because both paints B and C could potentially contain more than 90 ppm lead, more testing is needed to determine if this is actually the case.

We disagree with the commenter's characterization of composite testing as a ''gamble.'' Composite testing is a way to screen several paints quickly and less expensively than separate tests for each paint. If the composite does not meet the lead limits, then according to the rule, ''* * * additional testing would be required to determine which of the paints, * * * if any, fail to meet the applicable limit.'' The commenter's suggestion that 90 ppm be retained for the composite sample would not comply with the law because the composite might have less than 90 ppm lead, but some of the individual paints (that could be used on products or component parts) in the composite might exceed 90 ppm.

We have finalized proposed § 1109.14(a) with several changes. On our own initiative, we created a new Subpart C for composite testing so that Subpart B is for regulations about specific consumer products or chemicals, and we renumbered this section to § 1109.21(a). We also shortened the title of this section to ''Paint'' and removed ''and other surface coatings,'' because ''paint'' is a defined term in § 1109.4(j) that includes other surface coatings. In the first sentence, we broadened the reference to ''testing parties'' to include both ''certifiers and testing parties,'' to acknowledge and clarify that certifiers can also be testing parties. Also in the first sentence, we revised the phrase ''parties may test a combination of different paint samples'' to ''parties may procure tests conducted on a combination of different paint samples'' to clarify and emphasize that certifiers and testing parties for children's products must procure tests from a third party conformity assessment body. As set forth in the response to Comment 42, we added a sentence to this section to clarify the use of composite testing of paints to certify a product. Finally, we clarified that the testing and certification of composite paints must meet the general requirements for component part testing set forth in § 1109.5 and the requirements for component part testing of paints set forth in § 1109.11.

b. Proposed § 1109.14(b)—Component Parts

Proposed § 1109.14(b) (renumbered to § 1109.21(b) in the final rule) would allow a third party conformity assessment body to test a combination of component parts so long as the third party conformity assessment body follows procedures ensuring that no failure to comply with the content limits will go undetected, as described in proposed § 1109.14(c). Testing and certification of composite component parts for lead content must comply with § 1109.12. Testing and certification of composite component parts for phthalate content must comply with § 1109.13.

We did not receive any comments on proposed § 1109.14(b). On our own initiative, however, we made several changes in finalizing this section, in addition to renumbering. We revised the opening sentence to clarify who is responsible for procuring third party testing to state that ''[a] certifier or testing party may procure tests conducted on a combination of component parts for compliance with chemical content limits so long as test procedures are followed to ensure that no failure to comply with the content limits will go undetected * * *.'' We removed ''third party conformity assessment bodies'' from the opening sentence and replaced it with ''[a] certifier or testing party,'' because this rule puts the responsibility for ensuring that a certification is based on appropriate test methods and protocols on the party procuring testing. Consistent with this fact, we emphasized that certifiers and testing parties may ''procure tests,'' because they must rely on a third party conformity assessment body to conduct certification testing for children's products. We clarified that composite part testing for lead content must comply with the general rules for component part testing in § 1109.5 as well as the requirements for component part testing of lead content in § 1109.12. We made this same clarification for phthalate testing, such that composite part testing for phthalate content must comply with the general rules for component part testing in § 1109.5 as well as the requirements for component part testing of phthalate content in § 1109.13.

c. Proposed § 1109.14(c)—How To Evaluate Composite Part Testing

Proposed § 1109.14(c) (renumbered to § 1109.21(c) in the final rule) would state that when using composite testing, only the total amount or percentage of the target chemical is determined instead of the amount in each individual paint or component part. Therefore, to determine that each paint or component part is within the applicable limit, the entire amount of the target chemical in the composite is attributed to each paint or component part. If this method yields an amount of the target chemical that exceeds the limit applicable to any paint or component part in the composite sample, additional testing would be required to determine which of the paints or component parts, if any, fail to meet the applicable limit.

We received no comments on this proposed definition. However, because we have renumbered the provisions that were proposed as subpart B into a new subpart C, we have renumbered it as § 1109.21(c).

E. Miscellaneous Comments

(Comment 44)—One commenter urged us to conduct a full cost–benefit analysis of both the component testing rule and the testing and labeling rule.

(Response 44)—While we could have conducted a cost–benefit analysis, in the case of the component part testing rule, such an analysis would have little value. The component part testing rule gives manufacturers with a lower cost alternative for meeting the testing and certification requirements of section 14 of the CPSA. If manufacturers do not

find that component part testing reduces their costs, they are free to rely solely upon tests conducted on the finished product.

(Comment 45)—One commenter stated that implementation of the proposed rule would end the use of recycled materials in children's products. The commenter stated that it was unnecessary for safety reasons and not environmentally ''friendly.''

(Response 45)—We acknowledge that the 100 ppm lead content limit in section 101 of the CPSIA could result in reduced use of recycled materials in children's products. This is because the lead content of general use products can be higher than the amount allowed for children's products. Therefore, manufacturers of children's products may need to refrain from using recycled materials to avoid the possibility that the lead content exceeds the limits established by section 101 of the CPSIA. However, the lead limits were established by the CPSIA and so any changes to those limits must occur by statute rather than by regulation.

(Comment 46)—One commenter stated that the imposition of regulating each part of a particular product at the level before the final piece is completed made little sense and that safety issues should be dealt with at the finished product level. The commenter felt that because it is up to the manufacturer of a finished product to ensure its safety, it would be unnecessary and cumbersome for a government entity to micromanage each component part of that product. The commenter felt that while component part regulation of simpler products, such as children's toys, may be possible, component part regulation of more complex products would be senseless and a very difficult task. The commenter asserted that we should be concerned only with the finished product's compliance with the applicable standard. How the product was produced should be of lesser importance. The commenter predicted that such a focus on finished product compliance would force those who run businesses and commerce to compete and innovate to achieve the mandatory result. The commenter concluded by suggesting that the CPSC should not over regulate and thereby miss the mark of ensuring a safe toy for children.

(Response 46)—Finished product certifiers are responsible for the finished product's compliance with applicable product safety rules. Finished product certifiers include domestic manufacturers and importers.

In some cases, component part testing, while optional, may be more economical than finished product testing. For example, assume that a manufacturer makes 10 different toy cars, and the toy cars use the same metal axles. Component part testing of the metal axles for their compliance with the lead limit for children's product could result in testing only the metal axles rather than testing the metal axles 10 times (once with each type of toy car). Therefore, the final rule gives finished product certifiers the option to take advantage of component part testing, provided that the testing follows 16 CFR parts 1107 and 1109. However, we do not require component part manufacturers to test component parts as participation is voluntary. Finished product certificates always may be based on testing the finished product. Even when a regulation requires that tests be performed on a per part basis, such as lead content in children's products, finished products can be disassembled for testing purposes, if that is more efficient for a particular product.

(Comment 47)—One commenter noted that a publisher's ordinary books may have varying titles and authorial content, but they are all made with the same materials in the same manner. The commenter asserted that the differences between ordinary books are not material to compliance with the applicable rules. The commenter suggested relying on component part certification for all children's paper-based printed products manufactured using tested component materials. The commenter said a publisher with a reasonable testing program that publishes products without material changes could rely on the component certifications for all materials published within a 2-year period.

(Response 47)—Pursuant to section 14(i)(5)(A)(i) of the CPSA, as amended by H.R. 2715, third party certification testing no longer applies to ordinary books or to ordinary paper-based printed materials. The exception does not apply to non-paper components like metal or plastic parts, or to accessories that are not part of the binding and finishing materials. The exception also does not apply to books with inherent play value, books designed or intended for a child 3 years of age or younger, and does not include any toy or other article that is not a book that is sold or packaged with an ordinary book. Thus, it is unnecessary for us to address the commenter's concerns as they relate to ordinary books and ordinary paper-based printed materials. With regard to the non-excepted products, we agree that component part testing of books for chemical content can be used in the manner described by this commenter. As long as all of the inks and other component parts of a book meet all applicable requirements, the printed and assembled book will meet the requirements as well. As for the 2-year testing interval for nonexcepted children's books, as suggested by the commenter, the testing interval is subject to the children's product periodic testing provisions of 16 CFR part 1107.

(Comment 48)—One commenter suggested that final testing and certification should defer to the Occupational Safety and Health Administration (OSHA)-designated Nationally Recognized Testing Laboratory (NRTL) certification program. The commenter added that this program determines products certified by the NRTL, because they are manufactured and distributed for consumer use, and they are *per se* compliant with the proposed testing and certification rules. The CPSC would still maintain its authority to exercise recall, civil penalty, and other authorities, if violations are found, the commenter asserted.

(Response 48)—Pursuant to section 14(a)(3)(C) of the CPSA, we have chosen to designate accrediting bodies that are full-member signatories to the International Laboratory Accreditation Cooperation—Mutual Recognition Arrangement (ILAC–MRA) to conduct third party testing. Given that children's products intended for the U.S. market are manufactured in nations throughout the world, we decided to avoid designating accreditation programs or entities that are recognized only in a specific region, nation, or locality. The reasons for this are: (1) To keep the program as simple as possible for use by manufacturers, private labelers, importers, testing laboratories, and other interested parties; (2) to establish uniform requirements, regardless of location; (3) to establish a program that is manageable within agency resources; and (4) to maintain a degree of consistency in the procedures used by the designated accrediting bodies.

Moreover, the commenter appears to misstate testing requirements. Consumer products are not tested for whether they are compliant with the testing and certification rule (*i.e.,* parts 1107 and 1109); rather, consumer products are tested for compliance with applicable rules, bans, standards, and regulations that the CPSC enforces. Moreover, section 14(i)(2)(B)(i) of the CPSA requires such testing periodically and when there has been a material change. Therefore, continued testing is required by the statute and ''*per se* conformance'' with the applicable product safety rules

is not allowed. Additionally, section 14(a) of the CPSA requires manufacturers (including importers) to certify that their products comply with the applicable product safety rules. This responsibility cannot be delegated to another party, such as a certification body.

The qualifications of testing laboratories performing certification tests are outside the scope of this final rule. Such qualifications are addressed in the various notices of requirements that we have published pursuant to section 14(a)(3) of the CPSA.

Finally, we acknowledge that recently enacted H.R. 2715 requires us to seek public comment on ''opportunities to reduce the cost of third part testing requirements consistent with assuring compliance with any applicable consumer product safety rule, ban, standard, or regulation.'' One topic that H.R. 2715 requires us to address pertains to ''the extent to which evidence of conformity with other national or international governmental standards may provide assurance of conformity to consumer product safety rules, bans, standards, or regulations applicable under [the Consumer Product Safety Act].'' Elsewhere in this issue of the **Federal Register,** we have published a notice inviting public comment on the issues identified in H.R. 2715, so the commenter's argument would be raised and addressed, more appropriately, in that proceeding. We note, however, that very few products covered under the OSHA-designated Nationally Recognized Testing Laboratory certification program would be children's products for which third party testing would be required. Moreover, products that are subject to the OSHA certification program would likely be covered by CPSC regulations, if at all, for which the only requirement is a General Conformity Certificate based on a reasonable testing program. OSHA certification testing may be a sufficient basis for such certifications depending upon the product and the type of testing involved. Given that the CPSC does not have jurisdiction over products when the risks of injury associated with the consumer product could be eliminated or reduced to a sufficient extent by the actions of OSHA, there may be very little overlap between a particular product's results under OSHA's testing program and any CPSC-required testing.

(Comment 49)—One commenter said that it should be unnecessary for the manufacturer or private labeler of a finished children's product to ensure that every certificate (notably component part or materials testing certificates) required under section 102 of CPSIA accompanies the product or shipment of products and is furnished to each distributor or retailer of the product.

(Response 49)—Section 14(g)(3) of the CPSA requires that a GCC or a CPC accompany the applicable product or shipment of products covered by the same certificate, and it also requires that a copy of the certificate be furnished to each distributor or retailer of the product. We do not require component part certificates to accompany the finished product, although testing parties and certifiers must provide such documentation to a certifier relying on the documentation to issue a certificate, and must provide such documentation to the CPSC, upon request.

(Comment 50)—One commenter stated that the final rule should require adequate product design hazard review, both before introduction of products into commerce in the United States and, where appropriate, as an element of remedial action plans.

(Response 50)—This comment is outside the scope of 16 CFR part 1109 because product design hazard review may not be appropriate for all components, and neither the proposed, nor final rules on component part testing addresses remedial action plans. Remedial action plans are discussed in the rulemaking for 16 CFR part 1107, and so we address this comment in that rulemaking.

(Comment 51)—One commenter said that testing requirements for lead and the imposition of penalties on companies that violate the lead standards would reduce the incidence of lead poisoning. The commenter, however, did not provide any additional comment on the proposed rule.

(Response 51)—The requirements limiting lead content in children's products (section 101 of the CPSIA) and the imposition of penalties for violations of those requirements are beyond the scope of this rule.

(Comment 52)—A commenter disagreed with recent notices of requirements that we issued regarding the flammability standards for carpets and rugs (16 CFR parts 1630 and 1631) and vinyl plastic film (16 CFR part 1611), which considered a standard of general application to all consumer products in a category to be a ''children's product safety rule'' for purposes of the CPSIA. *See* 75 FR 42315 (July 21, 2010) and 75 FR 42311 (July 21, 2010), respectively. The commenter contended that a standard of general application to all consumer products in a category should not be considered a ''children's product safety rule'' for purposes of the CPSIA. The commenter expressed the belief that such an interpretation will expand testing burdens in an unwarranted way, posing difficulties for all participants in the supply chain and potentially resulting in the elimination of some products from the children's product category due to added test costs.

(Response 52)—The question of which rules constitute children's product safety rules is beyond the scope of this rulemaking. This rule addresses the requirements and conditions for component part testing, and it does not address whether a particular safety standard constitutes a children's product safety rule.

(Comment 53)—One commenter suggested that the testing costs could be reduced by reducing the number of components that must be tested. The commenter suggested that this could be done by expanding the number of materials for which testing for phthalate content is not required. Another commenter pointed out that inaccessible components are exempted from the lead content requirements. The commenter stated that, using the same logic, inaccessible components also should be exempted from the phthalate requirements.

(Response 53)—The question of which materials require testing for phthalate content is beyond the scope of this rulemaking. This rule addresses the requirements and conditions for component part testing, and it does not address section 108 of the CPSIA, which contains the requirements for phthalate content.

We acknowledge, however, that recently enacted H.R. 2715 contains a provision excluding inaccessible component parts from the phthalate prohibitions. The legislation requires us to promulgate regulations with respect to the inaccessible phthalates section or to adopt a guidance document comparable to that for lead. We will address such matters in a separate proceeding.

(Comment 54)—One commenter suggested that wet chemistry should not be considered the only retest method if a composite sample fails a test. X-Ray fluoroscopy could be a valid method for lead and heavy metals, and Fourier transform infrared spectroscopy could be a valid method for phthalates in determining which component or components caused the failure, the commenter observed. The commenter urged us to allow the use of XRF technology, following the method in ASTM F2853 for testing small quantities of paints and coatings where there is an insufficient amount of the paint or other

surface coatings to using the method that would normally be recommended.

(Response 54)—Section 1109.21(c) of the final rule does not specify what type of testing is required to determine which component parts have not met the concentration limits of the applicable rules. Specifying alternate test methods for determining the lead content in paint and surface coatings and for phthalate concentrations is beyond the scope of this rulemaking.

We do note, however, that on April 5, 2011, we published in the **Federal Register** a notice of requirements for accreditation of third party conformity assessment bodies for lead in paint (76 FR 18645). In that notice of requirements, the use of ASTM F2583–10, ''Standard Test Method for Determination of Lead in Paint Layers and Similar Coatings or in Substrates and Homogeneous Materials by Energy Dispersive X-Ray Fluorescence Spectrometry Using Multiple Monochromatic Excitation Beams,'' is allowed for testing the lead content in paint.

III. Environmental Considerations

Generally, the Commission's regulations are considered to have little or no potential for affecting the human environment, and environmental assessments and impact statements are not usually required. *See* 16 CFR 1021.5(a). The final rule contains the Commission's conditions and requirements for relying on component part testing or certification, or another party's finished product testing or certification, to meet testing and certification requirements in section 14 of the CPSA. As such, the final rule is not expected to have an adverse impact on the environment. The rule falls within the categorical exclusion in 16 CFR 1021.5(b)(2) for product certification rules. Accordingly, no environmental assessment or environmental impact statement is required.

IV. Regulatory Flexibility Analysis

The Regulatory Flexibility Act (''RFA''), 5 U.S.C. 601–612, generally requires that agencies review proposed rules for their potential economic impact on small entities, including small businesses. The RFA calls for agencies to prepare and make available for public comment an initial regulatory flexibility analysis describing the impact of the proposed rule on small entities and identifying impact-reducing alternatives. 5 U.S.C. 603. The RFA further requires agencies to consider comments they receive on the initial regulatory flexibility analysis and prepare a final regulatory flexibility analysis describing the impact of the final rule on small entities and identifying alternatives that could reduce that impact. *Id.* 604. This section summarizes CPSC staff's final regulatory flexibility analysis for the final rule on component part testing. (CPSC staff's final regulatory flexibility analysis can be found at Tab B of staff's briefing package.)

A. Reason for Agency Action and Objective of the Final Rule

Some testing can be done more efficiently on component parts of a product rather than on the finished product itself. This is especially true for tests for the chemical content (*e.g.,* lead or phthalate content) of a component part. The final rule establishes the conditions and requirements that must be met for a finished product certifier (the domestic manufacturer or importer) of a consumer product to rely upon tests conducted on component parts of the finished product as a basis for issuing a finished product certificate. It also describes the conditions and requirements that must be met for a finished product certifier to rely upon finished product testing conducted by or certificates issued by other parties.

In the absence of a rule allowing for component part testing, each component part of a children's product would have to be tested each time the manufacturer had to certify or periodically test the product, even if the same component part were used and tested in other products. The final rule allows the finished product certifier to rely upon tests conducted on component parts to certify that finished products in which the component parts are used comply with the applicable safety rules. Therefore, component part testing allows some testing costs to be spread over more units of finished products. The final rule also describes the conditions and requirements that must be met for a finished product certifier to rely upon finished product testing procured by or certificates issued by other parties that can reduce the cost of testing a product that is imported by more than one importer. This can reduce significantly the cost of testing consumer products for compliance with applicable consumer product safety rules, bans, standards, and regulations.

B. Comments on the Initial Regulatory Flexibility Act

We received three comments regarding the initial regulatory flexibility analysis.

(Comment 55)—One commenter noted that, in estimating the number of firms that could be impacted by the proposed rule, the book publishing industry (NAICS code 511130) and printing industry (NAICS code 323117) were not included; thus, the commenter recommended their inclusion for the final Regulatory Flexibility Analysis.

(Response 55)—We acknowledge that the initial regulatory flexibility analysis inadvertently omitted these industries. However, the recently enacted H.R. 2715 exempts ordinary books and ordinary printed materials from the third party testing requirements, so the commenter's concern no longer applies.

(Comment 56)—One commenter stated that the initial regulatory flexibility analysis was ''flawed and self–justifying.'' The commenter asserted that a ''best case'' scenario was used to justify the rule. The commenter claimed that the requirements that the rule imposes to use component testing, including the recordkeeping burdens and legal risks, could make the rule hard to use. Therefore, the commenter asserted, the rule could end up providing little, if any, relief to small businesses. Another commenter echoed these comments, stating that some aspects of the proposed rule would reduce the costs of testing for some products, but the proposed rule's restrictions and conditions would prevent the rule from providing material relief to small and medium–sized businesses that manufacture or import thousands of different products using tens of thousands of components that are consumed at very small volumes.

(Response 56)—The purpose of a regulatory flexibility analysis is to describe the impact of a rule on small entities. The intent of the component part testing rule is to provide manufacturers and private labelers the option of certifying conformity with some safety rules based upon certification or testing of component parts. In many cases, this option has the potential for reducing testing costs, especially if the same component part is used in more than one finished product. However, to ensure that the testing and certification requirements of the CPSIA are not undermined by allowing component part testing, there are some conditions on the use of component testing, including the traceability and recordkeeping requirements. We acknowledge that, in some cases, these requirements may reduce or even eliminate the advantages that the component part testing option offers. In these cases, the manufacturer or private labeler always has the option to certify their products based upon tests of the finished product.

(Comment 57)—One commenter stated that while some suppliers might provide certificates or third party testing, several types of components are not likely to be tested voluntarily by the suppliers. These include:

- Low-volume components;
- Components made in small lots;
- Components made by a small supplier (*e.g.,* many fabrics); and
- Components that derive only a tiny percentage of revenue from regulated products; or that cater principally to other industries.

The commenter asserted that the CPSC's logic appeared to be that if the CPSC can be certain that some certificates will be widely available, then all certificates will be widely available. Another commenter stated that they had surveyed their suppliers and found little interest in providing the testing required for children's products.

(Response 57)—The initial regulatory flexibility analysis did not assume that suppliers would certify all component parts. Where suppliers voluntarily certify their products or provide testing reports, component part testing has the potential to reduce significantly the testing costs for manufacturers of finished products. However, the rule does not require suppliers to certify or provide third party test results on their products. We agree that some suppliers, such as the ones that supply the products in the above list, might choose not to certify their products or provide the third party testing results.

C. Description of the Number of Small Entities to Which the Final Rule Will Apply

The final rule applies to any domestic manufacturer or importer of consumer products who must issue a finished product certificate, pursuant to 16 CFR part 1110, who uses component part testing or finished product testing or certification by another party as the basis for certification. The regulatory flexibility analysis for the final rule on testing and labeling pertaining to certification indicates that there were about 250,000 firms classified in industries, according to the North American Industrial Classification System (NAICS), that could manufacture or import children's products that could be subject to a consumer product safety rule, ban, standard, or regulation. Of these, more than 91 percent would be classified as a small business, according to the classification standards established by the U.S. Small Business Administration. Additionally, there are more than 4,700 small firms classified in industries that are unlikely to include children's products but could manufacture or import other consumer products subject to a product safety rule, ban, standard, or regulation. These include manufacturers of household appliances, lawn and garden equipment makers, manufacturers of fireworks, and firms that could manufacture or use architectural glazing materials. However, these are over estimates of the number firms to which the rule would apply.

Many of the NAICS categories included in the analysis are broad and include products that are not covered by any consumer product safety rules. Most firms included in the estimates were retailers or wholesalers and not manufacturers. Retailers or wholesalers that import consumer products would be responsible for ensuring that the product was tested properly and certified; but many retailers and wholesalers likely obtain all of their products from domestic manufacturers or wholesalers, and therefore, would not be impacted directly by the final rule. Finally, not all of the manufacturers and importers of consumer products that are subject to consumer product safety rules will use component part testing in certifying the products.

In addition to the firms discussed above, the U.S. Census Bureau estimates that there are more than 600,000 nonemployer businesses classified in the same NAICS categories. Nonemployer businesses are generally very small sole proprietorships with average receipts of about $55,000. Very little is known about the nonemployer businesses, but an unknown number could be manufacturers or importers of consumer products subject to a consumer product safety rule, ban, standard, or regulation.

The final rule also applies to manufacturers or wholesalers of component parts that may be used in consumer products, who voluntarily provide test reports or certify their products as complying with one or more consumer product safety rules. Manufacturers of clothing textiles, paints and coatings, buttons and other fasteners, and plastic materials and resins could certify their products voluntarily or provide third party test results to their customers. The 2007 Economic Census showed that there were 5,220 establishments that were engaged in manufacturing these materials or components.[4] However, not all of these establishments are expected to test or certify their products.

D. Projected Recordkeeping and Compliance Requirements

Component part testing is voluntary[5] for manufacturers (including importers) of consumer products and for manufacturers and suppliers of components that might be used in consumer products. The only firms that are expected to use component part testing are firms that determine that it would be advantageous for them to do so. This could include manufacturers of consumer products who might be able to reduce their testing costs by using component part testing and manufacturers or suppliers of component parts who believe that it would be to their advantage to do so, perhaps because it provides a marketing advantage over competitors (or because competitors are doing so). However, if a firm chooses to engage in component part testing, the final rule describes the conditions and requirements that must be met.

A manufacturer or supplier who tests a component part must ensure that the samples are collected and that the tests are performed according to the requirements in sections 14(a) and 14(i) of the CPSA. If the product is a children's product or a component to be used in a children's product, the testing must meet the requirements of 16 CFR part 1107, which includes requirements for the testing and certification of children's products, including requirements for third party testing. For both children's and non-children's products, any testing or certification must also meet any more specific rules, bans, standards, or regulations that are applicable to the product or component. A finished product certifier cannot rely upon component part product testing or finished product testing procured by another party unless the component parts or finished products are traceable to the parties who procured the tests. Firms using component part testing must exercise due care to ensure that no action or inaction subsequent to testing and before distribution in commerce has occurred that would affect the compliance of the component part, such

[4] Based on the 2007 Economic Census establishment data for the following NAICS codes: 313, 325211, 325510, and 339993. Obtained from *http://factfinder.census.gov/* on 30 March 2010.

[5] While testing and certification of component parts is voluntary, some statutes and/or regulations require that an applicable chemical limit be measured by component part. For example, the lead content requirement is now 100 ppm per component part. Although the specific lead measurement is by component part, component part testing under this rule is still voluntary. A finished product certifier could supply samples of finished product to a third party conformity assessment body, who would measure the lead content in each applicable sample by component part.

as by contamination or degradation during the manufacturing process of the finished product.

A subassembly or even a finished product can be considered to be a component part for purposes of the final rule. Thus, the final rule allows a foreign manufacturer of a children's product to procure the required third party tests on the children's product and provide those test results to the importers of the product. The importers could rely upon the tests procured by the foreign manufacturer in issuing their own certificate for the product, provided that all of the requirements of the final rule have been met.

The final rule requires that the component part testing be documented, and if the testing is done by a manufacturer or supplier of a component part, this documentation must be provided to the finished product certifier. The required documentation or records are:

(1) Identification of the component part or the finished product tested;

(2) Identification of a lot or batch number, or other information sufficient to identify the component parts or finished products to which the testing applies;

(3) Identification of the applicable rules, bans, standards, and regulations for which each component part or finished product was tested;

(4) Identification of the testing method(s) and sampling protocol(s) used;

(5) The date or date range when the component part or the finished product was tested;

(6) Test reports that provide the results of each test on a component part or finished products, and the test values, if any;

(7) Identification of the party that conducted each test (including testing conducted by a manufacturer, testing laboratory, or third party conformity assessment body and an attestation by the party conducting the testing that all testing of a component part or finished product by that party was performed in compliance with applicable provisions of section 14 of the CPSA, 16 CFR part 1107, or any more specific rules, bans, standards, or regulations;

(8) Component part certificate(s) or a finished product certificate, if any;

(9) Records to support traceability as defined in the draft final rule; and

(10) An attestation by each certifier and testing party that while the component part or finished product was in its custody, it exercised due care to ensure among other things, that the products, components, and raw materials were not handled, stored, or processed in a way that could affect the ability of the product to comply with all applicable rules.

All records must be maintained for five years. The records must be made available to the CPSC for inspection, upon request. The records do not have to be maintained in English, as long as the records in the original language can be provided to us immediately and can be translated into English within 48 hours of a request by us, unless a longer period is negotiated with CPSC staff.

The professional skills that would be required are the same that would be required to meet the requirements of the testing and labeling rule. Depending upon the specific product and the safety rules with which the component part manufacturer or supplier intends to test for compliance, people with special knowledge, such as engineers or chemists, may be needed to design and develop a testing program and to conduct the testing. Statistical skills or statistical consultants may be required to determine the testing frequency, sample size, and collection method for internal production testing and third party testing if the product is a children's product or the component part is for a children's product.

The final rule is not likely to have a significant adverse impact on a substantial number of small entities. As noted, component part testing is not mandatory. The only companies that are expected to engage in component part testing are companies that believe it will be advantageous to do so. Finished product manufacturers are expected to use component part testing if it lowers their testing costs. Although there will be some cost to manufacturers or suppliers of component parts who elect to engage in the voluntary testing of component parts, if the cost increase would have a significant adverse impact, it is unlikely that such firms would engage in or continue to engage in component part testing. Component part suppliers who engage in component part testing would be able to spread the cost of the testing over a higher production volume than finished product manufacturers. This would lower the cost of the testing per unit. At least some costs incurred by component part suppliers are likely to be passed on to the finished product manufacturers because finished product manufacturers are likely to be willing to pay more for a component part if it means that they do not have to test the component part themselves.

E. Steps Taken To Minimize Impact on Small Entities

The intent of the final rule is to reduce the impact of the testing and certification rule; thus, it is actually a step that the Commission has taken to reduce the impact of the testing and certification rule on manufacturers of finished products. It is not expected to have a significant adverse impact on a substantial number of small entities. Nevertheless, we made some changes to the rule that will reduce the economic impact further.

One change from the proposed rule is that the final rule does not require records to be kept in the English language. Instead, the final rule requires that an English translation of the records be provided to the CPSC upon request. Additionally, the records do not need to be maintained in the United States, as long as the records can be provided to us, either in hardcopy or electronically, upon request.

We also simplified the traceability requirements to require that traceability only has to be maintained back to the party who procured the testing results. For example, if a component part supplier, who is not the manufacturer of a component part, obtains testing results, a manufacturer of a finished product that uses that component part would have to maintain traceability only to the party who procured the testing, not to the manufacturer of the component part, as would have been required by the rule as proposed.

F. Alternatives Considered to the Final Rule

We considered alternatives to the final rule. These included: Not issuing a final rule allowing for component part testing (*i.e.,* taking no action); not imposing any recordkeeping requirements; and eliminating the traceability requirements from the rule.

One alternative would be to end rulemaking concerning component part testing and not finalize the proposed rule. If this alternative were adopted, manufacturers potentially could use component part testing for lead content testing following the interim enforcement policy issued on December 28, 2009 (74 FR 68593–68596). However, manufacturers could not rely upon testing procured by suppliers to establish compliance with other consumer product safety rules, bans, standards, or regulations (such as for compliance with limits on phthalate content or the limits on the heavy metal content in paints and surface coatings on toys). If the final rule were not finalized, importers of consumer products would not be able to rely upon testing procured by or certifications issued by the foreign manufacturers of the products.

We decided not to end the rulemaking because the final rule offers domestic manufacturers and importers options that have the potential to reduce the cost of testing and certifying consumer products, by spreading the cost of testing over more units of production and allowing certifiers of finished

products to rely upon testing procured by or certificates issued by their suppliers. Moreover, manufacturers retain the option of submitting samples of finished products to testing laboratories to be evaluated for compliance with all applicable rules, bans, standards, and regulations. Therefore, the final rule allows manufacturers and importers of consumer products to select the option that is most advantageous to them.

We considered eliminating altogether—or reducing significantly—the recordkeeping and traceability requirements in the final rule. However, while eliminating these requirements could have reduced, somewhat, the costs associated with component part testing, we concluded that the recordkeeping and traceability requirements are needed to provide the finished product certifier with the information required by section 14(g) of the CPSA to certify the finished product, which includes the test results, the date and place where the product was tested, and the parties who conducted the testing. Moreover, many of the records required normally would be generated in the course of testing a product or component and reporting the results (*e.g.,* the test reports), which suggests that eliminating the requirements would not necessarily eliminate all of the recordkeeping costs. Further, such documentation is required for the CPSC to investigate testing and certification failures when component part testing is used. Finally, the final rule allows the firms that are impacted significant flexibility in designing and maintaining the records. Generally, the rule requires specific information, but it does not specify the format in which the information must be maintained, as long as the information is provided to parties who require it, such as finished product certifiers and the CPSC, if it is requested.

V. Paperwork Reduction Act

The final rule contains information collection requirements that are subject to public comment and review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). In a May 20, 2010, **Federal Register** notice regarding the proposed rule (75 FR 28208, 28217–18), we described the information collection and the annual reporting burden. Our estimate included the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing each collection of information.

We invited comment on: (1) Whether the collection of information is necessary for the proper performance of the CPSC's functions, including whether the information will have practical utility; (2) the accuracy of the CPSC's estimate of the burden of the proposed collection of information, including the validity of the method 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.

We received several comments about the burden estimates contained in the proposed rule.

(Comment 58)—Several commenters stated that the estimates for recordkeeping time and expense were greatly underestimated. One commenter asserted that the proposed rule would impose more extensive requirements than the requirements that are contained in the interim enforcement policy, emphasizing that those requirements are extremely burdensome. The commenter stated that the proposed rule would impose specific and voluminous recordkeeping requirements. The commenter said that we should not require this information on every item, nor should we require companies to integrate multiple systems to compile the data, as long as companies, upon request, can provide reasonable data that is customary in a particular industry. Another commenter noted the burden associated with extracting all of the data that would be required by the proposed rule. The commenter pointed out that the data would come from several different record systems, some of which would have to be obtained manually. Moreover, the commenter remarked that the CPSC is unlikely to review the data, making the task unnecessarily burdensome, without any practical utility. The commenter, a large toy manufacturer, stated that it has several full-time staff who operate globally to manage their component testing process. Therefore, the commenter said that the 20,000 to 30,000 hours, or approximately 20 full-time employees, which we estimated would be needed to handle the paperwork and recordkeeping requirements of the component testing rule, is probably grossly underestimated. One commenter stated that it would be costly to extract the data required from multiple recordkeeping systems that have evolved over time. The commenter added that we envisioned extraction of the data to be easier than it is. One commenter stated that its company would probably have to open an office in Asia and expand its staff in the United States to manage the paperwork and recordkeeping required by the rule. The commenter expressed the belief that complying with the component part testing rule at its company alone could require 20,000 hours, per annum.

(Response 58)—We acknowledge that we significantly underestimated the total cost burden of the recordkeeping requirements. We have increased our estimate of the recordkeeping burden of meeting the requirements in the final rule. To decrease the burden presented by the recordkeeping requirements, the final rule provides that records do not have to be kept in the United States—if they can be accessed by the CPSC—upon request. Also, records do not have to be maintained in English if they can be translated by the manufacturer in a timely manner.

Nevertheless, we believe that some commenters might have misunderstood aspects of the proposed recordkeeping requirements. Neither the proposed rule, nor the final rule, require a firm to develop a new system of records if: It has retained the information in a different set of records; can provide the required information to distributers and finished product certifiers; and is able to furnish it to the CPSC, upon request, as required by the rule.

Title: Conditions and Requirements for Relying on Component Part Testing or Certification, or Another Party's Finished Product Testing or Certification, to Meet Testing and Certification Requirements

Description: The scope of the final rule includes component part testing and certification, as well as testing and certification of a finished product by a party who is not required to do so by 16 CFR part 1110, such as a foreign manufacturer (''finished product supplier''). The final rule requires testing parties (parties that procure tests) and certifiers (both component part and finished product certifiers) to provide the following documentation to a certifier intending to rely upon such information to issue a certificate:

- Identification of the component part or the finished product tested;
- Identification of a lot or batch number, or other information sufficient to identify the component parts or finished products to which the testing applies;
- Identification of the applicable rules, bans, standards, and regulations for which each component part or finished product was tested;

• Identification of the testing method(s) and sampling protocol(s) used;

• Date or date range when the component part or finished product was tested;

• Test reports that provide the results of each test on a component part or finished product, and the test values, if any;

• Identification of the party that conducted each test (including testing conducted by a manufacturer, testing laboratory, or third party conformity assessment body), and an attestation by the party conducting the testing that all testing of a component part or finished product by that party was performed in compliance with applicable provisions of section 14 of the CPSA, part 1107 of this chapter, or any more specific rules, bans, standards, or regulations;

• Component part certificate(s) or finished product certificate(s), if any;

• Records to support traceability as defined in § 1109.4(m); and

• An attestation by each certifier and testing party that while the component part or finished product was in its custody, it exercised due care to ensure compliance with the requirements set forth in § 1109.5(b).

Certifiers and testing parties must maintain this information for five years from the date of creation.

Records required to be maintained are similar to the records that a manufacturer would be required to develop and maintain under the final rule on ''Testing and Labeling Pertaining to Product Certification'' (which appears elsewhere in this issue of the **Federal Register**). Most of the records for children's products concern documentation of the test plan and test results for the component part or finished product, which would be required regardless of whether the component part was tested as part of the finished product or apart from the finished product. Even without component part testing, certifiers would be expected to maintain records regarding the lot, batch, or other information identifying the component parts used because changes in the component part or the sourcing of the component part would constitute a material change and trigger requirements for additional testing.

Based on the comments received, we revised the burden estimate that was set forth in the proposed rule on ''Testing and Labeling Pertaining to Product Certification'' and likewise, we revised the burden estimate for the component testing rule. A full discussion of the revised analysis appears in the final rule on ''Testing and Labeling Pertaining to Certification,'' which is published elsewhere in this issue of the **Federal Register.** The estimate of the total recordkeeping burden consists of three components: (1) The number of products for which recordkeeping will be required; (2) the average number of hours, per product, that will be required to manage the recordkeeping; and (3) the hourly compensation rate to be used to estimate the cost of the recordkeeping. The final rule on ''Testing and Labeling Pertaining to Certification'' contains the following revised estimates, concluding that the total cost of recordkeeping associated with that rule is $197 million:

• 300,000 non-apparel children's products are covered by the final rule;

■ An average of 5 hours will be required for the recordkeeping associated with these products;

• Approximately 1.3 million children's apparel and footwear products are covered by the final rule;

■ An average of 3 hours will be required for the recordkeeping associated with these products;

• Total hour burden = 5.4 million hours (300,000 × 5 hours plus 1,300,000 × 3 hours);

• Total cost of recordkeeping burden = $197 million (5.4 million hours × $36.43 per hour).

The component part rule will shift some testing costs and some recordkeeping costs to component part and finished product suppliers because some testing will be performed by these parties rather than by the finished product certifiers. However, a finished product certifier will still be responsible for receiving records from component part and finished product suppliers and recording information on the finished product certificate. Thus, even if a finished product certifier could rely entirely on component part and finished product suppliers for all required testing, the finished product supplier would still have some recordkeeping burden. Therefore, although the component part testing rule is expected to reduce the total cost of the testing required by the testing and certification rule, it will lead to an increase in the recordkeeping burden for those who choose to use component part testing.

No clear basis exists for estimating the amount of testing that will be performed by component part and finished product suppliers; nor is it known how many component part and finished product suppliers will be willing to provide the required testing or conformity certificates. Likewise, there is no clear method for estimating the number of finished product certifiers who might conduct their own component part testing. In the preamble to the proposed rule (75 FR at 28218), we suggested that the recordkeeping burden for the component part testing rule could amount to 10 percent of the burden estimated for the testing and labeling rule. Although some comments suggested that the resulting estimates were too low, no commenter provided a better estimate or suggested a better method for estimating the burden. Moreover, because the estimate of the recordkeeping burden for the testing and labeling rule has been increased, using the same methodology used in the proposed rule, the estimates for the component rule also would increase. This may address the concern of the commenters who believed the estimate used in the proposed rule was too low.

Therefore, if we continue use to use the estimate that component part testing will amount to about 10 percent of the burden estimated for the testing and labeling rule, then the hour burden of the component part rule would be about 540,000 hours. At $36.43 per hour, the total cost of the recordkeeping for the component part rule would be about $19.7 million.

Estimate Limitations: There are some limitations to the above estimates that warrant mentioning.

While the estimates of the number of products are more accurate than the original estimates, they are not based on a well-designed survey or comprehensive database. Additionally, the extent to which some products might be certified by multiple importers or are manufactured at different sites has not been established.

Recordkeeping for the flammability of children's sleepwear might be captured in the OMB submission on another rule, but the recordkeeping associated with the lead content rules should be captured here. However, no adjustment for this has been made because we have not tried to separate children's sleepwear from other apparel items.

The recordkeeping considered here is best thought of as the recordkeeping required by the testing and certification requirements of section 102 of the CPSIA. It would be impossible to separate the time associated with the initial certification from the time associated with periodic testing and documenting material changes, especially given that it often involves issuing a new certificate.

For finished goods manufacturers who also perform their own component testing, it is difficult to separate the recordkeeping burden associated with component part testing from the recordkeeping burden associated with

the testing and labeling rule. This could lead to overestimates of the costs associated with the testing and labeling rule and possibly underestimates associated with the component part testing rule. Better estimates may be possible if the recordkeeping burden is reevaluated after the rules are finalized.

VI. Executive Order 12988 (Preemption)

According to Executive Order 12988 (February 5, 1996), agencies must state in clear language the preemptive effect, if any, of new regulations. Section 26 of the CPSA only addresses the preemptive effect of consumer product safety standards under the CPSA. The current rule is not a consumer product safety standard under the CPSA.

Accordingly, this rule does not fall within the scope of any provision of any act enforced by the Commission that grants preemptive effect to rules.

VII. Effective Date

The Administrative Procedure Act (''APA'') generally requires that the effective date of a rule be at least 30 days after publication of a final rule. 5 U.S.C. 553(d). The preamble to the proposed rule indicated that we would make any final rule based on this proposal effective 180 days after the date of publication of a final rule in the **Federal Register.** The preamble to the proposed rule explained that 180 days should allow time for any product changes needed for testing of component parts and for implementation of the component part testing requirements.

We did not receive any comments regarding the effective date. However, we recognize that the stay of testing and certification requirements for lead content and phthalates in certain children's products expires on December 31, 2011. Accordingly, we want stakeholders to be able to take advantage of the efficiencies of component part testing or certification, as well as finished product testing or certification, without undue delay. While this rule does impose recordkeeping obligations, component part testing is voluntary. Therefore, the final rule will become effective on December 8, 2011.

List of Subjects in 16 CFR Part 1109

Business and industry, Children, Consumer protection, Imports, Product testing and certification, Records, Record retention, Toys.

Accordingly, 16 CFR part 1109 is added to read as follows:

PART 1109—CONDITIONS AND REQUIREMENTS FOR RELYING ON COMPONENT PART TESTING OR CERTIFICATION, OR ANOTHER PARTY'S FINISHED PRODUCT TESTING OR CERTIFICATION, TO MEET TESTING AND CERTIFICATION REQUIREMENTS

Subpart A—General Conditions and Requirements

Sec.
1109.1 Scope.
1109.2 Purpose.
1109.3 Applicability.
1109.4 Definitions.
1109.5 Conditions, requirements, and effects generally.

Subpart B—Conditions and Requirements for Specific Consumer Products, Component Parts, and Chemicals

1109.11 Component part testing for paint.
1109.12 Component part testing for lead content of children's products.
1109.13 Component part testing for phthalates in children's toys and child care articles.

Subpart C—Conditions and Requirements for Composite Testing

1109.21 Composite Testing.

Authority: Secs. 3 and 102, Pub. L. 110–314, 122 Stat. 3016; 15 U.S.C. 2063.

Subpart A—General Conditions and Requirements

§ 1109.1 Scope.

(a) This part applies to tests or certifications of the following when such testing or certification is used to support a certificate of compliance pursuant to section 14(a) of the Consumer Product Safety Act (CPSA) or to meet continued testing requirements pursuant to section 14(i) of the CPSA:

(1) Component parts of consumer products; and

(2) Finished products when conducted by a party that is not required to test or certify products pursuant to part 1110 of this chapter.

(b) Component part manufacturers and suppliers may certify or test their component parts, but are not required to do so. Also, parties that are not required to test finished products, or to issue finished product certificates pursuant to part 1110 of this chapter, may do so voluntarily.

(c) Subpart A establishes general requirements for component part testing and certification, and relying on component part testing or certification, or another party's finished product certification or testing, to support a certificate of compliance issued pursuant to section 14(a) of the Consumer Product Safety Act (CPSA) or to meet continued testing requirements pursuant to section 14(i) of the CPSA. Subpart B sets forth additional requirements for component part testing of chemical content. Subpart C describes the conditions and requirements for composite testing.

§ 1109.2 Purpose.

The purpose of this part is to set forth the conditions and requirements under which passing component part test reports, certification of component parts of consumer products, or finished product testing or certification procured or issued by another party, can be used to meet, in whole or in part, the testing and certification requirements of sections 14(a) and 14(i) of the CPSA.

§ 1109.3 Applicability.

The provisions of this part apply to all manufacturers and importers who are required to issue finished product certifications pursuant to section 14(a) of the CPSA and part 1110 of this chapter and to procure tests to ensure continued compliance pursuant to section 14(i) of the CPSA. This part also applies to manufacturers and suppliers of component parts or finished products who are not required to test or certify consumer products pursuant to part 1110 of this chapter, but who voluntarily choose to undertake testing or certification.

§ 1109.4 Definitions.

The following definitions apply to this part:

(a) *Certifier* means a party that is either a finished product certifier or a component part certifier as defined in this section.

(b) *Component part* means any part of a consumer product, including a children's product that either must or may be tested separately from a finished consumer product to assess the consumer product's ability to comply with a specific rule, ban, standard, or regulation enforced by the CPSC. Within the same consumer product, the component parts to be tested and the tests to be conducted may vary, depending on the applicable regulations and required test methods, if any.

(c) *Component part certifier* means a party who, although not required to do so pursuant to part 1110 of this chapter, voluntarily certifies the following as complying with one or more rules, bans, standards, or regulations enforced by the CPSC, consistent with the content requirements for certifications in part 1110 of this chapter:

(1) Component parts to be used in consumer products; or

(2) Finished products.

(d) *CPSA* means the Consumer Product Safety Act.

(e) *CPSC* means the Consumer Product Safety Commission.

(f) *CPSIA* means the Consumer Product Safety Improvement Act of 2008.

(g) *Due care* means the degree of care that a prudent and competent person engaged in the same line of business or endeavor would exercise under similar circumstances. Due care does not permit willful ignorance.

(h) *Finished product certifier* means a party responsible for certifying compliance of a finished consumer product pursuant to part 1110 of this chapter with all applicable rules, bans, standards, and regulations enforced by the CPSC.

(i) *Identical in all material respects* means there is no difference with respect to compliance to the applicable rules, bans, standards, or regulations, between the samples to be tested for compliance and the component part or finished product distributed in commerce.

(j) *Paint* means any type of surface coating that is subject to part 1303 of this chapter or section 4.3.5.2 of ASTM F 963–08 (or any successor standard of section 4.3.5.2 of ASTM F 963–08 accepted by the Commission).

(k) *Testing party* means a party (including, but not limited to, domestic manufacturers, foreign manufacturers, importers, private labelers, or component part suppliers) who procures tests (either by conducting the tests themselves, when this is allowed, or by arranging for another party to conduct the tests), of a consumer product, or any component part thereof, for compliance, in whole or in part, with any applicable rule, ban, standard, or regulation enforced by the CPSC. Testing laboratories and third party conformity assessment bodies are not testing parties under this definition.

(*l*) *Third party conformity assessment body* means a testing laboratory whose accreditation has been accepted by the CPSC to conduct certification testing on children's products. Only third party conformity assessment bodies whose scope of accreditation includes the applicable required tests can be used to test children's products for purposes of supporting certification pursuant to section 14(a) of the CPSA and testing to ensure continued compliance pursuant to section 14(i) of the CPSA.

(m) *Traceable* means the ability of a certifier to identify all testing parties of a component part of a consumer product or a finished product, including the name and address of each testing party and any party that conducted testing on the component part or finished product. Parties that conduct testing may include a manufacturer, a supplier, a testing laboratory, or a third party conformity assessment body. Traceability extends to the component part of the product that was tested for compliance, such that if a subassembly is tested, that subassembly must be traceable, not each component part of the subassembly, if those parts were not individually tested for other rules, bans, standards, or regulations.

§ 1109.5 Conditions, requirements, and effects generally.

(a) *Component part testing allowed.* Any party, including a component part manufacturer, a component part supplier, a component part certifier, or a finished product certifier, may procure component part testing as long as it complies with the requirements in this section and subparts B and C of this part. A finished product certifier may certify compliance of a consumer product with all applicable rules, bans, standards, and regulations as required by section 14(a) of the CPSA, and may ensure continued compliance of children's products pursuant to section 14(i) of the CPSA, based, in whole or in part, on passing component part test reports or certification of one or more component parts of a consumer product if the following requirements are met:

(1) Testing of the component part is required or sufficient to assess compliance, in whole or in part, of the consumer product with the applicable rule, ban, standard, or regulation. Any doubts about whether testing one or more component parts of a consumer product is sufficient to assess whether the finished product complies with applicable rules, bans, standards, and regulations should be resolved in favor of testing the finished product; and

(2) The component part tested is identical in all material respects to the component parts used in the finished consumer product. To be identical in all material respects to a component part for purposes of supporting a certification of a children's product, a sample need not necessarily be of the same size, shape, or finish condition as the component part of the finished product; rather, it may consist of any quantity that is sufficient for testing purposes and be in any form that has the same content as the component part of the finished product.

(b) *Test Result Integrity.* A certifier or testing party must exercise due care to ensure that while a component part or finished product is in its custody:

(1) Proper management and control of all raw materials, component parts, subassemblies, and finished products is established and maintained for any factor that could affect the finished product's compliance with all applicable rules;

(2) The manufacturing process does not add or result in a prohibited level of a chemical from any source, such as the material hopper, regrind equipment, or other equipment used in the assembly of the finished product; and

(3) No action or inaction subsequent to testing and before distribution in commerce has occurred that would affect compliance, including contamination or degradation.

(c) *Limitation.* A certifier must not use tests of a component part of a consumer product for any rule, ban, standard, or regulation that requires testing the finished product to assess compliance with that rule, ban, standard, or regulation.

(d) *Test method and sampling protocol.* Each certifier and testing party must exercise due care to ensure that when it procures a test for use in meeting the requirements of sections 14(a) or 14(i) of the CPSA:

(1) All testing is done using required test methods, if any;

(2) Required sampling protocols are followed, if any; and

(3) Testing and certification follows the applicable requirements in sections 14(a) and 14(i) of the CPSA, and part 1107 of this chapter or any more specific rules, bans, standards, or regulations, used to assess compliance of the component part or finished product.

(e) *Timing.* Subject to any more specific rule, ban, standard, or regulation, component part testing may occur before final assembly of a consumer product, provided that nothing in the final assembly of the consumer product can cause the component part or the final consumer product to become noncompliant.

(f) *Traceability.* A certifier must not rely on component part or finished product testing procured by a testing party or another certifier unless such component parts or finished products are traceable.

(g) *Documentation by certifiers and testing parties.* Each certifier and testing party must provide the following documentation, either in hard copy or electronically, to a certifier relying on such documentation as a basis for issuing a certificate:

(1) Identification of the component part or the finished product tested;

(2) Identification of a lot or batch number, or other information sufficient to identify the component parts or finished products to which the testing applies;

(3) Identification of the applicable rules, bans, standards, and regulations for which each component part or finished product was tested;

(4) Identification of the testing method(s) and sampling protocol(s) used;

(5) The date or date range when the component part or finished product was tested;

(6) Test reports that provide the results of each test on a component part or finished product, and the test values, if any;

(7) Identification of the party that conducted each test (including testing conducted by a manufacturer, testing laboratory, or third party conformity assessment body), and an attestation by the party conducting the testing that all testing of a component part or finished product by that party was performed in compliance with applicable provisions of section 14 of the CPSA, part 1107 of this chapter, or any more specific rules, bans, standards, or regulations;

(8) Component part certificate(s) or finished product certificate(s), if any;

(9) Records to support traceability as defined in § 1109.4(m); and

(10) An attestation by each certifier and testing party that while the component part or finished product was in its custody, it exercised due care to ensure compliance with the requirements set forth in subparagraph (b) of this section.

(h) *Effect of voluntary certification.* (1) The Commission will consider any certificate issued by a component part certifier in accordance with this part to be a certificate issued in accordance with section 14(a) of the CPSA. All certificates must contain all of the information required by part 1110 of this chapter.

(2) Any party who elects to certify compliance of a component part or a finished product with applicable rules, standards, bans, or regulations, must assume all responsibilities of a manufacturer under sections 14(a) and 14(i) of the CPSA and part 1107 of this chapter with respect to that component part or finished product's compliance to the applicable rules, standards, bans, or regulations.

(i) *Certification by finished product certifiers.* (1) A finished product certifier must exercise due care in order to rely, in whole or in part, on one or more of the following as a basis for issuing a finished product certificate:

(i) Finished product certificate(s) issued by another party;

(ii) Finished product test report(s) provided by another party;

(iii) Component part certificate(s); or

(iv) Component part test report(s).

(2) If a finished product certifier fails to exercise due care in its reliance on another party's certifications or test reports, then the Commission will not consider the finished product certifier to hold a certificate issued in accordance with section 14(a) of the CPSA. Exercising due care in this context means taking the steps that a prudent and competent person in the same line of business would take to conduct a reasonable review of another party's certification or test reports, and to address any concern over their validity, before relying on such documents to issue a finished product certificate. Due care does not permit willful ignorance. Such steps may vary according to the circumstances.

(3) A finished product certifier must not rely on another party's certifications or test reports unless the finished product certifier receives the documentation under paragraph (g) of this section from the certifier or testing party. The finished product certifier may receive such documentation either in hard copy or electronically, or access the documentation through an Internet Web site. The Commission may consider a finished product certifier who does not obtain such documentation before certifying a consumer product to have failed to exercise due care.

(j) *Recordkeeping requirements.* Each certifier or testing party must maintain the documentation required in paragraph (g) of this section for five years, and must make such documentation available for inspection by the CPSC upon request, either in hard copy or electronically, such as through an Internet Web site. Records may be maintained in languages other than English if they can be:

(1) Provided immediately by the certifier or testing party to the CPSC; and

(2) Translated accurately into English by the certifier or testing party within 48 hours of a request by the CPSC or any longer period negotiated with CPSC staff.

Subpart B—Conditions and Requirements for Specific Consumer Products, Component Parts, and Chemicals

§ 1109.11 Component part testing for paint.

(a) *Generally.* The Commission will permit certification of a consumer product, or a component part of a consumer product, as being in compliance with the lead paint limit of part 1303 of this chapter or the content limits for paint on toys of section 4.3.5.2 of ASTM F 963–08 or any successor standard of section 4.3.5.2 of ASTM F 963–08 accepted by the Commission if, for each paint used on the product, the requirements in § 1109.5 and paragraph (b) of this section are met.

(b) *Requirement.* For each paint used on the product:

(1) Unless using the test method ASTM F 2853–10 to test for lead in paint, all testing must be performed on dry paint that is scraped off of a substrate for testing. The substrate used need not be of the same material as the material used in the finished product or have the same shape or other characteristics as the part of the finished product to which the paint will be applied; and

(2) The tested paint is identical in all material respects to that used in production of the consumer product. The paint samples to be tested must have the same composition as the paint used on the finished product. However, a larger quantity of the paint may be tested than is used on the consumer product in order to generate a sufficient sample size. The paint may be supplied to the testing laboratory for testing either in liquid form or in the form of a dried film of the paint on any suitable substrate.

§ 1109.12 Component part testing for lead content of children's products.

A certifier may rely on component part testing of each accessible component part of a children's product for lead content, where such component part testing is performed by a third party conformity assessment body, provided that the requirements in § 1109.5 are met, and the determination of which, if any, parts are inaccessible pursuant to section 101(b)(2) of the Consumer Product Safety Improvement Act of 2008 (CPSIA) and part 1500.87 of this chapter is based on an evaluation of the finished product.

§ 1109.13 Component part testing for phthalates in children's toys and child care articles.

A certifier may rely on component part testing of appropriate component parts of a children's toy or child care article for phthalate content provided that the requirements in § 1109.5 are met.

Subpart C—Conditions and Requirements for Composite Testing

§ 1109.21 Composite testing.

(a) *Paint.* In testing paint for compliance with chemical content limits, certifiers and testing parties may procure tests conducted on a combination of different paint samples

so long as test procedures are followed to ensure that no failure to comply with the lead limits will go undetected (see paragraph (c) of this section). A certificate may be based on testing each component part of the paint according to the requirements of § 1109.11 and certifying that each component part in the mixture individually complies with the lead in paint limit or other paint limit. Testing and certification of composite paints must also comply with §§ 1109.5 and 1109.11.

(b) *Component parts.* A certifier or testing party may procure tests conducted on a combination of component parts for compliance with chemical content limits so long as test procedures are followed to ensure that no failure to comply with the content limits will go undetected (see paragraph (c) of this section). Testing and certification of composite component parts for lead content must also comply with §§ 1109.5 and 1109.12. Testing and certification of composite component parts for phthalate content must also comply with §§ 1109.5 and 1109.13.

(c) *How to evaluate composite testing.* When using composite testing, only the total amount or percentage of the target chemical is determined, not how much was in each individual paint or component part. Therefore, to determine that each paint or component part is within the applicable limit, the entire amount of the target chemical in the composite is attributed to each paint or component part. If this method yields an amount of the target chemical that exceeds the limit applicable to any paint or component part in the composite sample, additional testing would be required to determine which of the paints or component parts, if any, fail to meet the applicable limit.

Dated: October 21, 2011.

Todd A. Stevenson,

Secretary, Consumer Product Safety Commission.

[FR Doc. 2011–27677 Filed 11–7–11; 8:45 am]

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Part V

Consumer Product Safety Commission

16 CFR Part 1107

Testing and Labeling Pertaining to Product Certification Regarding Representative Samples for Periodic Testing of Children's Products; Proposed Rule

CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Part 1107

[CPSC Docket No. CPSC–2011–0082]

Testing and Labeling Pertaining to Product Certification Regarding Representative Samples for Periodic Testing of Children's Products

AGENCY: Consumer Product Safety Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Consumer Product Safety Commission (''CPSC,'' ''Commission,'' or ''we'') is proposing to amend its regulations on testing and labeling pertaining to product certification. The proposed rule would address the testing of representative samples to ensure continued compliance of children's products with all applicable rules, bans, standards, and regulations. The proposed rule also would establish a recordkeeping requirement associated with the testing of representative samples. We are taking this action to implement part of H.R. 2715 (Pub. L. 112–28).[1]

DATES: Written comments must be received by January 23, 2012.

ADDRESSES: You may submit comments, identified by Docket No. CPSC–2011–0082, 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 (email), except through: *http://www.regulations.gov*.

Written Submissions: Submit written submissions in the following way:

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 proposed collection of information. All comments received may be posted without change, including any personal identifiers, contact information, or other personal information provided to: *http://www.regulations.gov*. Do not submit confidential business information, trade secret information, or other sensitive or protected information electronically. Such information should be submitted in writing, with the sensitive portions clearly identified.

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

FOR FURTHER INFORMATION CONTACT: Randy Butturini, Project Manager, Office of Hazard Identification and Reduction, Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814; telephone (301) 504–7562; email *rbutturini@cpsc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction and Statutory Authority

Section 14(a)(2) of the Consumer Product Safety Act (CPSA), 15 U.S.C. 2063(a)(2), requires manufacturers and private labelers of any children's product that is subject to a children's product safety rule to submit samples of the product, or samples that are identical in all material respects to the product, to a third party conformity assessment body whose accreditation has been accepted by the CPSC to be tested for compliance with such children's product safety rule. Based on that testing, the manufacturer or private labeler must issue a certificate that certifies that such children's product complies with the children's product safety rule. 15 U.S.C. 2063(a)(2)(B). CPSC regulations, at 16 CFR part 1110, limit the certificate requirement to importers and domestic manufacturers. The manufacturer or importer of the children's product must issue a separate certificate for each applicable children's product safety rule or a combined certificate that certifies compliance with all applicable children's product safety rules and specifies each such rule. This certificate is called a Children's Product Certificate (''CPC'').

Further, former section 14(d)(2)(B) of the CPSA, 15 U.S.C. 2063(d)(2)(B), as originally provided in section 102 of the Consumer Product Safety Improvement Act of 2008 (''CPSIA''), requires that we establish protocols and standards for:

- Ensuring that a children's product tested for compliance with a children's product safety rule is subject to testing periodically and when there has been a material change in the product's design or manufacturing process, including the sourcing of component parts;
- Testing of random samples to ensure continued compliance;
- Verifying that a children's product tested by a conformity assessment body complies with applicable children's product safety rules; and
- Safeguarding against the exercise of undue influence on a third party conformity assessment body by a manufacturer or private labeler.

In the **Federal Register** of May 20, 2010 (75 FR 28336), we published a proposed rule on ''Testing and Labeling Pertaining to Product Certification.'' The proposed rule was intended to implement what was then known as section 14(d)(2)(B) of the CPSA and to implement parts of section 14(a) of the CPSA. Proposed § 1107.22, ''Random Samples,'' would implement the testing of random samples requirement in the CPSA, by requiring each manufacturer of a children's product to select samples for periodic testing by using a process that assigns each sample in the production population an equal probability of being selected (75 FR at 28349 through 28350, 28365).

On August 12, 2011, the President signed H.R. 2715 into law. Among other things, H.R. 2715 replaced the CPSA's requirement for the testing of ''random samples'' with a requirement for the testing of ''representative samples.'' Additionally, H.R. 2715 corrected an editorial error in section 14 of the CPSA, by renumbering section 14(d) of the CPSA, ''Additional Regulations for Third Party Testing,'' as section 14(i) of the CPSA.

Elsewhere in this **Federal Register**, we are publishing a final rule for part 1107 on those aspects of the rule left unchanged by H.R. 2715. However, because H.R. 2715 amended the CPSA to require the testing of ''representative samples,'' we deleted § 1107.22 from the final rule, and we are issuing this proposed rule to implement the new statutory requirement for the testing of representative samples. Additionally, § 1107.26 of the final rule establishes requirements pertaining to recordkeeping. We have reserved § 1107.26(a)(4) in anticipation of a recordkeeping requirement related to representative samples. This proposed rule, therefore, would establish a new recordkeeping requirement for representative samples.

We are issuing this proposed rule pursuant to section 14(i)(2)(B) of the CPSA, as well as its implementing authority pursuant to section 3 of the CPSIA.

II. Description of the Proposed Rule

The proposal would amend Title 16 of the Code of Federal Regulations: Part

[1] The Commission voted 5–0 to publish this notice of proposed rulemaking, with changes, in the **Federal Register**. Chairman Inez M. Tenenbaum, Commissioner Robert S. Adler, and Commissioner Thomas H. Moore issued a joint statement. Commissioner Nancy A. Nord issued a statement. The statements can be found at *http://www.cpsc.gov/pr/statements.html*.

1107, titled ''Testing and Labeling Pertaining to Product Certification.'' The amendment would implement section 14(i)(2)(B)(ii) of the CPSA, by amending § 1107.21, ''Periodic Testing.'' The proposal would require that periodic testing be conducted using representative samples. Additionally, the proposal would amend § 1107.26 to include a recordkeeping provision related to testing representative samples.

A. Proposed § 1107.21(f)—Testing Representative Samples

The proposal would create a new § 1107.21(f), which would state that a manufacturer must select representative product samples to be submitted to the third party conformity assessment body for periodic testing. We recognize that the proposed rule on ''Testing and Labeling Pertaining to Product Certification'' (75 FR 28336 (May 20, 2010)) would have treated ''Random Samples'' as a distinct section, rather than as a subparagraph within § 1107.21, ''Periodic Testing.'' However, because we have treated the requirement in section 14(i)(2)(B)(ii) of the CPSA as part of the periodic testing process, the proposed rule would place a requirement for the testing of representative samples in § 1107.21, rather than create a separate section.

The procedure used to select representative product samples for periodic testing must provide a basis for inferring compliance about the population of untested products produced during the applicable periodic testing interval. The number of samples selected for the sampling procedure must be sufficient to ensure continuing compliance with all of the applicable children's product safety rules. Manufacturers must document the procedure used to select the product samples for periodic testing and document the basis for inferring the compliance of the product manufactured during the periodic testing interval from the results of the tested samples.

Proposed § 1107.21(f) would implement the requirement to test representative samples, by requiring each manufacturer of a children's product to select samples for periodic testing known to be representative of the population of products manufactured since the last periodic test occurred (or since certification for the first periodic tests). In order for the test results of the samples submitted to a third party conformity assessment body to infer compliance of the untested units of the children's product, the manufacturer must have knowledge that the tested samples are, indeed, representative of the product produced. Haphazard methods of sample selection cannot provide a basis for inferring the compliance of the untested units without additional information indicating that the samples are representative.

1. Representative Samples

Representative samples of a children's product selected for testing are comparable to the unselected portion of the children's product population with respect to compliance to the applicable children's product safety rule(s). To be representative, the manufacturer must have a basis for inferring that, had other samples been chosen for testing, test results from those samples would have indicated the same compliance or noncompliance to the applicable children's product safety rule as the representative samples.

Determining that the selected samples are representative may be achieved in many ways, depending upon on the rule, ban, standard, or regulation being evaluated. For example, for the chemical tests, a sample selected from a homogeneous material, such as a well-mixed container of paint, could be considered representative of the entire container.

For discretely produced products, information indicating uniform materials and dimensional control could be used to indicate that a sample is representative of the product for mechanical tests. For example, if a bicycle handlebar sample is manufactured from the same grade of steel and with the same dimensions (*e.g.,* wall thickness, length, shape, placement of holes for attaching brake levers) as other handlebars produced, that handlebar sample can be considered representative of the population of handlebars for the purpose of the complying with the handlebar stem test in 16 CFR 1512.18(g).

Other methods that may be used to establish that samples selected for periodic testing are representative—with respect to compliance—of the population of products manufactured since the last periodic test. Examples of such methods include: Incoming inspection of raw materials or component parts; process control data generated during product manufacture; and use of manufacturing techniques with intrinsic manufacturing uniformity, such as die casting.

Random sampling is another means of selecting representative samples that provide a basis for inferring the compliance of untested product units from the tested product units. The conditions that allow for the inference of compliance concerning untested units versus tested units may be met by a range of probability-based sampling designs, including, but not limited to, simple random sampling, cluster sampling, systematic sampling, stratified sampling, and multistage sampling. These methods allow the manufacturer the flexibility to select a random sampling procedure that is most appropriate for the manufacturer's product production setting but still allow for the inference about the compliance of the population of product units. For example, alternative sampling procedures—like systematic sampling (where a starting unit is randomly selected and then every kth unit after that is selected) or multistage sampling (where units are grouped in clusters such as pallets, the clusters are randomly selected and then units within the selected clusters are randomly drawn)—can be employed for products for which such sampling procedures would be beneficial. Even though every unit produced does not have the same probability of selection for testing in these examples, these techniques can be used to infer the compliance of the untested units. It should be noted, however, that just because random sampling can be used as one method of conducting representative testing, it is by no means the only method to meet the new broader ''representative'' sampling in H.R. 2715.

With evidence that the samples submitted to a third party conformity assessment body are representative of the children's product produced since the last periodic test (or since product certification for the first periodic test interval), the manufacturer can infer the compliance of the untested units.

2. Testing To Ensure Compliance

For the purposes of periodic testing, passing test results means the samples tested are in compliance with the applicable children's product safety rule. Most children's product safety rules require each product sample submitted to pass the prescribed tests. For example, each pacifier subjected to the guard and shield testing specified in 16 CFR 1511.3 must pass the test. In a similar manner, each infant walker submitted for testing must pass the tests prescribed in 16 CFR part 1216.

However, for some children's product standards, compliance with the standard can include individual test results that exceed a specified maximum. For example, for children's products tested for compliance to 16

CFR part 1611, *Standard for the flammability of vinyl plastic film,* 10 samples are averaged to determine if the maximum burn rate exceeds 1.2 inches per second, as specified in 16 CFR 1611.3. Because the maximum burn rate applies to the average, it is possible for one or more of the tested samples to exceed that burn rate when tested. In this circumstance, the samples are considered to be in conformance with the standard and have passed the test.

As another example, small carpets and rugs that are children's products are subject to the requirements for periodic testing. For small carpets and rugs, at least seven of the eight samples tested for compliance to 16 CFR part 1631, *Standard for the surface flammability of small carpets and rugs (FF 2–70),* must meet the test criterion specified in § 1631.3(b). Alternatively, a small carpet or rug that does not meet the test criterion must be permanently labeled prior to its introduction into commerce. Small carpets and rugs that meet either condition would be considered to be in compliance with 16 CFR part 1631 and deemed to have passed the periodic tests.

B. Proposed § 1107.26(a)(4)—Recordkeeping

Proposed § 1107.26(a)(4) would require a manufacturer of a children's product subject to an applicable children's product safety rule to maintain records documenting the testing of representative samples, as set forth in proposed § 1107.21(f) on periodic testing, including the number of representative samples selected and the procedure used to select representative samples. Records also must include the basis for inferring compliance of the product manufactured during the periodic testing interval from the results of the tested samples.

The recordkeeping requirement for the testing of representative samples is intended to allow manufacturers to demonstrate continued compliance by establishing how the samples selected are representative of the population of products manufactured during the periodic testing interval and how the manufacturer can infer compliance of all products produced during this interval based on such testing.

III. Environmental Considerations

This proposed rule falls within the scope of the Commission's environmental review regulations at 16 CFR 1021.5(c)(2), which provide a categorical exclusion from any requirement for the agency to prepare an environmental assessment or environmental impact statement for product certification rules.

IV. Regulatory Flexibility Analysis

The Regulatory Flexibility Act (''RFA''), 5 U.S.C. 601–612, generally requires that agencies review proposed rules for their potential economic impact on small entities, including small businesses. The RFA calls for agencies to prepare and make available for public comment an initial regulatory flexibility analysis describing the impact of the proposed rule on small entities and identifying impact-reducing alternatives. 5 U.S.C. 603.

The Commission is proposing this rule in order to implement Section 14(i)(2)(B)(ii) of the CPSA. As originally enacted in 2008, this provision required the Commission to promulgate a regulation to establish protocols and standards for the testing of ''random samples'' to ensure that children's products continue to comply with all applicable children's product safety rules. H.R. 2715, which was enacted on August 12, 2011, amended the provision by substituting the term ''representative'' for the term ''random,'' in describing the samples that must be tested.

A. Objectives of the Rule

The objective of the rule is to reduce the risk of death and injury from consumer products, especially from products intended for children aged 12 years and younger. The proposed rule would accomplish this objective by requiring that manufacturers select the samples of children's products for periodic testing (which will be required by 16 CFR 1107.21), using a procedure that results in the selection of samples from a population that is representative of the unselected products and provides a basis for inferring that if the selected samples comply with the applicable children's product safety rules, then the units not selected will also comply. (The term ''manufacturer,'' for purposes of this proposed rule, includes private labelers and importers of products manufacturer by foreign manufacturers.) Being able to infer the compliance of the untested units is how the continued compliance of the product is ensured.

B. Small Entities to Which the Rule Will Apply

By regulation (16 CFR part 1110), the domestic manufacturer or importer is responsible for ensuring that a consumer product is properly tested, and, based upon the testing results, certifying that the product conforms to all applicable consumer product safety rules. Therefore, the domestic manufacturer or importer will be responsible for ensuring that representative samples of children's products that are subject to one or more children's product safety rules are tested to ensure continued compliance. The definition of a ''children's product'' is broad and includes bicycles, furniture, apparel, jewelry, televisions, electronic games, toys, and so on, if designed or intended primarily for a child 12 years of age or younger. Virtually all children's products are subject to one or more children's product safety rules. A full list of the children's product safety rules for which third party testing and certification will be required is given in Table 1.

TABLE 1—PRODUCT SAFETY RULES APPLICABLE TO CHILDREN'S PRODUCTS

16 CFR part No. (or test method or standard)	Description
1420	All-Terrain Vehicles.
1203	Bicycle Helmets.
1512	Bicycles.
1513	Bunk Beds.
1500.86(a)(5)	Clacker Balls.
1500.86(a)(7) and (8)	Dive Sticks and Other Similar Articles.
1505	Electrically Operated Toys or Articles.
1615	Flammability of Children's Sleepwear, Sizes 0 through 6X.
1616	Flammability of Children's Sleepwear, Sizes 7 through 14.
1610	Flammability of Clothing Textiles.
1632	Flammability of Mattresses and Mattress Pads.
1633	Flammability (Open-Flame) of Mattress Sets.
1611	Flammability of Vinyl Plastic Film.

TABLE 1—PRODUCT SAFETY RULES APPLICABLE TO CHILDREN'S PRODUCTS—Continued

16 CFR part No. (or test method or standard)	Description
1219	Full-Size Cribs.
1215	Infant Bath Seats.
1216	Infant Walkers.
Sec. 101 of CPSIA (Test Method CPSC–CH–E1001–08, CPSC–CH–E1001–08.1 or 2005 CPSC Laboratory SOP).	Lead Content in Children's Metal Jewelry.
Sec. 101 of CPSIA (Test Method CPSC–CH–E1001–08 or CPSC–CH–E1001–08.1).	Lead Content in Children's Metal Products.
Sec. 101 of CPSIA (Test Method CPSC–CH–E1002–08 and/or CPSC–CH–E1002–08.1).	Lead Content in Children's Non-Metal Products.
1303	Lead Paint.
1220	Non-Full-Size Cribs.
1511	Pacifiers.
Sec. 108 of CPSIA (Test Method CPSC–CH–C1001–09.3)	Phthalate Content of Children's Toys and Child Care Articles.
1510	Rattles.
1501	Small Parts Rule.
1630	Surface Flammability of Carpets and Rugs.
1631	Surface Flammability of Small Carpets and Rugs.
1217	Toddler Beds.
(ASTM F963)	Toys.

The number of firms that could be impacted was estimated by reviewing every industry in the North American Industrial Classification System (NAICS) and selecting industries whose firms could manufacture or sell any children's product that could be covered by a consumer product safety rule. Firms are classified in the NAICS category that describes their primary activity. Therefore, firms that might manufacture or import consumer products covered by a safety rule as a secondary or tertiary activity may not have been counted. There is no separate NAICS category for importers. Firms that import products might be classified as manufacturers, wholesalers, or retailers.

C. Manufacturers

According to the criteria established by the U.S. Small Business Administration (''SBA), manufacturers are generally considered to be small entities if they have fewer than 500 employees. Table 2 shows the number of manufacturing firms by the NAICS categories that cover most children's products that are subject to a product safety rule. Although there are more than 26,000 manufacturers that would be considered small in these categories, not all of these firms are engaged in manufacturing children's products that are subject to a children's product safety rule. It would be expected that most of the firms engaged in *Doll, Toy, and Game* manufacturing produce some products that are intended for children age 12 and younger. On the other hand, the *Surgical Appliance and Supplies Manufacturing* category includes crash helmets, but most of the other products in this category are not under the CPSC's jurisdiction.

TABLE 2—MANUFACTURERS

NAICS Code	Description	Small firms	Total firms
31411	Carpet and Rug Mills	244	262
315	Apparel Manufacturing	7,126	7,195
316211	Rubber and Plastic Footwear Manufacturing	43	45
316212	House Slipper Manufacturing	1	1
316219	Other Footwear Manufacturing	53	54
326299	All Other Rubber Product Manufacturing	622	666
336991	Motorcycle, Bicycle, and Parts Manufacturing	447	452
33712	Household and Institutional Furniture Manufacturing	6,058	6,154
33791	Mattress Manufacturing	427	441
339113	Surgical Appliance and Supplies Manufacturing	1,817	1,916
33991	Jewelry and Silverware Manufacturing	2,470	2,484
33992	Sporting and Athletic Goods Manufacturing	1,707	1,748
33993	Doll, Toy and Game Manufacturing	694	705
339942	Lead Pencil and Art Good Manufacturing	124	129
339999	All Other Miscellaneous Manufacturing	4,646	4,695
	Total Manufacturers	26,479	26,947

Source: U.S. Department of Commerce, Bureau of the Census, 2008 County Business Patterns, Number of Firms, Number of Establishments, Employment, and Annual Payroll by Small Enterprise Employment Sizes for the United States, NAICS Sectors: 2008. Available at: *http://www2.census.gov/econ/susb/data/2008/us_naicssector_small_emplsize_2008.xls*, last accessed on 16 August 2011.

In addition to the manufacturers in Table 3, there were 25,184 nonemployer businesses classified in NAICS 315 (Apparel Manufacturing) and 61,180 classified in NAICS 3399 (Other Miscellaneous Manufacturers) in 2008. Nonemployer businesses are generally very small businesses with no employees. They are typically sole proprietorships, and they may or may not constitute the owner's principal source of income. The average receipts

for the nonemployer businesses classified in *Apparel Manufacturing* was about $31,000, and the average receipts for the nonemployer businesses classified as *Other Miscellaneous Manufacturers* was about $41,000.[2]

D. Wholesalers

Wholesalers would be impacted by the rule if they import any children's product that is subject to a product safety rule. Wholesalers who obtain their products strictly from domestic manufacturers or from other wholesalers would not be impacted by the rule because the manufacturer or importer would be responsible for certifying the products. Table 3 shows the number of wholesalers by NAICS code that would cover most children's products that are subject to a product safety rule. According to SBA criteria, wholesalers are generally considered to be small entities if they have fewer than 100 employees. Although there are more than 78,000 wholesalers that would be considered small in these categories, not all of these firms are engaged in importing children's products that are subject to a children's product safety rule. A significant proportion of the firms classified as *Toy and Hobby Goods and Supplies Merchant Wholesalers* probably import at least some children's products. However, the only firms classified as *Motor Vehicle and Motor Vehicle Parts and Suppliers* that would be impacted by the final rule are those that import all-terrain vehicles that are intended for children 12 year old or younger.

TABLE 3—WHOLESALERS

NAICS Code	Description	Small firms	Total firms
4231	Motor Vehicle and Motor Vehicle Parts and Suppliers	17,734	18,769
4232	Furniture and Home Furnishing Merchant Wholesalers	11,353	11,844
42362	Electrical and Electronic Appliance, Television, and Radio Set Merchant Wholesalers	2,444	2,591
42391	Sporting and Recreational Goods and Supplies Merchant Wholesalers	5,019	5,196
42392	Toy and Hobby Goods and Supplies Merchant Wholesalers	2,227	2,302
42394	Jewelry, Watch, Precious Stone, and Precious Metal Merchant Wholesalers	7,363	7,447
42399	Other Miscellaneous Durable Goods Merchant Wholesalers	9,040	9,302
42432	Men's and Boy's Clothing and Furnishings Merchant Wholesalers	3,557	3,722
42433	Women's, Children's, and Infant's Clothing, and Accessories Merchant Wholesalers	6,797	7,029
42434	Footwear Merchant Wholesalers	1,521	1,593
42499	Other Miscellaneous Nondurable Goods Merchant Wholesalers	11,203	11,490
	Total Wholesalers	78,258	81,285

Source: U.S. Department of Commerce, Bureau of the Census, 2008 County Business Patterns, Number of Firms, Number of Establishments, Employment, and Annual Payroll by Small Enterprise Employment Sizes for the United States, NAICS Sectors: 2008. (Available at: *http://www2.census.gov/econ/susb/data/2008/us_naicssector_small_emplsize_2008.xls,* last accessed on 16 August 2011.

In addition to the wholesalers tabulated in Table 3, the U.S. Census Bureau estimated that there were 206,072 nonemployer businesses classified in NAICS categories that could include wholesalers of children's products. Nonemployer businesses are generally very small sole proprietorships. The average receipts for the nonemployer business wholesalers were about $86,000.[3] An unknown number of nonemployer wholesalers could import children's products.

E. Retailers

Retailers that obtain all of their products from domestic manufacturers or wholesalers will not be directly impacted by the rule because the manufacturers or wholesalers would be responsible for the testing and certification of the children's products. However, there are some retailers that manufacture or directly import some products and, therefore, will be responsible for ensuring that these products are properly tested and certified. The number of such retailers is not known. Table 4 shows the number of retailers by NAICS code that would cover most children's products. According to SBA size standards, retailers are generally considered to be small entities if their annual sales are less than $7 million to $30 million, depending on the specific NAICS category. Because of the way in which the data were reported by the Bureau of the Census, the estimates of the number of small firms in each category in Table 4 are based on similar, but different criteria. Although there are more than 100,000 firms that would be considered to be small businesses in these categories, it is not known how many of these firms are engaged in importing or manufacturing children's products. Many of these firms probably obtain all of their products from domestic wholesalers or manufacturers and would not be directly impacted by the rule.

TABLE 4—RETAILERS

NAICS Code	Description	SBA size standard (millions of dollars of annual sales)	Criteria used for estimate of small firms (millions of dollars of annual sales)	Small firms	Total firms
441221	Motorcycle, ATV, and Personal Watercraft Dealers.	<30	<25	4,794	4,879

[2] U.S. Department of Commerce, Bureau of the Census, ''Revised 2008 Nonemployer Statistics Table.'' Available at: *http://www.census.gov/econ/nonemployer/Revised%202008%20Data%20With%202009%20Methodology%20Applied.xls* (last accessed 16 August 2011).

[3] U.S. Department of Commerce, Bureau of the Census, ''Revised 2008 Nonemployer Statistics Table.'' available at *http://www.census.gov/econ/nonemployer/Revised%202008%20Data%20With%202009%20Methodology%20Applied.xls* (last accessed 16 August 2011).

TABLE 4—RETAILERS—Continued

NAICS Code	Description	SBA size standard (millions of dollars of annual sales)	Criteria used for estimate of small firms (millions of dollars of annual sales)	Small firms	Total firms
4421	Furniture Stores	< 19	< 10	16,033	16,611
44813	Children's and Infant's Clothing Stores	< 30	< 25	2,057	2,074
44814	Family Clothing Stores	< 25.5	< 25	6,588	6,684
44815	Clothing Accessories Stores	< 14	< 10	2,757	2,774
44819	Other Clothing Stores	< 19	< 10	6,331	6,393
4482103	Children's & Juveniles' Shoe Stores	< 25.5	< 25	227	230
4482104	Family Shoe Stores	< 25.5	< 25	2,905	2,941
45111	Sporting Goods Stores	< 14	< 10	14,388	14,545
45112	Hobby, Toy, & Game Stores	< 25.5	< 25	4,612	4,629
452	General Merchandise Stores	< 30	< 25	6,873	6,971
45322	Gift, Novelty, and Souvenir Store	< 30	< 25	19,297	19,339
454111	Electronic Shopping	< 30	< 25	11,374	11,646
454113	Mail Order Houses	< 35.5	< 25	5,281	5,645
4542	Vending Machine Operators	< 10	< 10	3,796	3,887
	Total Retailers			107.313	124,700

Source: U.S. Census Bureau, 2007 Economic Census, Release date 11/02/2010.

In addition to the retailers tabulated in Table 4, the U.S. Census Bureau estimated that there were 324,918 nonemployer businesses classified in NAICS categories that could include retailers of children's products. Nonemployer businesses are generally very small sole proprietorships. The average receipts for the nonemployer business wholesalers were about $40,000.[4] An unknown number of nonemployer wholesalers could import children's products.

F. Compliance, Reporting, and Recordkeeping Requirements of Proposed Rule

The proposed rule would require that children's product manufacturers select representative samples required for the third party periodic testing (required by 16 CFR 1107.21) to be selected using a procedure that provides a basis for inferring compliance about the population of untested products produced during the applicable periodic testing interval. The proposed rule would further require that the number of samples selected must be sufficient to ensure continuing compliance with all the applicable children's product safety rules.

In order to be able to infer the compliance of the untested products, the samples selected must be representative of the untested or unselected units in the population of products produced during the periodic testing interval. In other words, children's product manufacturers must have a basis for believing that if the samples selected for periodic testing show compliance with the applicable children's product safety rules, then one can infer the compliance of the untested units in the population.

Haphazard or nonpurposive methods of sample selection cannot provide a basis for believing that the samples are representative without additional information. In many cases, a manufacturer's knowledge of the manufacturing processes or materials used in the process may provide such information. For example, if the manufacturer knows that a product or component is manufactured using the same grade of material as all of the other units, and if the production processes are controlled such that the all dimensions are the same as all other units, then that product or component could be considered representative of all other units produced during the interval. Information that can be used to establish that a sample is representative can come from a variety of sources, including inspection of, or tests on, incoming materials or components, as well as inspection, tests, and process-control data generated during production.

Other methods of selecting representative samples include various probability-based sampling methods. These methods include simple random sampling, cluster sampling, systematic sampling, stratified sampling, and multistage sampling. Probability-based sampling methods allow one to make statistical inferences about the population of the products, based upon results of tests on the selected samples.

The proposed rule would require that manufacturers document the procedures used to select the product samples for periodic testing and document the basis for that belief that the samples are representative of the untested product produced during the periodic testing interval. The records must be maintained for five years. The records can be maintained electronically or in hardcopy. The manufacturer must make the records available for inspection by the CPSC upon request. The records may be maintained in languages other than English—if they can be provided immediately to the CPSC upon request, and provided that the manufacturer can translate them accurately into English within 48 hours—or any longer period negotiated with CPSC staff, upon a request by the CPSC to translate the records.

There will be some costs associated with developing and implementing sampling procedures that will result in the selection of representative samples. Some knowledge of subjects such as statistics and quality control techniques may be necessary to develop the procedure even though the Commission has not mandated the use of statistical sampling techniques. Some manufacturers may have these skills in-house; others may need to hire outside consultants with these skills. There also may be some ongoing costs associated with selecting the representative samples once the procedures have been developed. There also would be some costs associated with documenting the

[4] U.S. Department of Commerce, Bureau of the Census, ''Revised 2008 Nonemployer Statistics Table.'' Available at: *http://www.census.gov/econ/nonemployer/Revised%202008%20Data%20With%202009%20Methodology%20Applied.xls* (last accessed 16 August 2011).

procedure and maintaining the records that would be required by the proposed rule. We invite comment on these costs and other impacts that the proposed rule could have on manufacturers.

G. Alternatives for Reducing the Adverse Impact on Small Businesses

The Regulatory Flexibility Act requires agencies to consider alternatives to proposed rules that would accomplish the stated objectives of the applicable statutes and that would reduce the economic impact on small entities. At a minimum, agencies must consider:

1. The establishment of differing compliance or reporting requirements that take into account the resources available to small businesses;
2. The clarification, consolidation, or simplification of compliance and reporting requirements for small entities;
3. The use of performance rather than design standards; and
4. An exemption from coverage of the rule, or any part of the rule thereof, for small entities.

One alternative we considered was to propose less stringent alternatives for selecting representative samples. One alternative would be to allow manufacturers to select the samples using any method, provided that the method used would not purposively lead to the selection of samples that the manufacturers knows are more likely to comply with a standard or requirement than other samples, or select samples that are manufactured and chosen specifically to comply with a standard or requirement (often referred to as ''golden samples''). For example, manufacturers could pull randomly or nonpurposively the samples for periodic testing from their finished goods inventory or from the next lot or batch when the periodic testing needs to be completed.

This alternative was not incorporated in the proposed rule because we think that it is necessary for the manufacturer to have a positive basis for their belief that the samples selected for periodic testing are, in fact, representative of the entire population of units produced during the periodic testing interval. If the manufacturer does not have a basis for believing that the samples selected are representative, then the ability to make inferences regarding the compliance of the untested units produced during the interval is limited, and the continued compliance, as stated in § 14(i)(2)(B)(ii) of the CPSA, cannot be ensured.

We invite comments on these or any other alternatives to the proposed rule that could reduce the impact on small businesses. In providing such comments, we request that the comments provide specific suggestions and well-developed justifications for the suggestions.

V. Paperwork Reduction Act

This proposed rule contains information collection requirements that are subject to public comment and review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). We describe the provisions in this section of the document with an estimate of the annual reporting burden. Our estimate includes the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing each collection of information.

We invite comments on: (1) Whether the collection of information is necessary for the proper performance of the CPSC's functions, including whether the information will have practical utility; (2) the accuracy of the CPSC's estimate of the burden of the proposed collection of information, including the validity of the method 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.

Title: Amendment to Regulation on Testing and Labeling Pertaining to Product Certification Regarding Representative Samples for Periodic Testing of Children's Products

Description: The proposed rule would require records that describe how the samples for periodic testing are selected, the number of samples that will be selected, and an explanation of why the procedure described will result in the selection of representative samples, such that one can infer that the untested units produced during the periodic testing interval comply with the applicable children's product safety rules if the samples selected comply.

Description of Respondents: Manufacturers of children's products.

We estimate the burden of this collection of information as follows: Although it might take a manufacturer several hours, perhaps several days to analyze its products and manufacturing processes to determine its options for selecting representative samples (and some might need to hire consultants for this purpose), the actual documentation of the procedure and basis for inferring compliance will probably take less time.

On the assumption that, because this document would be required by regulation, manufacturers will make sure that the document is reviewed and edited properly, it could take an average of 4 hours to prepare this document, once the procedure that will be used is decided and the number of samples has been determined. Developing the sampling procedure and documenting it are managerial or professional functions. According to the Bureau of Labor Statistics, as of March 2011, total compensation for management, professional, and related occupations for all workers in private industry was $50.08 an hour. Therefore, the cost of creating the record documenting a procedure for selecting representative samples could be estimated to be about $200 ($50.08 × 4 hours).[5]

In developing the estimates of the recordkeeping burden associated with the testing and labeling pertaining to the certification of a children's products rule, we estimated that there were about 1.6 million children's products. However, manufacturers probably will not need to develop and document a separate sampling procedure for each product. It might be more reasonable to believe that manufacturers will be able to use the same sampling plan for similar or closely related products or product lines. Therefore, manufacturers may need to develop and document separate sampling procedures for each set of closely related children's products or children's product lines rather than each individual product. For example, a manufacturer of die-cast toy cars might offer 50 different models, but if each one is manufactured using the same manufacturing processes and the same materials, one sampling plan for all die-cast cars might be sufficient. We do not have information on the number of closely related products or product lines that manufacturers offer or the average number of individual models within each set of closely related products or product lines. In some cases, a manufacturer might have only one product in a particular product line. Some large manufacturers may offer several hundred models or styles within some product lines.

A starting point to estimate the recordkeeping burden of the proposed rule is to assume that each product line averages 10 to 50 individual product models or styles. If each product line averages 50 individual models or styles,

[5] Bureau of Labor Statistics, Employer Costs for Employee Compensation, Table 9 (March 2011). Available at: *http://www.bls.gov/ncs.*

then a total of 32,000 individual sampling plans (1.6 million children's products ÷ 50 models or styles) would need to be developed and documented. This would require 128,000 hours (32,000 plans × 4 hours per plan) at a total cost of approximately $6.4 million (128,000 hours × $50.08 per hour). If each product line averages 10 individual models or styles, then a total of 160,000 different sampling plans (1.6 million children's products ÷ 10 models or styles) would need to be documented. This would require 640,000 hours (160,000 plans × 4 hours per plan), at a total cost of approximately $32 million (640,000 hours × $50.08 per hour).

Once a sampling plan is developed and documented, manufacturers will probably not incur the full cost of documenting their sampling plans in subsequent years because the same plan and documentation should be valid. However, each year, it is expected that manufacturers will retire some product lines and introduce new ones. Moreover, some manufacturers will leave the market, and other manufacturers will enter the market. Therefore, there will be some ongoing costs associated with documenting sampling plans.

We do not have data on the number of new product lines introduced annually, whether from existing manufacturers or from new manufacturers entering a market. For purposes of this analysis, we will assume that about 20 percent of the children's product lines are new each year, either because an existing manufacturer has changed an existing product line to the extent that a new sampling plan is required, introduced a new product line, or because a new manufacturer has entered the market. If this is the case, then the ongoing recordkeeping costs associated with the draft proposed rule would be 25,600 hours (128,000 hours × 0.2) to 128,000 hours (640,000 hours × 0.2) annually or approximately $1.3 million (25,600 hours × $50.08 per hour) to approximately $6.4 million (128,000 hours × $50.08 per hour) annually.

Another potential ongoing recordkeeping cost might result if manufacturers make adjustments or revisions to their sampling plans or procedures for their existing product lines. This might occur if manufacturers find that their initial procedures are difficult to implement or if they come up with more efficient methods of selecting representative samples. We do not have any information that could be used to estimate how often manufacturers will revise these plans. For purposes of this analysis, we will assume that this, too, would amount to about 20 percent of the burden estimated for the initial year, or approximately $1.3 million to $6.4 million annually.

As noted above, we do not have empirical data for most of the numbers used in the examples above. We invite comments from manufacturers and others to gather better insight on the potential recordkeeping burden of the draft proposed rule.

In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), we have submitted the information collection requirements of this rule to OMB for review. Interested persons are requested to fax comments regarding information collection by December 8, 2011, to the Office of Information and Regulatory Affairs, OMB (see **ADDRESSES**).

VI. Executive Order 12988 (Preemption)

Executive Order 12988 (February 5, 1996), requires agencies to state in clear language the preemptive effect, if any, of new regulations. The proposed rule would be issued under the authority of the CPSA and the CPSIA. The CPSA provision on preemption appears at section 26 of the CPSA. The CPSIA provision on preemption appears at section 231 of the CPSIA. The preemptive effect of this rule would be determined in an appropriate proceeding by a court of competent jurisdiction.

VII. Effective Date

The Administrative Procedure Act (APA) generally requires that the effective date of a rule be at least 30 days after publication of a final rule. 5 U.S.C. 553(d). The Commission intends that any final rule based on this proposal would become effective on the same date as the rule on ''Testing and Labeling Pertaining to Certification,'' published elsewhere in this **Federal Register**, which is February 8, 2013.

VIII. Request for Comments

The issuance of this proposed rule begins a rulemaking proceeding under sections 3 and 102 of the CPSIA that will establish performance and recordkeeping requirements for the testing of representative samples for periodic testing of children's products. We invite interested persons to submit comments on any aspect of the proposed rule. Comments should be submitted in accordance with the instructions in the **ADDRESSES** section at the beginning of this notice.

List of Subjects in 16 CFR Part 1107

Business and industry, Children, Consumer protection, Imports, Product testing and certification, Records, Record retention, Toys.

Accordingly, the Commission proposes to amend 16 CFR part 1107, as proposed to be added elsewhere in this issue of the **Federal Register**, to read as follows:

PART 1107—TESTING AND LABELING PERTAINING TO PRODUCT CERTIFICATION

1. The authority citation for part 1107 continues to read as follows:

Authority: 15 U.S.C. 2063, Sec. 3, 102 Pub. L. 110–314, 122 Stat. 3016, 3017, 3022.

Subpart C—Certification of Children's Products

2. Add paragraph (f) to § 1107.21 to read as follows:

§ 1107.21 Periodic testing.

* * * * *

(f) A manufacturer must select representative product samples to be submitted to the third party conformity assessment body for periodic testing. The procedure used to select representative product samples for periodic testing must provide a basis for inferring compliance about the population of untested products produced during the applicable periodic testing interval. The number of samples selected for the sampling procedure must be sufficient to ensure continuing compliance with all applicable children's product safety rules. The manufacturer must document the procedure used to select the product samples for periodic testing and the basis for inferring the compliance of the product manufactured during the periodic testing interval from the results of the tested samples.

* * * * *

3. Add paragraph (a)(4) to § 1107.26 to read as follows:

§ 1107.26 Recordkeeping.

(a) * * *

(4) Records documenting the testing of representative samples, as set forth in § 1107.21(f), including the number of representative samples selected and the procedure used to select representative samples. Records also must include the basis for inferring compliance of the product manufactured during the periodic testing interval from the results of the tested samples;

* * * * *

Dated: October 21, 2011.

Todd A. Stevenson,

Secretary, Consumer Product Safety Commission.

[FR Doc. 2011–27686 Filed 11–7–11; 8:45 am]

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Part VI

Consumer Product Safety Commission

16 CFR Chapter II

Application of Third Party Testing Requirements; Reducing Third Party Testing Burdens; Proposed Rule

CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Chapter II

Application of Third Party Testing Requirements; Reducing Third Party Testing Burdens

AGENCY: Consumer Product Safety Commission.

ACTION: Request for comments.

SUMMARY: The Consumer Product Safety Commission staff (''CPSC,'' ''Commission,'' or ''we'') invites public comment on opportunities to reduce the cost of third party testing requirements consistent with assuring compliance with any applicable consumer product safety rule, ban, standard, or regulation. Third party testing requirements apply to most children's products that are subject to a children's product safety rule. We are taking this action pursuant to section 14(i)(3)(A) of the Consumer Product Safety Act (''CPSA''), as amended by H.R. 2715, Public Law 112–28.[1]

DATES: Written comments must be submitted by January 23, 2012.

ADDRESSES: You may submit comments, identified by Docket No. CPSC–2011–0081, 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 (email), except through *www.regulations.gov*.

Written Submissions

Submit written submissions in the following way:

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 502, 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, including any personal identifiers, contact information, or other personal information provided, to *http://www.regulations.gov*. Do not submit confidential business information, trade secret information, or other sensitive or protected information electronically. 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: Randy Butturini, Project Manager, Office of Hazard Identification and Reduction, U.S. Consumer Product Safety Commission, 4330 East-West Highway, Bethesda, MD 20814; telephone (301) 504–7562; email *RButturini@cpsc.gov*.

SUPPLEMENTARY INFORMATION:

I. What is third party testing? Why is it required?

Section 14(a)(2) of the Consumer Product Safety Act (CPSA) (15 U.S.C. 2063(a)(2)) establishes testing requirements for children's products that are subject to a children's product safety rule. Section 3(a)(2) of the CPSA (15 U.S.C. 2052(a)(2)) defines a ''children's product,'' in relevant part, as a consumer product designed or intended primarily for children 12 and younger. Section 14(a)(2)(A) of the CPSA also states that, before a children's product that is subject to a children's product safety rule is imported for consumption or warehousing or distributed in commerce, the manufacturer or private labeler of such children's product must submit sufficient samples of the children's product ''or samples that are identical in all material respects to the product'' to an accredited ''third party conformity assessment body'' to be tested for compliance with the children's product safety rule. Based on such testing, the manufacturer or private labeler, in accordance with section 14(a)(2)(B) of the CPSA, must issue a certificate that certifies that such children's product complies with the children's product safety rule based on the assessment of a third party conformity assessment body accredited to perform such tests.

Section 14(i)(2)(A) of the CPSA requires that we initiate a program by which a manufacturer or private labeler may label a consumer product as complying with the certification requirements. This provision applies to all consumer products that are subject to a product safety rule administered by the Commission.

Section 14(i)(2)(B) of the CPSA requires that we establish protocols and standards for: (1) Ensuring that a children's product tested for compliance with a children's product safety rule is subject to testing periodically and when there has been a material change in the product's design or manufacturing process, including the sourcing of component parts; (2) testing of representative samples; (3) verifying that a children's product tested by a conformity assessment body complies with applicable children's product safety rules; and (4) safeguarding against the exercise of undue influence on a third party conformity assessment body by a manufacturer or private labeler.

In the **Federal Register** of May 20, 2010 (75 FR 28336), we published a proposed rule titled, ''Testing and Labeling Pertaining to Product Certification,'' which would establish, among other things, requirements for compliance and continuing testing for children's products and the labeling of consumer products to indicate that they meet the certification requirements in section 14(a) of the CPSA. In the same issue of the **Federal Register**, we also published a proposed rule on ''Conditions and Requirements for Testing Component Parts of Consumer Products'' (75 FR 28208); the proposed rule would establish requirements regarding the testing of component parts of consumer products to demonstrate, in whole or in part, their compliance with applicable rules, bans, standards, and regulations to support a certificate for a children's product.

On August 12, 2011, the President signed H.R. 2715 into law (Pub. L. 112–28). Section 2 of H.R. 2715 amended what was then section 14(d) of the CPSA in several ways, including:

- Renumbering section 14(d) of the CPSA, as it pertained to ''Additional Regulations for Third Party Testing,'' as section 14(i) of the CPSA. Congress took this action because the CPSA, as amended by the Consumer Product Safety Improvement Act of 2008 (Pub. L. 110–314), inadvertently created a second paragraph (d) in section 14 of the CPSA;
- Requiring us to seek public comment, not later than 60 days after H.R. 2715's enactment, on opportunities to reduce the cost of third party testing requirements consistent with assuring compliance with any applicable consumer product safety rule, ban, standard, or regulation. H.R. 2715 also specifies seven issues for public comment.

Thus, this notice complies with the requirement that we seek public

[1] The Commission voted 5–0 to publish this notice, with changes, in the **Federal Register**. Chairman Inez M. Tenenbaum, Commissioner Robert S. Adler, and Commissioner Thomas H. Moore issued a joint statement. Commissioner Nancy A. Nord issued a statement. The statements can be found at *http://www.cpsc.gov/pr/statements.html*.

comment on the issues specified in H.R. 2715.

II. What are the issues for which we invite comment?

As directed by H.R. 2715, we invite public comment on opportunities to reduce the cost of third party testing requirements consistent with assuring compliance with any applicable consumer product safety rule, ban, standard, or regulation. (Elsewhere in this issue of the **Federal Register**, we have published the final rule on ''Testing and Labeling Pertaining to Product Certification,'' the final rule on ''Conditions and Requirements for Relying on Component Part Testing or Certification, or Another Party's Finished Product Testing or Certification, to Meet Testing and Certification Requirements,'' and a proposed rule on ''Testing and Labeling Pertaining to Product Certification Regarding Representative Samples for Periodic Testing of Children's Products.'' Interested parties may wish to familiarize themselves with the two final rules and the one proposed rule before responding to this notice.) We identify each issue, using the language set forth in H.R. 2715, and, after each issue, provide additional questions to refine the issue further or to focus comments on particular concerns or questions.

1. Issue 1—The extent to which the use of materials subject to regulations of another government agency that requires third party testing of those materials may provide sufficient assurance of conformity with an applicable consumer product safety rule, ban, standard, or regulation without further third party testing.

- What materials are subject to regulations of another government agency that require third party testing? Please specify the materials and the government agency's regulation. Please summarize the purpose, test methods, and testing frequency required by the government agency, and describe how compliance with the government agency's regulation is relevant to demonstrating compliance with the specific consumer product safety rule(s), ban(s), standard(s), or regulation(s). Please state whether the government agency requires third party testing to be conducted by a third party conformity assessment body meeting the requirements of section 14(f)(2) of the CPSA. If the government agency permits testing by third party conformity assessment bodies that do not meet the requirements of section 14(f)(2) of the CPSA, what is the basis for assuring the testing laboratories' technical competence and protection against undue influence? Also, please address whether the number of laboratories used by a single testing party, or the number of products tested, could be reduced, while still assuring compliance with all applicable consumer product safety rules, bans, standards, or regulations, by aligning the CPSC's rules governing the frequency of third-party testing and the sampling of products for testing with the rules governing product testing under the regulations of the other government agency that requires third party testing.
- Currently, third party testing of materials subject to a rule, ban, standard, or regulation that we administer requires a third party conformity assessment body (testing laboratory) to apply to the CPSC for acceptance of the third party conformity assessment body's accreditation using CPSC-specified testing methods. The application includes specific requirements for the testing laboratory's accreditation body and has extra requirements for firewalled or governmental testing laboratories. Should the other governmental agencies' third party conformity assessment bodies also comply with these requirements in order for their testing results to provide sufficient assurance of conformity with an applicable consumer product safety rule? Why or why not?
- Should the same testing methods as required by the CPSC-accepted testing laboratories be required for any third party conformity assessment bodies to provide sufficient assurance of conformity to an applicable product safety rule? Why or why not?

2. Issue 2—The extent to which modification of the certification requirements may have the effect of reducing redundant third party testing by or on behalf of 2 or more importers of a product that is substantially similar or identical in all material respects.

- What situations might result in redundant third party testing by or on behalf of two or more importers of a product that is substantially similar or identical in all material respects? Please provide a definition and examples of products that are considered ''substantially similar'' or ''identical in all material respects.''
- How might the certification requirements of section 14 of the CPSA be modified to reduce redundant third party testing by or on behalf of two or more importers of a product that is substantially similar or identical in all material respects?
- How should we determine that a product is substantially similar to another product or ''identical in all material respects,'' in order to allow reduced third party testing?
- If an exporter third party tests and/or certifies a product and provides importers copies of test results, certificates, and other information needed by the importer to issue its own finished product certificate, what additional steps might the importer take to ensure the compliance of the product to the applicable product safety rules?

3. The extent to which products with a substantial number of different components subject to third party testing may be evaluated to show compliance with an applicable rule, ban, standard, or regulation by third party testing of a subset of such components selected by a third party conformity assessment body.

- How might we interpret ''substantial number of different components?''
- In general, the final rule on ''Conditions and Requirements for Relying on Component Part Testing or Certification, or another Party's Finished Product Testing or Certification, to Meet Testing and Certification Requirements'' establishes conditions and requirements for relying on testing or certification of component parts of consumer products, or another party's finished product testing or certification, to demonstrate, in whole or in part, compliance of a consumer product with all applicable rules, bans, standards, and regulations: (1) To support a children's product certificate (''CPC''); (2) as part of the standards and protocols for continued testing of children's products; and/or (3) to meet the requirements of any other rule, ban, standard, guidance, policy, or protocol regarding consumer product testing that does not already directly address component part testing. The final rule is intended to give all parties involved in testing and certifying consumer products pursuant to sections 14(a) and 14(i) of the CPSA the flexibility to conduct or rely on required certification testing where such testing is the easiest and least expensive. However, the final rule does not require third party conformity assessment bodies to select component part samples for testing, nor does it specify how many samples are to be tested; sample selection is left to the manufacturer or importer. Thus, how should a third party conformity assessment body select or determine the subset of components to test? Should the subset of components be a statistically valid sampling of the population of component parts? How might one assure that the subset of component parts is representative of the

population of component parts? Please explain.

• How would the test results on a subset of components infer compliance of the untested components?

• Should some form of batch/lot control be used on these components to identify and ensure that only approved component materials are used in producing the finished product? If so, what forms might provide the desired level of control with the least burden? Please explain.

• What similarities should be required among the different components in order to be evaluated in this manner?

4. Issue 4—The extent to which manufacturers with a substantial number of substantially similar products subject to third party testing may reasonably make use of sampling procedures that reduce the overall test burden without compromising the benefits of third party testing.

• How might we interpret:

○ ''Substantial number''?

○ ''Substantially similar products''?

○ ''Reasonably make use?''

For example, if a manufacturer makes toy cars and toy boats, are they ''substantially similar'' products in the sense that they are all toy ''vehicles''? Does ''substantially similar'' refer to the type of products and/or their composition? Can first party testing (meaning testing by the manufacturer rather than testing by a third party) be designed to show the similarity between the products?

• Also, sampling procedures that may seem ''reasonable'' to one manufacturer, such as a large firm that makes many products, may not seem ''reasonable'' to another, such as an individual who makes a similar product by hand. How might a manufacturer combine knowledge from first party testing to develop a sampling plan for third party testing that reduces the overall test burden while still allowing the compliance of untested products to be inferred from the products tested by the third party conformity assessment body? What knowledge from first party testing would be used to develop the sampling plan and how would the plan be structured?

• What sampling procedures could be used with a set of substantially similar products to reduce the overall test burden without compromising the benefits of third party testing?

5. Issue 5—The extent to which evidence of conformity with other national or international governmental standards may provide assurance of conformity to consumer product safety rules, bans, standards, or regulations applicable under [the CPSA].

• Please identify national or international governmental standards that provide assurance of conformity to consumer product safety rules, bans, standards, or regulations under the CPSA. How should the CPSC evaluate the equivalency of such national or international standards?

• What constitutes ''evidence of conformity''? If a product bears a mark indicating conformance to the standard of another government or an international body, what factors should be considered in determining whether conformance to the standard of another government or an international body provides assurance of conformity to U.S. standards? In the event the Commission were to have a sufficient level of assurance of conformity to U.S. standards, how much should the concern regarding the likely existence of counterfeit marks inform the Commission's consideration of accepting those marks as evidence of conformity?

• If the test methods used by other national or international governmental standards are not those required by CPSC-accepted third party conformity assessment bodies for determining compliance with a consumer product safety rule, ban, standard, or regulation, what additional information should be required to provide assurance of conformity?

• If a CPSC-accepted third party conformity assessment body is not used, what assurance should be provided of the testing laboratory's technical competence and protections against undue influence?

6. Issue 6—The extent to which technology, other than the technology already approved by the Commission, exists for third party conformity assessment bodies to test or to screen for testing consumer products subject to a third party testing requirement.

• Please identify specific technologies, except for those that have already been approved by the CPSC, that may be used to test or screen a consumer product subject to a third party testing requirement.

• What are the objective requirements that we should use to evaluate testing or screening technologies for consumer products (e.g., accuracy, precision, repeatability, sensitivity, linearity)? What objective requirements, if any, should exist for those who would use the testing or screening technology? For example, assume that a machine exists that can detect the presence of a particular substance. If the machine must be calibrated before each use, then an individual using the machine should be aware of the need to calibrate the machine and also should be trained to do such calibrations; otherwise, using an improperly calibrated machine could lead to incorrect or misleading test results.

• In what ways (and by how much) should screening technologies be allowed to be less technically capable than testing technologies?

• Should screening technologies be allowed only for third party conformity assessment bodies to use, or should certifiers be allowed to use screening technologies as a means of reducing third party testing? What controls or limits should be placed on first party use of screening technologies?

7. Issue 7—Other techniques for lowering the cost of third party testing consistent with assuring compliance with the applicable consumer product safety rules, bans, standards, and regulations.

• Are there techniques, consistent with assuring compliance with applicable consumer product safety rules, bans, standards, and regulations, that can use a risk-based analysis to reduce the cost of third party testing? If yes, please describe what they are. What other techniques might exist for lowering the cost of third party testing but still assure compliance with applicable consumer product safety rules, bans, standards, and regulations? Please describe how the other technique(s) lower(s) testing costs and still assure compliance.

• Under what circumstances could component part testing (as described in the final rule on component part testing, which appears elsewhere in this issue of the **Federal Register**) be expanded beyond what is already permitted in the rule to reduce the overall test burden without compromising the benefits of third party testing?

III. How should comments be submitted?

We invite public comment on the issues identified in part II of this document, as well as any comments on other opportunities to reduce the cost of third party testing requirements consistent with assuring compliance with any applicable consumer product safety rule, ban, standard, or regulation. Written comments should be submitted by January 23, 2012, as described in the **ADDRESSES** portion of this document.

Dated: October 21, 2011.

Todd A. Stevenson,

Secretary, Consumer Product Safety Commission.

[FR Doc. 2011–27676 Filed 11–7–11; 8:45 am]

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