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

NUCLEAR REGULATORY COMMISSION

10 CFR Part 72

[NRC–2011–0221]

RIN 3150–AJ05

List of Approved Spent Fuel Storage Casks: HI–STORM 100, Revision 8

AGENCY: Nuclear Regulatory Commission.

ACTION: Direct final rule.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC or the Commission) is amending its spent fuel storage regulations by revising the Holtec International HI–STORM 100 dry cask storage system listing within the ''List of Approved Spent Fuel Storage Casks'' to include Amendment No. 8 to Certificate of Compliance (CoC) No. 1014. Amendment No. 8 adds a new multipurpose canister (MPC)–68M to the approved models currently included in CoC No. 1014 with two new boiling water reactor fuel assembly/array classes, and a new pressurized water reactor fuel assembly/class to CoC No. 1014 for loading into the MPC–32. In addition, the amendment makes several other changes as described under the ''Discussion'' heading in the **SUPPLEMENTARY INFORMATION** section of this document.

DATES: The final rule is effective May 2, 2012, unless significant adverse comments are received by March 19, 2012. A significant adverse comment is a comment where the commenter explains why the rule would be inappropriate, including challenges to the rule's underlying premise or approach, or would be ineffective or unacceptable without a change. If the rule is withdrawn, timely notice will be published in the **Federal Register**.

ADDRESSES: You can access publicly available documents related to this document using the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for documents filed under Docket ID NRC–2011–0221. Address questions about NRC dockets to Carol Gallagher, telephone: 301–492–3668; email: *Carol.Gallagher@nrc.gov.*
- *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 O–1F21, 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 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.* An electronic copy of the proposed CoC, Technical Specifications (TSs), and preliminary safety evaluation report (SER) can be found under ADAMS Package Accession Number ML112160574.

FOR FURTHER INFORMATION CONTACT: Gregory Trussell, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: 301–415–6445, email: *Gregory.Trussell@nrc.gov.*

SUPPLEMENTARY INFORMATION:

Background

Section 218(a) of the Nuclear Waste Policy Act (NWPA) of 1982, as amended, requires that ''the Secretary [of the Department of Energy] shall establish a demonstration program, in cooperation with the private sector, for the dry storage of spent nuclear fuel at civilian nuclear power reactor sites, with the objective of establishing one or more technologies that the [U.S. Nuclear Regulatory] Commission may, by rule, approve for use at the sites of civilian nuclear power reactors without, to the maximum extent practicable, the need for additional site-specific approvals by the Commission.'' Section 133 of the NWPA states, in part, that [the Commission] shall, by rule, establish procedures for the licensing of any technology approved by the Commission under Section 219(a) for use at the site of any civilian nuclear power reactor.''

To implement this mandate, the Commission approved dry storage of spent nuclear fuel in NRC-approved casks under a general license by publishing a final rule in Title 10 of the Code of Federal Regulations (10 CFR) Part 72, which added a new Subpart K within 10 CFR Part 72, entitled ''General License for Storage of Spent Fuel at Power Reactor Sites'' (55 FR 29181; July 18, 1990). This rule also established a new Subpart L within 10 CFR Part 72, entitled ''Approval of Spent Fuel Storage Casks,'' which contains procedures and criteria for obtaining NRC approval of spent fuel storage cask designs. The NRC subsequently issued a final rule on May 1, 2000 (65 FR 25241), that approved the Holtec International cask design and added it to the list of NRC-approved cask designs in 10 CFR 72.214 as CoC No. 1014.

Discussion

On November 28, 2009, and as supplemented on November 4 and December 14, 2010, and February 25 and July 8, 2011, Holtec International, the holder of CoC No. 1014, submitted a certificate amendment request to the NRC requesting an amendment to CoC No. 1014. Specifically, Holtec International requested changes to add a new MPC–68M to the approved models currently included in CoC No. 1014 with two new boiling water reactor fuel assembly/array classes, and a new pressurized water reactor fuel assembly/class to CoC No. 1014 for loading into the MPC–32. In addition, the amendment would change 1) Condition 5 of CoC No. 1014 to add ''if applicable'' after the reference to Section 3.5 of Appendix B, ''Cask Transfer Facility (CTF)'' to clarify that the CTF is an optional facility; 2) Appendix A, TS 1.1, to modify the CTF definition to clarify that it could be used in lieu of 10 CFR Part 50 controlled structures for cask transfer evolutions; and 3) Table 3–1, MPC Cavity Drying Limits, to include the previously approved, but omitted table to eliminate inconsistencies

between Table 3–1 and TS 3.1.1, Limiting Condition for Operation.

As documented in the SER, the NRC staff performed a detailed safety evaluation of the proposed CoC amendment request and found that an acceptable safety margin is maintained. In addition, the NRC staff has determined that there continues to be reasonable assurance that public health and safety will be adequately protected.

This direct final rule revises the HI–STORM 100 listing in 10 CFR 72.214 by adding Amendment No. 8 to CoC No. 1014. The amendment consists of the changes previously described, as set forth in the revised CoC and TSs. The revised TSs are identified in the SER.

The amended HI–STORM 100 cask design, when used under the conditions specified in the CoC, the TSs, and the NRC's regulations, will meet the requirements of 10 CFR Part 72; thus, adequate protection of public health and safety will continue to be ensured. When this direct final rule becomes effective, persons who hold a general license under 10 CFR 72.210 may load spent nuclear fuel into HI–STORM 100 casks that meet the criteria of Amendment No. 8 to CoC No. 1014 under 10 CFR 72.212.

Discussion of Amendments by Section

Section 72.214 List of approved spent fuel storage casks

The CoC No. 1014 is revised by adding the effective date of Amendment Number 8.

Procedural Background

This rule is limited to the changes contained in Amendment No. 8 to CoC No. 1014 and does not include other aspects of the HI–STORM 100 dry storage cask system. The NRC is using the ''direct final rule procedure'' to issue this amendment because it represents a limited and routine change to an existing CoC that is expected to be noncontroversial. Adequate protection of public health and safety continues to be ensured. The amendment to the rule will become effective on May 2, 2012. However, if the NRC receives significant adverse comments on this direct final rule by March 19, 2012, then the NRC will publish a document that withdraws this action and will subsequently address the comments received in a final rule as a response to the companion proposed rule published elsewhere in this issue of the **Federal Register**. Absent significant modifications to the proposed revisions requiring republication, the NRC will not initiate a second comment period on this action.

A significant adverse comment is a comment where the commenter explains why the rule would be inappropriate, including challenges to the rule's underlying premise or approach, or would be ineffective or unacceptable without a change. A comment is adverse and significant if:

(1) The comment opposes the rule and provides a reason sufficient to require a substantive response in a notice-and-comment process. For example, a substantive response is required when:

(a) The comment causes the NRC staff to reevaluate (or reconsider) its position or conduct additional analysis;

(b) The comment raises an issue serious enough to warrant a substantive response to clarify or complete the record; or

(c) The comment raises a relevant issue that was not previously addressed or considered by the NRC staff.

(2) The comment proposes a change or an addition to the rule, and it is apparent that the rule would be ineffective or unacceptable without incorporation of the change or addition.

(3) The comment causes the NRC staff to make a change (other than editorial) to the rule, CoC, or TSs.

For detailed instructions on filing comments, please see the companion proposed rule published elsewhere in this issue of the **Federal Register**.

Voluntary Consensus Standards

The National Technology Transfer and Advancement Act of 1995 (Pub. L. 104–113) requires that Federal agencies use technical standards that are developed or adopted by voluntary consensus standards bodies unless the use of such a standard is inconsistent with applicable law or otherwise impractical. In this direct final rule, the NRC will revise the Holtec International HI–STORM 100 System cask design listed in § 72.214 (List of Approved Spent Fuel Storage Casks). This action does not constitute the establishment of a standard that contains generally applicable requirements.

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. Although an Agreement State may not adopt program elements reserved to the NRC, it may wish to inform its licensees of certain requirements via a mechanism that is consistent with the particular State's administrative procedure laws but does not confer regulatory authority on the State.

Plain Writing

The Plain Writing Act of 2010 (Pub. L. 111–274) requires Federal agencies to write documents in a clear, concise, well-organized manner that also follows other best practices appropriate to the subject or field and the intended audience. The NRC has attempted to use plain language in promulgating this rule consistent with the Federal Plain Writing Act guidelines.

Finding of No Significant Environmental Impact: Availability

Under the National Environmental Policy Act of 1969, as amended, and the NRC regulations in Subpart A of 10 CFR Part 51, the NRC has determined that this rule, if adopted, would not be a major Federal action significantly affecting the quality of the human environment and, therefore, an environmental impact statement is not required. The NRC has prepared an environmental assessment and, on the basis of this environmental assessment, has made a finding of no significant impact. This rule amends the CoC for the Holtec International HI–STORM 100 System cask design within the list of approved spent fuel storage casks that power reactor licensees can use to store spent fuel at reactor sites under a general license. Amendment No. 8 adds a new multipurpose canister (MPC)—68M to the approved models currently included in CoC No. 1014 with two new boiling water reactor fuel assembly/array classes, and a new pressurized water reactor fuel assembly/class to CoC No. 1014 for loading into the MPC–32. In addition, the amendment changes: (1) Condition 5 of CoC No. 1014 to add ''if applicable'' after the reference to Section 3.5 of Appendix B, ''Cask Transfer Facility (CTF)'' to clarify that the CTF is an optional facility; (2) Appendix A, TS 1.1, to modify the CTF definition to clarify that it could be used in lieu of 10 CFR part 50 controlled structures for cask transfer evolutions; and (3) Table 3–1, MPC Cavity Drying Limits, to include the previously approved, but omitted, table to eliminate inconsistencies between Table 3–1 and TS 3.1.1, Limiting Condition for Operation.

The environmental assessment and finding of no significant impact on

which this determination is based are available for inspection at the NRC PDR, Room O–1F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852. Single copies of the environmental assessment and finding of no significant impact are available from Gregory Trussell, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: 301–415–6445, email: *Gregory.Trussell@nrc.gov.*

Paperwork Reduction Act Statement

This rule does not contain any information collection requirements and, therefore, is not 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 Number 3150–0132.

Public Protection Notification

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

Regulatory Analysis

On July 18, 1990 (55 FR 29181), the NRC issued an amendment to 10 CFR part 72 to provide for the storage of spent nuclear fuel under a general license in cask designs approved by the NRC. Any nuclear power reactor licensee can use NRC-approved cask designs to store spent nuclear fuel if it notifies the NRC in advance, the spent fuel is stored under the conditions specified in the cask's CoC, and the conditions of the general license are met. A list of NRC-approved cask designs is contained in 10 CFR 72.214. On May 1, 2000 (65 FR 25241), the NRC issued an amendment to 10 CFR part 72 that approved the HI–STORM 100 cask design by adding it to the list of NRC-approved cask designs in 10 CFR 72.214.

On November 28, 2009, and as supplemented on November 4 and December 14, 2010, and February 25 and July 8, 2011, Holtec International, the holder of CoC No. 1014, submitted a certificate amendment request to the NRC requesting an amendment to CoC No. 1014. Specifically, Holtec International requested changes to add a new multipurpose canister (MPC)–68M to the approved models currently included in CoC No. 1014 with two new boiling water reactor fuel assembly/array classes, and a new pressurized water reactor fuel assembly/class to CoC No. 1014 for loading into the MPC–32. In addition, the amendment would change: (1) Condition 5 of CoC No. 1014 to add ''if applicable'' after the reference to Section 3.5 of Appendix B, ''Cask Transfer Facility (CTF)'' to clarify that the CTF is an optional facility; (2) Appendix A, TS 1.1, to modify the CTF definition to clarify that it could be used in lieu of 10 CFR part 50 controlled structures for cask transfer evolutions; and (3) Table 3–1, MPC Cavity Drying Limits, to include the previously approved, but omitted table to eliminate inconsistencies between Table 3–1 and TS 3.1.1, Limiting Condition for Operation.

The alternative to this action is to withhold approval of Amendment No. 8 and to require any 10 CFR part 72 general licensee seeking to load spent nuclear fuel into HI–STORM 100 casks under the changes described in Amendment No. 8 to request an exemption from the requirements of 10 CFR 72.212 and 72.214. Under this alternative, each interested 10 CFR part 72 licensee would have to prepare, and the NRC would have to review, a separate exemption request, thereby increasing the administrative burden upon the NRC and the costs to each licensee.

Approval of the direct final rule is consistent with previous NRC actions. Further, as documented in the SER and the environmental assessment, the direct final rule will have no adverse effect on public health and safety or the environment. This direct final rule has no significant identifiable impact or benefit on other Government agencies. Based on this regulatory analysis, the NRC concludes that the requirements of the direct final rule are commensurate with the NRC's responsibilities for public health and safety and the common defense and security. No other available alternative is believed to be as satisfactory, and thus, this action is recommended.

Regulatory Flexibility Certification

Under the Regulatory Flexibility Act of 1980 (5 U.S.C. 605(b)), the NRC certifies that this rule will not, if issued, have a significant economic impact on a substantial number of small entities. This direct final rule affects only nuclear power plant licensees and Holtec International. These entities do not fall within the scope of the definition of ''small entities'' set forth in the Regulatory Flexibility Act or the size standards established by the NRC (10 CFR 2.810).

Backfit Analysis

The NRC has determined that the backfit rule (10 CFR 72.62) does not apply to this direct final rule because this amendment does not involve any provisions that would impose backfits as defined in 10 CFR Chapter I. Therefore, a backfit analysis is not required.

Congressional Review Act

Under 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, OMB.

List of Subjects in 10 CFR Part 72

Administrative practice and procedure, Criminal penalties, Manpower training programs, Nuclear materials, Occupational safety and health, Penalties, Radiation protection, Reporting and recordkeeping requirements, Security measures, Spent fuel, Whistleblowing.

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; the Nuclear Waste Policy Act of 1982, as amended; and 5 U.S.C. 552 and 553; the NRC is adopting the following amendments to 10 CFR part 72.

PART 72—LICENSING REQUIREMENTS FOR THE INDEPENDENT STORAGE OF SPENT NUCLEAR FUEL, HIGH-LEVEL RADIOACTIVE WASTE, AND REACTOR-RELATED GREATER THAN CLASS C WASTE

■ 1. The authority citation for part 72 continues to read as follows:

Authority: Secs. 51, 53, 57, 62, 63, 65, 69, 81, 161, 182, 183, 184, 186, 187, 189, 68 Stat. 929, 930, 932, 933, 934, 935, 948, 953, 954, 955, as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2071, 2073, 2077, 2092, 2093, 2095, 2099, 2111, 2201, 2232, 2233, 2234, 2236, 2237, 2238, 2282); sec. 274, Pub. L. 86–373, 73 Stat. 688, as amended (42 U.S.C. 2021); sec. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846); Pub. L. 95–601, sec. 10, 92 Stat. 2951 as amended by Pub. L. 102–486, sec. 7902, 106 Stat. 3123 (42 U.S.C. 5851); sec. 102, Pub. L. 91–190, 83 Stat. 853 (42 U.S.C. 4332); secs. 131, 132, 133, 135, 137, 141, Pub. L. 97–425, 96 Stat. 2229, 2230, 2232, 2241, sec. 148, Pub. L. 100–203, 101 Stat. 1330–235 (42 U.S.C. 10151, 10152, 10153, 10155, 10157, 10161, 10168); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note); Energy Policy Act of 2005, Pub. L. No. 109–58, 119 Stat. 549 (2005).

Section 72.44(g) also issued under secs. 142(b) and 148(c), (d), Pub. L. 100–203, 101

Stat. 1330–232, 1330–236 (42 U.S.C. 10162(b), 10168(c), (d)). Section 72.46 also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239); sec. 134, Pub. L. 97–425, 96 Stat. 2230 (42 U.S.C. 10154). Section 72.96(d) also issued under sec. 145(g), Pub. L. 100–203, 101 Stat. 1330–235 (42 U.S.C. 10165(g)). Subpart J also issued under secs. 2(2), 2(15), 2(19), 117(a), 141(h), Pub. L. 97–425, 96 Stat. 2202, 2203, 2204, 2222, 2244 (42 U.S.C. 10101, 10137(a), 10161(h)). Subparts K and L are also issued under sec. 133, 98 Stat. 2230 (42 U.S.C. 10153) and sec. 218(a), 96 Stat. 2252 (42 U.S.C. 10198).

■ 2. In § 72.214, Certificate of Compliance 1014 is revised to read as follows:

§ 72.214 List of approved spent fuel storage casks.

* * * * *

Certificate No.: 1014.

Initial Certificate Effective Date: May 31, 2000.

Amendment Number 1 Effective Date: July 15, 2002.

Amendment Number 2 Effective Date: June 7, 2005.

Amendment Number 3 Effective Date: May 29, 2007.

Amendment Number 4 Effective Date: January 8, 2008.

Amendment Number 5 Effective Date: July 14, 2008.

Amendment Number 6 Effective Date: August 17, 2009.

Amendment Number 7 Effective Date: December 28, 2009.

Amendment Number 8 Effective Date: May 2, 2012.

SAR Submitted by: Holtec International.

SAR Title: Final Safety Analysis Report for the HI–STORM 100 Cask System.

Docket Number: 72–1014.

Certificate Expiration Date: May 31, 2020.

Model Number: HI–STORM 100.

* * * * *

Dated at Rockville, Maryland, this 25th day of January, 2012.

For the Nuclear Regulatory Commission.

R.W. Borchardt,

Executive Director for Operations.

[FR Doc. 2012–3678 Filed 2–16–12; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2011–0725; Directorate Identifier 2011–NM–065–AD; Amendment 39–16943; AD 2012–03–02]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain The Boeing Company Model 767–200, –300, and –300F series airplanes. This AD was prompted by reports of loss of avionics cooling due to an unserviceable relay installed on a panel as part of the cabin air conditioning and temperature control system (CACTCS). This AD requires doing certain wiring changes, installing a new relay and necessary wiring in the CACTCS, and performing an operational test of the cooling pack system. We are issuing this AD to prevent loss of electrical equipment bay cooling and the overheating of flight deck instruments, which would result in the eventual loss of primary flight displays, an unusually high pilot workload, and depressurization of the cabin.

DATES: This AD is effective March 23, 2012.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in the AD as of March 23, 2012.

ADDRESSES: For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, Washington 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; email: *me.boecom@boeing.com;* Internet *https://www.myboeingfleet.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 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: Ana Martinez Hueto, Aerospace Engineer, Cabin Safety and Environmental Systems Branch, ANM–150S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: 425–917–6592; fax: 425–917–6590; email: *ana.m.hueto@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That NPRM published in the **Federal Register** on August 24, 2011 (76 FR 52899). That NPRM proposed to require doing certain wiring changes, installing a new relay and necessary wiring in the CACTCS, and performing an operational test of the cooling pack system.

Comments

We gave the public the opportunity to participate in developing this AD. We have considered the comments received. Boeing supports the NPRM (76 FR 52899, August 24, 2011). American Airlines stated that it is not affected by the NPRM.

Conclusion

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

- Are consistent with the intent that was proposed in the NPRM (76 FR 52899, August 24, 2011) for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM (76 FR 52899, August 24, 2011).

Costs of Compliance

We estimate that this AD affects 35 airplanes of U.S. registry.

We estimate the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Change wire bundle, install relay, and operational test.	29 work-hours × $85 per hour = $2,465 per relay installation.	$1,240	$3,705	$129,675

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify that this AD:

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

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

Adoption of the Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new airworthiness directive (AD):

2012–03–02 The Boeing Company: Amendment 39–16943; Docket No. FAA–2011–0725; Directorate Identifier 2011–NM–065–AD.

(a) Effective Date

This AD is effective March 23, 2012.

(b) Affected ADs

None.

(c) Applicability

This AD applies to The Boeing Company Model 767–200 and –300 series airplanes, certificated in any category, as identified in Boeing Special Attention Service Bulletin 767–21–0246, dated January 7, 2011; and Model 767–300F series airplanes, certificated in any category, as identified in Boeing Special Attention Service Bulletin 767–21–0234, dated August 6, 2009.

(d) Subject

Joint Aircraft System Component (JASC)/ Air Transport Association (ATA) of America Code 21: Air conditioning.

(e) Unsafe Condition

This AD results from reports of loss of avionics cooling due to an unserviceable relay installed on a panel as part of the cabin air conditioning and temperature control system (CACTCS). We are issuing this AD to prevent loss of electrical equipment bay cooling and the overheating of flight deck instruments, which would result in the eventual loss of primary flight displays, an unusually high pilot workload, and depressurization of the cabin.

(f) Compliance

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

(g) Installation of New Relay and Wiring Bundle

Within 72 months after the effective date of this AD: Change the wire bundle route and wiring, install a new relay and applicable wiring in the CACTCS, and do an operational test of the cooling pack system, in accordance with the Accomplishment Instructions of the service information specified in paragraph (g)(1) or (g)(2) of this AD, as applicable.

(1) For Model 767–200 and 767–300 series airplanes: Boeing Special Attention Service Bulletin 767–21–0246, dated January 7, 2011.

(2) For Model 767–300F series airplanes: Boeing Special Attention Service Bulletin 767–21–0234, dated August 6, 2009.

(h) Alternative Methods of Compliance (AMOCs)

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

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

(i) Related Information

For more information about this AD, contact Ana Martinez Hueto, Aerospace Engineer, Cabin Safety and Environmental Systems Branch, ANM–150S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue SW., Renton, WA 98057–3356; phone 425–917–6592; fax 425–917–6590; email: *ana.m.hueto@faa.gov*.

(j) Material Incorporated by Reference

(1) You must use the following service information to do the actions required by this AD, unless the AD specifies otherwise. The Director of the Federal Register approved the incorporation by reference (IBR) of the following service information under 5 U.S.C. 552(a) and 1 CFR part 51:

(i) Boeing Special Attention Service Bulletin 767–21–0246, dated January 7, 2011.

(ii) Boeing Special Attention Service Bulletin 767–21–0234, dated August 6, 2009.

(2) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, Washington 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; email *me.boecom@boeing.com;* Internet *https://www.myboeingfleet.com.*

(3) 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.

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

Issued in Renton, Washington, on January 26, 2012.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2012–2973 Filed 2–16–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2011–1092; Directorate Identifier 2011–NM–111–AD; Amendment 39–16946; AD 2012–03–05]

RIN 2120–AA64

Airworthiness Directives; Bombardier Inc., Airplanes

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

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain Bombardier, Inc. Model BD–700–1A10 and BD–700–1A11 airplanes. This AD was prompted by a report of deformation at the neck of the pressure regulator body on certain oxygen cylinder and regulator assemblies (CRA). This AD requires an inspection to determine if a certain oxygen CRA is installed and the replacement of oxygen CRAs containing pressure regulators having a certain part number. We are issuing this AD to prevent elongation of the pressure regulator neck, which could result in rupture of the oxygen cylinder, and in the case of cabin depressurization, oxygen not being available when required.

DATES: This AD becomes effective March 23, 2012.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of March 23, 2012.

ADDRESSES: You may examine the AD docket on the Internet at *http://www.regulations.gov* or in person at the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC.

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:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That NPRM was published in the **Federal Register** on October 26, 2011 (76 FR 66198). The MCAI states:

> During a routine inspection, deformation was found at the neck of the pressure regulator body on the oxygen Cylinder and Regulator Assemblies (CRA).
>
> An investigation by the vendor, Avox Systems Inc., revealed that the deformation was attributed to two (2) batches of raw material that did not meet the required tensile strength. This may cause elongation of the pressure regulator neck, which could result in rupture of the oxygen cylinder, and in the case of cabin depressurization, oxygen not being available when required.
>
> This [Canadian] directive mandates [an inspection to determine if a certain oxygen CRA is installed and] the replacement of oxygen CRAs containing pressure regulators, part number (P/N) 806370–06, that do not meet the required material properties.

You may obtain further information by examining the MCAI in the AD docket.

Comments

We gave the public the opportunity to participate in developing this AD. We received no comments on the NPRM (76 FR 66198, October 26, 2011), or on the determination of the cost to the public.

Conclusion

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

- Are consistent with the intent that was proposed in the NPRM (76 FR 66198, October 26, 2011), for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM (76 FR 66198, October 26, 2011).

Costs of Compliance

We estimate that this AD will affect 39 products of U.S. registry. We also estimate that it will take about 10 work-hours per product to comply with the basic requirements of this AD. The average labor rate is $85 per work-hour. Required parts will 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 this AD to the U.S. operators to be $33,150, or $850 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 AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that this AD:

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

We prepared a regulatory evaluation of the estimated costs to comply with this AD and placed it in the AD docket.

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 the NPRM (76 FR 66198, October 26, 2011), 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.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new AD:

2012–03–05 Bombardier, Inc.: Amendment 39–16946. Docket No. FAA–2011–1092; Directorate Identifier 2011–NM–111–AD.

(a) Effective Date

This airworthiness directive (AD) becomes effective March 23, 2012.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Bombardier, Inc. Model BD–700–1A10 and BD–700–1A11 airplanes, certificated in any category, serial numbers (S/N) 9002 through 9126 inclusive, 9128 through 9312 inclusive, 9314 through 9322 inclusive, 9324 through 9335 inclusive, 9337, 9338, 9340, 9341, 9343, 9344, 9346, 9347, 9350, 9353, 9355, 9356, 9358, 9361, 9365, 9372, 9374, 9384, 9402, 9403, and subsequent.

(d) Subject

Air Transport Association (ATA) of America Code 35: Oxygen.

(e) Reason

This AD was prompted by a report of deformation at the neck of the pressure regulator body on certain oxygen cylinder and regulator assemblies (CRA). We are issuing this AD to prevent elongation of the pressure regulator neck, which could result in rupture of the oxygen cylinder, and in the case of cabin depressurization, oxygen not being available when required.

(f) Compliance

You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

(g) Actions

For airplanes having S/N 9002 through 9126 inclusive, 9128 through 9312 inclusive, 9314 through 9322 inclusive, 9324 through 9335 inclusive, 9337, 9338, 9340, 9341, 9343, 9344, 9346, 9347, 9350, 9353, 9355, 9356, 9358, 9361, 9365, 9372, 9374, 9384, 9402, and 9403: Within 7 months after the effective date of this AD, do an inspection of oxygen pressure regulators having P/N 806370–06 to determine if the serial number is listed in Table 2 of the Accomplishment Instructions of Bombardier Service Bulletin 700–35–011 (for Model BD–700–1A10 airplanes) or 700–1A11–35–010 (for Model BD–700–1A11 airplanes), both Revision 01, both dated February 1, 2011.

(1) If the serial number of the pressure regulator having P/N 806370–06 is listed in Table 2 of the Accomplishment Instructions of Bombardier Service Bulletin 700–35–011 (for Model BD–700–1A10 airplanes) or 700–1A11–35–010 (for Model BD–700–1A11 airplanes), both Revision 01, both dated February 1, 2011: Within 7 months after the effective date of this AD, replace the affected oxygen CRA, in accordance with paragraph 2.C. of the Accomplishment Instructions of Bombardier Service Bulletin 700–35–011 (for Model BD–700–1A10 airplanes) or 700–1A11–35–010 (for Model BD–700–1A11 airplanes), both Revision 01, both dated February 1, 2011.

(2) If the serial number of the oxygen pressure regulator having P/N 806370–06 is not listed in Table 2 of the Accomplishment Instructions of Bombardier Service Bulletin 700–35–011 (for Model BD–700–1A10 airplanes) or 700–1A11–35–010 (for Model BD–700–1A11 airplanes), both Revision 01, both dated February 1, 2011: No further action is required by this paragraph.

(h) Parts Installation

For all airplanes: As of the effective date of this AD, no person may install an oxygen pressure regulator (P/N 806370–06) having any serial number listed in Table 2 of the Accomplishment Instructions of Bombardier Service Bulletin 700–35–011 (for Model BD–700–1A10 airplanes) or 700–1A11–35–010 (for Model BD–700–1A11 airplanes), both Revision 01, both dated February 1, 2011, on any airplane, unless a suffix ''–A'' is beside the serial number.

(i) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, New York Aircraft Certification Office (ACO), ANE–170, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the ACO, send it to ATTN: Program Manager, Continuing Operational Safety, FAA, New York ACO, 1600 Stewart Avenue, Suite 410, Westbury, 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.

(j) Related Information

Refer to MCAI Canadian Airworthiness Directive CF–2011–10, dated May 13, 2011, and the service bulletins specified in paragraphs (j)(1) and (j)(2) of this AD, for related information.

(1) Bombardier Service Bulletin 700–35–011, Revision 01, dated February 1, 2011.

(2) Bombardier Service Bulletin 700–1A11–35–010, Revision 01, dated February 1, 2011.

(k) Material Incorporated by Reference

(1) You must use the following service information to do the actions required by this AD, unless the AD specifies otherwise. The Director of the Federal Register approved the incorporation by reference (IBR) of the following service information under 5 U.S.C. 552(a) and 1 CFR part 51:

(i) Bombardier Service Bulletin 700–35–011, Revision 01, dated February 1, 2011.

(ii) Bombardier Service Bulletin 700–1A11–35–010, Revision 01, dated February 1, 2011.

(2) For service information identified in this AD, contact Bombardier, Inc., 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; telephone 514–855–5000; fax 514–855–7401; email: *thd.crj@aero.bombardier.com;* Internet *http://www.bombardier.com.*

(3) You may review copies of the 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.

(4) You may also review copies of the service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at an NARA facility, call 202–741–6030, or go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Renton, Washington, on January 26, 2012.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2012–2974 Filed 2–16–12; 8:45 am]

BILLING CODE 4910–13–P

CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Part 1130

Requirements for Consumer Registration of Durable Infant or Toddler Products

AGENCY: Consumer Product Safety Commission.

ACTION: Final rule.

SUMMARY: In accordance with the Consumer Product Safety Improvement Act of 2008 (''CPSIA''), the Consumer Product Safety Commission (''Commission,'' ''CPSC,'' or ''we'') issued a final consumer product safety rule requiring manufacturers of durable infant or toddler products to establish a consumer registration program. The Commission is amending that rule to clarify and correct some of its requirements.

DATES: The rule is effective February 18, 2013.

FOR FURTHER INFORMATION CONTACT: Keysha Watson, Office of Compliance and Field Operations, U.S. Consumer Product Safety Commission, 4330 East-West Highway, Bethesda, MD 20814; telephone (301) 504–6820; *kwatson@cpsc.gov*.

SUPPLEMENTARY INFORMATION:

A. Background

On December 29, 2009, we published a final rule requiring manufacturers of durable infant or toddler products to: (1) Provide with each product a postage-paid consumer registration form; (2) keep records of consumers who register such products with the manufacturer; and (3) permanently place the manufacturer's name and contact information, model name and number, and the date of manufacture on each such product. 74 FR 68668. The rule specified formatting and text requirements for the registration forms. Subsequently, we published a correction notice on February 22, 2010. 75 FR 7550. Since December 29, 2010, registration forms have been required for all durable infant or toddler products covered by the rule.

On August 8, 2011, we published a notice of proposed rulemaking to amend the rule in order to clarify or correct certain aspects of the rule. 76 FR 48053. Through this document, we are finalizing the amendment.

We note that, although manufacturers of durable infant or toddler products must comply with the registration requirements, they are not required to have a third party testing laboratory ''test'' their product's compliance with the registration requirements.

B. Statutory Provisions

The CPSIA directed us to promulgate a final consumer product safety rule requiring manufacturers of durable infant or toddler products to establish and maintain consumer registration programs for such products. Section 104(d) of the CPSIA specified numerous requirements for the manufacturer's registration programs and for the Commission's rule. The rule we published on December 29, 2009 (74 FR 68668) carried out that statutory direction.

C. Response to Comments on the Proposed Rule

We received three comments on the proposed amendment that we had published on August 8, 2011. 76 FR 48053. These three comments raised four issues. One comment was from a consumer who generally supported the proposed amendment; the remaining two comments addressed particular aspects of the proposed amendment. We describe and respond to the comments in section C of this document and describe the final rule in section D. To make it easier to identify the comments and our responses, the word ''Comment,'' in parentheses, will appear before the comment's description, and the word ''Response,'' in parentheses, will appear before our response. We also have numbered each comment issue to help distinguish between different issues. The number assigned to each comment issue is purely for organizational purposes and does not signify the comment's value or importance, or the order in which it was received.

(*Comment 1*): As noted, one comment was from a consumer who generally supported the proposed amendment.

(*Response 1*): We agree that the changes will clarify the registration rule requirements.

(*Comment 2):* Another comment also supported the amendment, but requested that ''if a third party is used for collecting the registration cards, then the manufacturer should be allowed to put the third party vendor or a 'brand name' in lieu of a manufacturer's name.'' The commenter explained that ''[S]ometimes the manufacturer or importer's name may have little meaning to consumers who may be more inclined to fill out a registration card with a reputable processor they believe will be more likely to adhere to confidential treatment of submitted information or by identification of a product description with ''Brand Name'' that they more readily recognize than an unknown legal entity that is the manufacturer of the product.''

(*Response 2):* We proposed to amend the rule to state that if a manufacturer uses a third party to process the registration cards, the third party's name could be included as ''in care of'' (''c/o'') as part of the address on the form. The third party processor's name would be in addition to the manufacturer's name. Allowing a brand name to replace the manufacturer's name entirely, we believe, could confuse consumers and make it more difficult for consumers to report a problem with the product. Moreover, section 104(d)(2)(D) of the CPSIA requires that the manufacturer's name be on the registration form. However, we do agree that a consumer may be more likely to submit a registration card with a brand name that he or she is familiar with. For these reasons, we accept this suggestion in part. A manufacturer may list the brand name in addition to the manufacturer's name on the bottom front and the top back of the form, with the brand owner's permission.

(*Comment 3):* A third comment suggested that we allow Quick Response (''QR'') codes on registration cards. The comment explained that QR codes ''are a type of matrix barcode that allow[s] storage of information, including links that direct consumers to a Web site when read with a readily available QR reader on a smart phone or other device.''

(Response 3): We agree that QR codes and other barcode technologies that allow consumers to use a smart phone or other device to reach a registration page may facilitate product registration; therefore, we have added paragraph (e) (Optional Barcode) to section 1130.6. Manufacturers who use these technologies must comply with all the requirements of this part 1130, including those in section 1130.7 and the restriction that the manufacturer shall not use or disseminate the consumer registration information for any purpose other than notifying the consumer of a safety alert or recall.

(Comment 4): One comment agreed with the proposed 12-month effective date, stating that it ''is a reasonable time frame for all manufacturers to deplete their current inventory of registration cards.''

(Response 4): We agree with the comment and are finalizing the proposed effective date.

D. The Clarifications and Corrections in the Final Rule

1. Simplifying the Provisions for the Format and Text of Registration Forms (§ 1130.6)

As originally published, § 1130.6 specifies requirements for the format of registration forms, and § 1130.7 specifies the requirements for the text of registration forms. In the preamble to the proposal, we stated that we believe explaining the requirements in this way may be confusing. 76 FR 48053–54. Therefore, we proposed eliminating this framework and collapsing the requirements from §§ 1130.6 and 1130.7 into one section and clarifying them. *Id.* We proposed describing the registration form more clearly, moving logically from the front top of the form to the front bottom of the form, to the back top of the form, and ending with the back bottom of the form. We proposed the following corresponding changes: combining the existing §§ 1130.6 and 1130.7 into a revised § 1130.6; renumbering existing §§ 1130.8 and 1130.9 as §§ 1130.7 and 1130.8, respectively; and changing references to §§ 1130.6 through 1130.9 (such as § 1130.3(a)(2), which refers to § 1130.9) to reflect the renumbered sections. *Id.*

We did not receive any negative comments on proposed § 1130.6 and the proposed corresponding references, and so we are finalizing them without change.

2. Clarifying the Required Font Size (§ 1130.6(b)(2))

As originally published, § 1130.6(c) requires that registration forms use 12-point and 10-point type. Manufacturers and testing labs reported confusion concerning the physical size required for the type. The dictionary defines a ''point'' as 1/72 of an inch. However, according to font charts, font sizes used in printing do not follow this formula and are actually smaller than this measurement.

We proposed specifying the physical measurement of the type, rather than referring to ''point.'' For example, instead of requiring ''12-point'' type, we proposed stating in § 1130.6(b)(2) that ''0.12-inch (3.0 mm) type'' is required.

We did not receive any negative comments on proposed § 1130.6(b)(2) and are finalizing it without change.

3. Changes To Clarify That Consumers Should Return the Bottom Part of the Form Only (§ 1130.6(c)(1) and (d)(1))

Section 1130.6(a) of the rule requires firms to provide a form at least the size of two standard postcards, connected together by a perforated line, so that the two portions can be separated. The consumer retains the top portion, which contains a statement of the purpose of the card and the manufacturer's contact information. According to several manufacturers, consumers have been confused about what they need to return to the manufacturer, and some consumers have been sending in the entire form or the top portion of the form only.

As originally published, § 1130.7(b) requires that the back of the top portion of the form state the manufacturer's name and contact information (a U.S. mailing address, a telephone number, toll-free, if available), among other things. The example shown in Figure 1 of the rule shows this information to be center justified, which makes this look like a mailing address.

We proposed amending § 1130.6(d)(1)(i) to specify that the manufacturer's name and contact information on the top portion of the form is to be stated in sentence format and appear underneath the heading: ''*Manufacturer's Contact Information.*'' In Figure 2, we proposed that the order of the manufacturer's contact information and the model name, model number, and manufacture date would be reversed from the order in the original Figure 2. This places the manufacturer's contact information on top and decreases the likelihood that a consumer would return the top part of the form.

In addition, we proposed adding a new provision in § 1130.6(d)(1)(ii), requiring that just above the perforation line, each form must state in capital letters: ''KEEP THIS TOP PART FOR YOUR RECORDS. FILL OUT AND RETURN BOTTOM PART.''

Finally, we proposed revising the wording in the purpose statement to clarify that consumers should mail the bottom part of the form. As originally published, § 1130.7(a) and Figure 1 stated: ''please complete and mail this card.'' We proposed that § 1130.6(c)(1) and Figure 1 state: ''please complete and mail the bottom part of this card.''

As discussed in section C of this preamble, we received a comment asking us to allow the brand name in lieu of the manufacturer's name on registration cards. We are accepting this suggestion in part and have revised § 1130.6(d)(1)(i) to allow the manufacturer to list the brand name in addition to the manufacturer's name.

4. Omitting Manufacturer's Name on the Back Bottom of the Form (§ 1130.6(d)(2))

As originally published, (and then corrected in February 2010), § 1130.7(d) requires that the bottom back portion of the form state the manufacturer's name with the product information. However, the illustration in Figure 2 of the rule does not show the manufacturer's name in this location. Some manufacturers pointed out that there is limited space on this part of the form, and they suggested that omitting the manufacturer's name would allow more space for the consumer's information.

We proposed (in § 1130.6(d)(2)) omitting the requirement that the manufacturer's name be stated along with the product information at the back bottom portion of the form. We stated in the preamble to the proposed rule that we will allow a manufacturer to include its name on the back portion of the card if it wants to do so.

We received no negative comments on proposed § 1130.6(d)(2) and are finalizing it without change.

5. Identifying a Third Party That Is Processing the Forms (§ 1130.6(c)(2))

As originally published, § 1130.6(b)(3) requires that the registration form be pre-addressed ''with the manufacturer's name and mailing address where registration information is to be collected.'' As discussed in the preamble to the final rule (74 FR at 68670), a manufacturer is allowed to contract with a third party who would be responsible for maintaining the registration information. Some manufacturers asked whether the third party's name could appear in the mailing information on the form in these circumstances.

We proposed stating in § 1130.6(c)(2) that, if a manufacturer uses a third party to process the registration forms, the third party's name may be included as a ''c/o'' on the form. As discussed in section C of this preamble, we received a comment asking us to allow a ''brand name'' in lieu of the manufacturer's name. In response to the comment, we have revised § 1130.6(c)(2) to allow the manufacturer to add a brand name on the bottom front of the registration form.

6. Clarifying the Location Where Registration Information Is To Be Maintained (§ 1130.8(d))

Several manufacturers asked whether the consumer registration information they receive must be maintained at a location in the United States. As originally published, the rule does not specifically address this issue.

In the preamble to the proposed rule, we stated that because so much data and information are kept electronically and can be retrieved quickly, we do not believe that it is necessary to require that registration information be maintained in the United States. 76 FR

48054. However, manufacturers must be able to access the information when requested. Therefore, we proposed stating in § 1130.8(d) that registration records shall be made available within 24 hours of a request by the CPSC.

We received no negative comments on this provision and are finalizing it without change.

7. Correcting Text Requirement for Purpose Statement To Match Figure 1 (§ 1130.6(c)(1))

As originally published, § 1130.7(a) provides, in part, that: ''The front top portion of each form shall state 'PRODUCT REGISTRATION FOR SAFETY ALERT OR RECALL. We will use the information provided on this card to contact you only if there is a safety alert or recall for this product. We will not sell, rent, or share your personal information. To register your product, please complete and mail this card or visit our online registration at *http://www.Web sitename.com.*' '' In the preamble to the proposed rule, 76 FR 48054, we noted that there are two discrepancies between the wording of the text and the illustration in Figure 1.

To make the text and Figure 1 consistent, we proposed making two changes to the text in § 1130.6(c)(1): Adding the word ''ONLY'' at the end of the first sentence, and deleting ''http//from the Web site name.

We received no comment on this provision and are finalizing it without change.

8. Barcodes (§ 1130.6(e))

As discussed in section C of this preamble, we received a comment asking us to allow QR codes on registration forms. We are adding a new paragraph (e) to § 1130.6 to give manufacturers the option of including a barcode, or other machine readable data, that would provide a link for the consumer to register the product. If manufacturers use this technology they must comply with all the requirements of the rule.

E. Effective Date

We stated in the preamble to the proposed rule, 76 FR 48055, that we recognize that manufacturers may have an existing inventory of registration forms and that the changes to the forms are minor and would not affect safety. We proposed that the amendment would take effect 12 months after publication of a final rule. We also stated that until the amendment takes effect, we would consider registration forms to be in compliance that meet either the existing rule or the amendment. *Id.* We received one comment in favor of the proposed effective date. Therefore, the final rule provides a 12-month effective date.

F. Regulatory Flexibility Analysis or Certification

The Regulatory Flexibility Act (''RFA'') generally requires that agencies review proposed rules for their potential economic impact on small entities, including small businesses. However, as we noted in the preamble to the proposed rule, *id.,* section 104(d)(1) of the CPSIA removes this requirement for the rule implementing the CPSIA's consumer registration provision. Consequently, no regulatory flexibility analysis or certification is necessary for this proposed amendment clarifying and correcting the consumer registration rule. Moreover, the changes are minor and will not alter the impact that the registration rule has on small entities.

G. Paperwork Reduction Act

Section 104(d)(1) of the CPSIA also excludes the consumer registration rule from requirements of the Paperwork Reduction Act, 44 U.S.C. sections 3501 through 3520. Consequently, no Paperwork Reduction Act analysis is necessary for this amendment clarifying and correcting the consumer registration rule. Moreover, the changes are minor and will not alter any collection of information required under the registration rule.

H. Environmental Considerations

Our regulations provide a categorical exemption for our rules from any requirement to prepare an environmental assessment or an environmental impact statement as they ''have little or no potential for affecting the human environment.'' 16 CFR 1021.5(c)(2). This amendment falls within the categorical exemption.

List of Subjects in 16 CFR 1130

Administrative practice and procedure, Business and industry, Consumer protection, Reporting and recordkeeping requirements.

Accordingly, we amend 16 CFR part 1130 as follows:

PART 1130—REQUIREMENTS FOR CONSUMER REGISTRATION OF DURABLE INFANT OR TODDLER PRODUCTS

■ 1. The authority citation for part 1130 continues to read as follows:

Authority: 15 U.S.C. 2056a, 2065(b).

§ 1130.3 [Amended]

■ 2. In § 1130.3(a)(2), remove ''§ 1130.9'' and add in its place ''§ 1130.8''.

§ 1130.5 [Amended]

■ 3. Section 1130.5 is amended as follows:

■ a. In paragraph (a), remove ''and 1130.7''; and

■ b. In paragraph (f), remove ''1130.7(a)'' and add, in its place ''1130.6(c)(1)''.

■ 4. Revise § 1130.6 to read as follows:

§ 1130.6 Requirements for format and text of registration forms.

(a) *Size of form.* The form shall be at least the size of two standard post cards, connected with perforation for later separation, so that each of the two portions is at least 3½ inches high x 5 inches wide x 0.007 inches thick.

(b) *Layout of form.* (1) *General.* The form shall consist of four parts: top and bottom, divided by perforations for easy separation, and front and back.

(2) *Font size and typeface.* The registration form shall use bold black typeface. The size of the type shall be at least 0.12 in (3.0 mm) for the purpose statement required in paragraph (c)(1) of this section, and no less than 0.10 in (2.5 mm) for the other information in the registration form. The title of the purpose statement and the retention statement required in paragraph (d)(2) of this section shall be in all capitals. All other information shall be in capital and lowercase type.

(c) *Front of form.* (1) *Top front of form: Purpose statement.* The top portion of the front of each form shall state: ''PRODUCT REGISTRATION FOR SAFETY ALERT OR RECALL ONLY. We will use the information provided on this card to contact you only if there is a safety alert or recall for this product. We will not sell, rent, or share your personal information. To register your product, please complete and mail the bottom part of this card, or visit our online registration at: *www.Web sitename.com.*'' Manufacturers that do not have a Web site may provide an email address and state at the end of the purpose statement: ''To register your product, please complete and mail the bottom part of this card, or email your contact information, the model name and number, and date of manufacture of the product, as provided on this card, to: *name@firmname.com.*''

(2) *Bottom front of form: Manufacturer's mailing address.* The bottom portion of the front of each form shall be pre-addressed and postage-paid with the manufacturer's name and mailing address where registration information is to be collected. A manufacturer may list a brand name in addition to the manufacturer's name. If a manufacturer uses a third party to

process registration forms, the third party's name may be included as a ''c/o'' (''in care of'') in the address on the form.

(d) *Back of the form.* (1) *Top back of form.* (i) *Product information and manufacturer's identification.* The top portion of the back of each form shall state: ''Manufacturer's Contact Information'' and provide the manufacturer's name and contact information (a U.S. mailing address displayed in sentence format, Web site address, a telephone number, toll-free, if available); product model name and number (or other identifier as described in § 1130.4(a)(1) and (2)); and manufacture date of the product. A rectangular box shall be placed around the model name, model number, and manufacture date. A manufacturer may list the brand name in addition to the manufacturer's name.

(ii) *Retention statement.* On the back of each form, just above the perforation line, the form shall state: ''KEEP THIS TOP PART FOR YOUR RECORDS. FILL OUT AND RETURN BOTTOM PART.''

(2) *Bottom back of form.* (i) *Consumer information.* The bottom portion of the back of each form shall have blocks for the consumer to provide his/her name, address, telephone number, and email address. These blocks shall be 5 mm wide and 7 mm high, with as many blocks as possible to fill the width of the card allowing for normal printing practices.

(ii) *Product information.* The following product information shall be provided on the bottom portion of the back of each form below the blocks for consumer information printed directly on the form or on a pre-printed label that is applied to the form: the model name and number (or other identifier as described in § 1130.4(a)(1) and (2)), and the date of manufacture of the product. A rectangular box shall be placed around the model name, model number, and manufacture date. A manufacturer may include its name on the bottom portion of the back of the form if they choose to do so.

§ 1130.7 [Removed]

■ 5. Remove § 1130.7.

§§ 1130.8 and 1130.9 [Redesignated as §§ 1130.7 and 1130.8]

■ 6. Redesignate §§ 1130.8 and 1130.9 as §§ 1130.7 and 1130.8, respectively.

■ 7. In newly redesignated § 1130.8, add paragraphs (d) and (e) to read as follows:

§ 1130.8 Requirements for Web site registration or alternative email registration.

* * * * *

(d) Records required under this section shall be made available within 24 hours, upon the request of any officer, employee, or agent acting on behalf of the U.S. Consumer Product Safety Commission.

(e) *Optional barcode.* (1) A manufacturer may include a barcode, or other machine readable data, that when scanned would provide a direct link for the consumer to register the product.

(2) Such a link must comply with all the requirements of this part 1130, including those in § 1130.7 and the restriction that the manufacturer shall not use or disseminate the consumer registration information for any purpose other than notifying the consumer of a safety alert or recall.

■ 8. Revise Figure 1 to Part 1130—Front of Registration Form to read as follows:

BILLING CODE 6355–01–P

PRODUCT REGISTRATION FOR SAFETY ALERT OR RECALL ONLY

We will use the information provided on this card to contact you only if there is a safety alert or recall for this product. We will not sell, rent, or share your personal information. To register your product, please complete and mail the bottom part of this card, or visit our online registration at: www.website.com.

NO POSTAGE NECESSARY IF MAILED IN THE UNITED STATES

BUSINESS REPLY MAIL

FIRST-CLASS MAIL PERMIT NO.

POSTAGE WILL BE PAID BY ADDRESSEE

Manufacturer's Name
Post Office Box 0000
Anytown, ST 01234

FIGURE 1 TO PART 1130 – FRONT OF REGISTRATION FORM

■ 9. Revise Figure 2 to Part 1130—Back of Registration Form to read as follows:

Manufacturer's Contact Information

Manufacturer's Name • 111 Main St • Anytown, ST 01234
www.website.com
Phone Number – Toll-Free (if available)

Model Name:

Model Number:

Manufacture Date:

KEEP THIS TOP PART FOR YOUR RECORDS.
FILL OUT AND RETURN BOTTOM PART.

Name

Mailing Address

City State Zip Code

Telephone Number

- -

E-mail address

Model Name:

Model Number:

Manufacture Date:

FIGURE 2 TO PART 1130 – BACK OF REGISTRATION FORM

Dated: February 13, 2012.

Todd A. Stevenson,

Secretary, U.S. Consumer Product Safety Commission.

[FR Doc. 2012–3712 Filed 2–16–12; 8:45 am]

BILLING CODE 6355–01–C

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 500

[Docket No. FDA–2011–N–0003]

Animal Drugs, Feeds, and Related Products; N-Methyl-2-Pyrrolidone; Correction

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule; correcting amendment.

SUMMARY: The Food and Drug Administration (FDA) published a document in the **Federal Register** of November 25, 2011 (76 FR 72617), codifying a method of detection for residues of *n*-methyl-2-pyrrolidone in edible tissues of cattle. That document contained a universal resource locator (URL) linking to the Agency's Web site that did not reflect the most recent URL.

DATES: This correction is effective February 17, 2012.

FOR FURTHER INFORMATION CONTACT: George K. Haibel, Center for Veterinary Medicine (HFV–6), Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855, 240–276–9019, *george.haibel@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of November 25, 2011 (76 FR 72617), FDA issued a final rule codifying a method of detection for residues of *n*-methyl-2-pyrrolidone in edible tissues of cattle. That document contained a universal resource locator (URL) linking to the Agency's Web site that did not reflect the most recent URL. This document corrects the URL.

List of Subjects in 21 CFR Part 500

Animal drugs, Animal feeds, Cancer, Labeling, Packaging and containers, Polychlorinated biphenyls (PCBs), Incorporation by reference.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR part 500 is amended as follows:

PART 500—GENERAL

■ 1. The authority citation for 21 CFR part 500 continues to read as follows:

Authority: 21 U.S.C. 321, 331, 342, 343, 348, 351, 352, 353, 360b, 371.

■ 2. Section 500.1410 is amended in paragraph (a) by revising the third sentence to read as follows:

§ 500.1410 N-methyl-2-pyrrolidone.

(a) * * * You may obtain a copy of the method from the Communications Staff (HFV–12), Center for Veterinary Medicine, Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855, 240–276–9120; or go to *http://www.fda.gov/AboutFDA/CentersOffices/OfficeofFoods/CVM/CVMFOIAElectronicReadingRoom/default.htm.* * * *

* * * * *

Dated: February 13, 2012.

William T. Flynn,

Acting Director, Center for Veterinary Medicine.

[FR Doc. 2012–3747 Filed 2–16–12; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2012–0087]

Security Zone; Protection of Military Cargo, Captain of the Port Zone Puget Sound

AGENCY: Coast Guard, DHS.

ACTION: Notice of enforcement of regulation.

SUMMARY: The Coast Guard will enforce the Blair Waterway Security Zone in Commencement Bay, Tacoma, Washington from 6 a.m. on February 17, 2012, through 11:59 p.m. on February 21, 2012, unless cancelled sooner by the Captain of the Port. This action is necessary for the security of Department of Defense assets and military cargo in the navigable waters of Puget Sound and adjacent waters. During the enforcement period, this security zone will exclude persons and vessels from the immediate vicinity of these facilities during military cargo loading and unloading operations. In addition, the regulation establishes requirements for all vessels to obtain permission of the COTP or Designated Representative, including the Vessel Traffic Service (VTS), to enter, move within, or exit this security zone when they are enforced. Entry into this zone is prohibited unless otherwise exempted or excluded or unless authorized by the Captain of the Port or his Designated Representative.

DATES: The regulations in 33 CFR 165.1321 will be enforced from 6 a.m. on February 17, 2012, through 11:59 p.m. on February 21, 2012, unless cancelled sooner by the Captain of the Port.

FOR FURTHER INFORMATION CONTACT: If you have questions on this notice, call or email Ensign Anthony P. LaBoy, Sector Puget Sound Waterways Management Division, Coast Guard; telephone 206–217–6323, email *SectorPugetSoundWWM@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce the Blair Waterway Security Zone set forth in paragraph (c)(1) of 33 CFR 165.1321 on February 17, 2012 at 6 a.m. through 11:59 p.m. on February 21, 2012 unless cancelled sooner by the Captain of the Port or Designated Representative. Under the provisions of 33 CFR 165.1321, the Coast Guard published a final rule for the security of Department of Defense assets and military cargo in the navigable waters of Puget Sound and adjacent waters. The security zone will provide for the regulation of vessel traffic in the vicinity of military cargo loading facilities in the navigable waters of the United States. This security zone also excludes persons and vessels from the immediate vicinity of these facilities during military cargo loading and unloading operations. In addition, the regulation establishes requirements for all vessels to obtain permission of the COTP or Designated Representative, including the Vessel Traffic Service (VTS), to enter, move within, or exit this security zone when it is enforced. Entry into this zone is prohibited unless otherwise exempted or excluded under 33 CFR 165.1321 or unless authorized by the Captain of the Port or Designated Representative.

This notice is issued under authority of 33 CFR 165.1321 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 extensive advance notification of this enforcement period via the Local Notice to Mariners, marine information broadcasts, local radio stations and area newspapers.

If the COTP determines that the regulated area need not be enforced for the full duration stated in this notice, he may use a Broadcast Notice to Mariners to grant general permission to enter the regulated area.

Dated: February 8, 2012.

S.J. Ferguson,

Captain, U.S. Coast Guard, Captain of the Port, Puget Sound.

[FR Doc. 2012–3734 Filed 2–16–12; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R07–OAR–2008–0538; FRL–9632–7]

Approval and Promulgation of Implementation Plans; State of Missouri

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is granting full approval of Missouri's attainment demonstration State Implementation Plan (SIP) and control strategy for the lead National Ambient Air Quality Standard (NAAQS) nonattainment area of Herculaneum, Missouri. This action is based on a proposed conditional approval of the SIP published on October 8, 2008, and a proposed approval of the supplemental SIP submittal received by EPA on September 3, 2009, published in the **Federal Register** on August 27, 2010. The applicable standard addressed in this action is the lead NAAQS promulgated by EPA in 1978. EPA has determined that both SIP submittals from the State of Missouri satisfy the applicable requirements of the Clean Air Act (CAA or Act) and demonstrates attainment of the 1.5 microgram per cubic meter (μg/m^3) lead NAAQS in the Herculaneum, Missouri area. This action does not address the obligations which Missouri has relative to the revised lead NAAQS promulgated by EPA in 2008.

DATES: This final rule is effective on March 19, 2012.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–R07–OAR–2008–0538. All documents in the docket are listed on the *www.regulations.gov* web site. Although listed in the index, some information is not publicly available, i.e., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy at the Environmental Protection Agency, Air Planning and Development Branch, 901 North 5th Street, Kansas City, Kansas 66101. The Regional Office's official hours of business are Monday through Friday, 8 to 4:30 excluding Federal holidays. The interested persons wanting to examine these documents should make an appointment with the office at least 24 hours in advance.

FOR FURTHER INFORMATION CONTACT: Stephanie Doolan at (913) 551–7719, or by email at *doolan.stephanie@epa.gov.*

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

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I. Background

EPA established NAAQS for lead on October 5, 1978 (43 FR 46246). The 1978 NAAQS for lead is set at a level of 1.5 μg/m^3 of air, averaged over a calendar quarter. The Herculaneum, Missouri area is designated nonattainment for the 1978 lead NAAQS. The area is also designated nonattainment for the lead NAAQS promulgated by EPA in 2008, published on November 12, 2008 (73 FR 66964). The action which is the subject of today's notice addresses only the State's obligations regarding the 1978 standard. A SIP addressing the 2008 standard is due no later than June 30, 2012.

A. SIP Call

From 2002 to 2005, ambient air monitors in the Herculaneum area monitored attainment of the 1978 lead NAAQS for 10 consecutive calendar quarters. Despite implementation of all contingency measures specified by the approved 2002 SIP (67 FR 18497), in the first two quarters of 2005, air quality monitors in the area recorded violations of the 1978 lead NAAQS, which is 1.5 μg/m^3 lead. Because of these violations of the 1978 lead NAAQS, EPA proposed and subsequently finalized a SIP Call on April 14, 2006 (71 FR 19432). The SIP Call notified the State of EPA's finding that the SIP was substantially inadequate to provide for attainment and maintenance of the lead NAAQS in Herculaneum, and required the State to submit a revised SIP within 12 months of the finding.

B. Proposed Conditional Approval

On May 31, 2007, EPA received Missouri's revised SIP dated April 26, 2007, for the Herculaneum area. MDNR submitted supplemental information to EPA on March 19, 2008. The 2007 SIP submission addressed most of the criteria set forth in the SIP Call, with the exception that process ventilation requirements had not yet been established. On October 8, 2008, EPA proposed conditional approval of Missouri's SIP submissions for May 31, 2007, and March 19, 2008 (73 FR 58913), pending the establishment of enforceable ventilation requirements. The reader should refer to the proposed conditional approval for a detailed discussion of the 2007 SIP submittal, and the rationale for proposing to approve it with conditions.

C. Supplemental Proposal

On September 3, 2009, EPA received the SIP revision addressing ventilation controls, following adoption by the Missouri Air Conservation Commission on July 29, 2009. EPA determined that the SIP revision contains enforceable ventilation conditions to ensure adequate building particle capture. On August 27, 2010, EPA proposed full approval of Missouri's SIP, including the May 31, 2007, SIP submittal; the March 19, 2008, supplemental information; and the September 3, 2009, supplemental SIP revision; to bring Herculaneum into attainment of the 1978 lead NAAQS (75 FR 52701). A detailed rationale for the proposed approval was included in the August 27, 2010, supplemental proposal.

II. EPA Review of the State Submittal

The October 8, 2008, proposed conditional approval contains an extensive description of the operation of the smelter, and a discussion of Missouri's SIP. The proposed conditional approval includes a discussion of air dispersion model selection, and meteorological and emissions inventory input data, among other elements. The control strategy and contingency measures are incorporated into the 2007 Consent Judgment between Missouri and Doe Run. For more information on these elements, and EPA's analysis of them, please refer to the October 8, 2008 **Federal Register** (73 FR 58913) and associated docket.

The September 3, 2009, SIP revision addressing building ventilation requirements, supplements the May 2007 SIP submission. Ventilation controls include flow rate and fan amperage limits for the Sinter Plant, Blast Furnace Building, and Refinery Building that result in a minimum inflow of air at all openings (e.g., doors) to demonstrate that each building is under negative pressure. The 2009 supplemental SIP revision includes the revised Work Practices Manual, as well as the Consent Judgment amended to include the ventilation controls,

associated implementation schedules, and contingency measures. The 2009 amended Consent Judgment and Work Practices Manual are enforceable documents included in Missouri's SIP submittal, and, by virtue of this approval, are Federally enforceable as well. For additional information on these elements, please refer to the August 27, 2010, **Federal Register** (75 FR 52701) and associated docket.

MDNR has revised the Work Practices Manual to include the additional recordkeeping, compliance monitoring, and corrective action requirements associated with building ventilation. The facility is required to measure flow rates once per minute using an automatic data logging system and to conduct an inflow test of all applicable doors and openings each calendar quarter. Doe Run must submit quarterly reports to MDNR summarizing any violations of flow rate and amperage requirements, and corrective actions taken. Finally, if an ambient air quality monitor in Herculaneum exceeds 1.4 μg/m³ of lead, the facility must conduct a fluid modeling study of flow patterns within process buildings to determine whether additional ventilation controls are appropriate.

In addition to the ventilation control requirements, the Work Practices Manual has also been revised to prohibit construction when temperatures are below 39 degrees Fahrenheit. During the first quarter of 2008, the facility monitored a violation of the 1978 lead NAAQS primarily due to in-plant road dust from construction equipment activities during periods of time when the watering system at the plant was not operating. Limiting construction when the plant watering system cannot be operated for dust suppression is expected to decrease the lead concentrations in ambient air.

EPA has determined that the September 3, 2009, supplemental SIP revision contains the necessary enforceable conditions for ventilation-related control measures. EPA described its analysis of these ventilation requirements in the supplemental proposal, and incorporates its analysis in this final action.

The Main Street monitor operated by MDNR is the closest ambient air monitor to the Herculaneum facility. Since the first quarter of 2008, the Main Street monitor has reported 12 consecutive quarterly averages, or three years, of lead concentrations that attain the 1978 lead NAAQS (1.5 μg/m³). Lead concentrations measured by MDNR at the Main Street monitor from the second quarter of 2008 to the present range from 0.662 μg/m³, reported for October through December of 2009, to 1.124 μg/m³, reported for July through September 2009.

Modeling conducted by MDNR as a part of its 2007 SIP attainment demonstration predicts an ambient lead concentration of 1.49 μg/m³ at the facility fence line. A comparison of the SIP attainment demonstration modeling with the measured ambient lead concentrations over the past three years, described above, indicates that the model conservatively predicts ambient lead concentrations and provides further assurance that the control strategy provides for attainment of the 1978 lead NAAQS.

III. Comments and Responses

A. Comments Received

EPA received one set of comments from Doe Run on its October 8, 2008, proposed conditional approval of Missouri's SIP submission (73 FR 58913). EPA is responding to this set of comments in this final action. EPA did not receive any comments on the supplemental proposed rule.

On November 7, 2008, Doe Run commented that EPA should grant full approval of the 2007 Missouri SIP submittal for attainment of the 1978 lead NAAQS at the Herculaneum facility. The basis of this comment was:

1. Doe Run proceeded to install and implement the controls and measures specified by the 2007 SIP submission even though EPA had not approved the SIP;
2. EPA points to no specific SIP deficiency under section 110 of the CAA in its proposal to conditionally rather than fully approve the SIP submittal;
3. It is unnecessary for EPA to further delay final and full approval to ensure the enforceability of the SIP submittal;
4. The buildings included in the ventilation study upon which final approval is predicated have been and continue to maintain adequate inflow and building closures control fugitive emissions as intended by the SIP submittal; and
5. The modeling demonstration supports full approval.

B. EPA Response

In this action, EPA is granting full approval to the Missouri SIP submittal (consisting, as stated previously, of the initial 2007 submittal, the 2008 supplemental information, and the 2009 supplemental SIP revision) so that the comment requesting full approval of the prior submission is no longer relevant. However, we note that EPA initially proposed conditional approval of the SIP submittal based on the requirement of section 110(a)(2)(A) of the CAA which states that SIPs shall include enforceable emission limitations and other control measures that may be necessary or appropriate to meet the applicable requirements of the CAA. Until the 2009 supplemental SIP revision was received, the ventilation controls, which are a necessary part of the emission reduction strategy for attaining the 1978 lead NAAQS, were not permanent and enforceable. With this final action, the obligation to continue to meet these requirements is now mandated by the SIP, as required by section 110(a)(2)(A).

IV. Final Action

This rulemaking takes final action to approve the Missouri SIP containing control measures to bring the Herculaneum area into attainment with the 1978 lead NAAQS (1.5 μg/m³). The 2007 SIP submittal, 2008 supplemental information, and the 2009 supplemental SIP revision (which includes the revised Work Practices Manual and the 2007 Missouri Consent Judgment with the 2009 amendment to include enforceable ventilation control requirements) together demonstrate attainment of the 1978 lead NAAQS and fulfill the requirements of the CAA. EPA notes that although this SIP revision is directionally correct in terms of achieving reductions in lead emissions, the State remains obligated to submit a SIP to attain the 2008 lead NAAQS.

V. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that the Administrator determines to be in compliance 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 final 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 final 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.

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 April 17, 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

Air pollution control, Environmental protection, Incorporation by reference, Lead, Reporting and recordkeeping requirements.

Dated: February 6, 2012.

Karl Brooks,

Regional Administrator, Region 7.

40 CFR part 52 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 AA—Missouri

■ 2. In § 52.1320:

■ a. The table in paragraph (d) is amended by adding entry (25) in numerical order; and

■ b. The table in paragraph (e) is amended by adding entry (56) in numerical order to read as follows:

§ 52.1320 Identification of plan.

* * * * *

(d) * * *

EPA-APPROVED MISSOURI SOURCE-SPECIFIC PERMITS AND ORDERS

Name of source	Order/permit number	State effective date	EPA approval date	Explanation
* *	*	*	* *	*
(25) Doe Run Herculaneum, MO	Consent Judgment Modification 07JE–CC00552.	5/21/07 7/29/09 modification	2/17/12 [*insert FR page number where the document begins*].	This approval does not include any subsequent modifications after 2009.

* * * * * (e) * * *

EPA-APPROVED MISSOURI NONREGULATORY SIP PROVISIONS

Name of nonregulatory SIP provision	Applicable geographic or nonattainment area	State submittal date	EPA approval date	Explanation
* *	*	*	* *	*
(56) CAA Section 110(a)(2) SIP—1978 Pb NAAQS.	City of Herculaneum, MO	7/29/09	2/17/12 [*insert FR page number where the document begins*].	

[FR Doc. 2012–3699 Filed 2–16–12; 8:45 am]
BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 81

[EPA–HQ–OAR–2011–0572; FRL–9624–3]

RIN–2060–AR06

Air Quality Designations for the 2010 Primary Nitrogen Dioxide (NO_2) National Ambient Air Quality Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This rule establishes air quality designations for all areas in the United States for the 2010 Primary Nitrogen Dioxide (NO_2) National Ambient Air Quality Standards (NAAQS). Based on air quality monitoring data, the EPA is issuing this rule to designate all areas of the country as ''unclassifiable/attainment'' for the 2010 NO_2 NAAQS. The EPA is designating areas as ''unclassifiable/attainment'' to mean that available information does not indicate that the air quality in these areas exceeds the 2010 NO_2 NAAQS.

DATES: The effective date of this rule is February 29, 2012.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–HQ–OAR–2011–0572. All documents in the docket are listed in the index at *http://www.regulations.gov.* Although listed in the index, some information is not publicly available, i.e., Confidential Business Information (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 the docket or in hard copy at the Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m. Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Office of Air and Radiation Docket and Information Center is (202) 566–1742.

In addition, the EPA has established a Web site for this rulemaking at: *http://www.epa.gov/air/nitrogenoxides/designations.* The Web site includes the EPA's final state and tribal designations, as well as state initial recommendation letters, the EPA modification letters, technical support documents, responses to comments and other related technical information.

FOR FURTHER INFORMATION CONTACT: Doug Solomon, Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Mail Code C539–04, Research Triangle Park, NC 27711, phone number (919) 541–4132 or by email at: *solomon.douglas@epa.gov;* or Rhea Jones, Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Mail Code C539–04, Research Triangle Park, NC 27711, phone number (919) 541–2940 or by email at: *jones.rhea@epa.gov.*

SUPPLEMENTARY INFORMATION:

Regional Office Contacts

Region I—Alison Simcox (617) 918–1684,
Region II—Kenneth Fradkin (212) 637–3702,
Region III—Maria Pino (215) 814–2181,
Region IV—Steve Scofield (404) 562–9034,
Region V—John Summerhays (312) 886–6067,
Region VI—Joe Kordzi (214) 665–7186,
Region VII—Amy Algoe-Eakin (913) 551–7942,
Region VIII—Catherine Roberts (303) 312–6025,
Region IX—Eleanor Kaplan (415) 972–4147,
Region X—Krishna Viswanathan (206) 553–2684.

The public may inspect the rule and state-specific technical support information at the following locations:

Regional offices	States
Dave Conroy, Chief, Air Programs Branch, EPA New England, 1 Congress Street, Suite 1100, Boston, MA 02114–2023, (617) 918–1661.	Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont.
Raymond Werner, Chief, Air Programs Branch, EPA Region 2, 290 Broadway, 25th Floor, New York, NY 10007–1866, (212) 637–3706.	New Jersey, New York, Puerto Rico, and Virgin Islands.
Cristina Fernandez, Branch Chief, Air Quality Planning Branch, EPA Region 3, 1650 Arch Street, Philadelphia, PA 19103–2187, (215) 814–2178.	Delaware, District of Columbia, Maryland, Pennsylvania, Virginia, and West Virginia.
R. Scott Davis, Branch Chief, Air Planning Branch, EPA Region 4, Sam Nunn Atlanta Federal Center, 61 Forsyth Street SW., 12th Floor, Atlanta, GA 30303, (404) 562–9127.	Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee.
John Mooney, Chief, Air Programs Branch, EPA Region 5, 77 West Jackson Street, Chicago, IL 60604, (312) 886–6043.	Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin.
Guy Donaldson, Chief, Air Planning Section, EPA Region 6, 1445 Ross Avenue, Dallas, TX 75202, (214) 665–7242.	Arkansas, Louisiana, New Mexico, Oklahoma, and Texas.
Joshua A. Tapp, Chief, Air Programs Branch, EPA Region 7, 901 North 5th Street, Kansas City, Kansas 66101–2907, (913) 551–7606.	Iowa, Kansas, Missouri, and Nebraska.
Monica Morales, Leader, Air Quality Planning Unit, EPA Region 8, 1595 Wynkoop Street, Denver, CO 80202–1129, (303) 312–6936.	Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming.
Lisa Hanf, Air Planning Office, EPA Region 9, 75 Hawthorne Street, San Francisco, CA 94105, (415) 972–3854.	American Samoa, Arizona, California, Guam, Hawaii, Nevada, and Northern Mariana Islands.
Krishna Viswanathan, Manager, State and Tribal Air Programs, EPA Region 10, Office of Air, Waste, and Toxics, Mail Code OAQ–107, 1200 Sixth Avenue, Seattle, WA 98101, (206) 553–2684.	Alaska, Idaho, Oregon, and Washington.

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I. Preamble Glossary of Terms and Acronyms

The following are abbreviations of terms used in the preamble.

APA Administrative Procedure Act
AQS Air Quality System
CAA Clean Air Act
CBI Confidential Business Information
CFR Code of Federal Regulations
DC District of Columbia
EPA Environmental Protection Agency
FR **Federal Register**
FRM Federal Reference Method
NAAQS National Ambient Air Quality Standards
NO_2 Nitrogen Dioxide
NTTAA National Technology Transfer and Advancement Act
OMB Office of Management and Budget
PSD Prevention of Significant Deterioration
RFA Regulatory Flexibility Act
RIA Regulatory Impact Analysis
SBA Small Business Administration
SIP State Implementation Plan
UMRA Unfunded Mandates Reform Act of 1995
TAR Tribal Authority Rule
TSD Technical Support Document
TPY Tons Per Year
U.S. United States
VCS Voluntary Consensus Standards

II. What is the purpose of this action?

The purpose of this action is to promulgate and announce initial area designations for all areas of the country for the 2010 NO_2 NAAQS based on available information, in accordance with the requirements of the Clean Air Act (CAA). The list of all areas being designated in each state, and the boundaries of each area, appear in the tables at the end of this final rule. The EPA has been working closely with the states involved in these designations and several steps have been taken to announce that this rule is available. The EPA has posted the notice on several EPA Web sites.

This notice identifies all areas of the United States (U.S.) as being designated as ''unclassifiable/attainment'' for the 2010 NO_2 NAAQS. The basis for designating these areas as ''unclassifiable/attainment'' is monitored air quality data from calendar years 2008–2010 indicating no violations of the NAAQS.

The EPA and state agencies are currently working to establish an expanded network of NO_2 monitors, expected to be deployed in 2013. Once 3 years of air quality data have been collected from the expanded network, the EPA will be able to evaluate NO_2 air quality in additional locations.

III. What is nitrogen dioxide?

NO_2 is a reddish-brown, highly reactive gas that is formed in the ambient air through the oxidation of nitric oxide (NO). Nitrogen oxides (NO_X) is the term used to describe the sum of NO, NO_2, and other oxides of nitrogen. A variety of NO_X compounds and their transformation products occur both naturally and as a result of human activities. Anthropogenic (i.e., manmade) emissions of NO_X account for a large majority of all nitrogen inputs to the environment. The major sources of anthropogenic NO_X emissions are high-temperature combustion processes, such as those occurring in automobiles and power plants. Most NO_X from combustion sources (about 95 percent) are emitted as NO, which is readily converted to NO_2 in the environment; the remainder is emitted largely as NO_2. Natural sources of NO_X are lightning, biological and abiological processes in soil, and stratospheric intrusion.

IV. What are the health concerns addressed by the NO_2 standards?

Current scientific evidence links short-term NO_2 exposures, ranging from 30 minutes to 24 hours, with an array of adverse respiratory effects including increased asthma symptoms, more difficulty controlling asthma, and an increase in respiratory illnesses and symptoms. Studies also show a connection between short-term exposure and increased visits to emergency departments and hospital admissions for respiratory illnesses, particularly in populations including children, the elderly, and asthmatics.

The EPA's NAAQS for NO_2 is designed to protect against exposure to the entire group of NO_X. NO_2 is the component of greatest concern and is used as the indicator for the larger group of NO_X. (*See* 75 FR 6474.)

V. What are the CAA requirements for air quality designations and what action has the EPA taken to meet these requirements?

After the promulgation of a new or revised NAAQS, the EPA is required to designate areas as nonattainment, attainment, or unclassifiable, pursuant to section 107(d)(1) of the CAA. The Administrator signed a final rule revising the NO_2 NAAQS on January 22, 2010, which was published in the **Federal Register** on February 9, 2010, and became effective April 12, 2010. Based on the Administrator's review of the scientific evidence, including numerous studies published since the last review of the NO_2 NAAQS, and taking into consideration the comments expressed by the Clean Air Scientific Advisory Committee and the public, the Administrator set a new 1-hour NO_2 standard at the level of 100 parts per billion (ppb). In addition to establishing an averaging time and level, the Administrator also set a new form for the standard. The form for the 1-hour NO_2 standard is the 3-year average of the 98th percentile of the annual distribution of daily maximum 1-hour average concentrations. The rule also retained, with no change, the current annual average NO_2 standard of 53 ppb.

The rule also set new requirements for the placement of NO_2 monitors. The EPA and state agencies are currently working to establish an expanded network of NO_2 monitors, expected to be deployed in 2013. NO_2 concentrations near major roads are appreciably higher than those measured at monitors in the current network. Monitoring studies indicate that near-road (within about 50 meters) concentrations of NO_2 can be 30 to 100 percent higher than concentrations away from major roads.

The CAA requires the EPA to complete the initial area designation process within 2 years of promulgating a new or revised NAAQS. However, if

the Administrator has insufficient information to make these designations within that time frame, the EPA has the authority to extend the designation process by up to 1 additional year.

By not later than 1 year after the promulgation of a new or revised NAAQS, each state governor is required to recommend air quality designations, including the appropriate boundaries for areas, to the EPA. The EPA reviews those state recommendations and is authorized to make any modifications the Administrator deems necessary. The statute does not define the term ''necessary,'' but the EPA interprets this to authorize the Administrator to modify designations that did not meet the statutory requirements or were otherwise inconsistent with the facts or analysis deemed appropriate by the EPA. If the EPA is considering modifications to a state's initial recommendation, the EPA is required to notify the state of any such intended modifications to its recommendation not less than 120 days prior to the EPA's promulgation of the final designation. If the state does not agree with the EPA's intended modification, it then has an opportunity to respond to the EPA and to demonstrate why it believes the modification proposed by the EPA is inappropriate. Even if a state fails to provide any recommendation for an area, in whole or in part, the EPA still must promulgate a designation that the Administrator deems appropriate.

Section 107(d)(1)(A)(i) of the CAA defines a nonattainment area as any area that does not meet an ambient air quality standard or that is contributing to ambient air quality in a nearby area that does not meet the standard. If an area meets either prong of this definition, then the EPA is obligated to designate the area as ''nonattainment.'' Section 107(d)(1)(A)(iii) provides that any area that the EPA cannot designate on the basis of available information as meeting or not meeting the standards should be designated as ''unclassifiable.''

The EPA believes that section 107(d) provides the agency with discretion to determine how best to interpret the terms in the definition of a nonattainment area (e.g., ''contributes to'' and ''nearby'') for a new or revised NAAQS, given considerations such as the nature of a specific pollutant, the types of sources that may contribute to violations, the form of the standards for the pollutant, and other relevant information. In particular, the EPA believes that the statute does not require the agency to establish bright line tests or thresholds for what constitutes ''contribution'' or ''nearby'' for purposes of designations.[1]

Similarly, the EPA believes that the statute permits the EPA to evaluate the appropriate application of the term ''area'' to include geographic areas based upon full or partial county boundaries, and contiguous or non-contiguous areas, as may be appropriate for a particular NAAQS. For example, section 107(d)(1)(B)(ii) explicitly provides that the EPA can make modifications to designation recommendations for an area ''or portions thereof,'' and, under section 107(d)(1)(B)(iv), a designation remains in effect for an area ''or portion thereof'' until the EPA redesignates it.

Designation activities for federally-recognized tribes are covered under the authority of section 301(d) of the CAA. This provision of the CAA authorizes the EPA to treat eligible tribes in a similar manner as states. Pursuant to section 301(d)(2), we promulgated regulations, known as the Tribal Authority Rule (TAR), on February 12, 1999. *See* 63 FR 7254, codified at 40 CFR 49 (1999). That rule specifies those provisions of the CAA for which it is appropriate to treat tribes in a similar manner as states. Under the TAR, tribes may choose to develop and implement their own CAA programs, but are not required to do so. The TAR also establishes procedures and criteria by which tribes may request from the EPA a determination of eligibility for such treatment. The designations process contained in section 107(d) of the CAA is included among those provisions determined to be appropriate by the EPA for treatment of tribes in the same manner as states. Under the TAR, tribes generally are not subject to the same submission schedules imposed by the CAA on states. As authorized by the TAR, tribes may seek eligibility to submit designation recommendations to the EPA. In addition, CAA section 301(d)(4) gives the EPA discretionary authority, in cases where it determines that treatment of tribes as identical to states is ''inappropriate or administratively infeasible,'' to provide for direct administration by regulation to achieve the appropriate purpose.

Designation recommendations and supporting documentation for the NO_2 NAAQS were submitted by most states and a few tribes to the EPA by January 22, 2011. After receiving recommendations from states and tribes, and after reviewing and evaluating each recommendation, the EPA provided a response to the states and tribes on June 29, 2011. In these letter responses, we indicated whether the EPA intended to make modifications to the initial state or tribal recommendations and explained the EPA's reasons for making any such modifications. The EPA requested that states and tribes respond to any proposed EPA modifications by August 29, 2011. We received comments from some states suggesting changes to the EPA's proposed modifications and providing additional information. The EPA evaluated these comments, and, as a result, some of the final designations reflect further modifications to the initial state and tribal recommendations. The state and tribal letters, including the initial recommendations, the EPA's June 2011 responses to those letters, including any modifications, and the subsequent state and tribal comment letters are in the docket for this action.

Although not required by section 107(d) of the CAA, the EPA also provided an opportunity for members of the public to comment on the EPA's June 2011 response letters. In order to gather additional information for the EPA to consider before making final designations, EPA published a notice on July 7, 2011, (76 FR 39798) which invited the public to comment on the EPA's intended designations. In that notice, the EPA provided the opportunity to all interested parties other than states and tribes to submit comments by August 8, 2011. State and tribal initial recommendations and EPA's responses, including modifications, were posted on a publically accessible Web site (*http://www.epa.gov/airquality/nitrogenoxides/designations/index.html*). Comments from the public and EPA's responses to comments are in the docket for this action.

VI. What guidance did the EPA issue and how did the EPA apply the statutory requirements and applicable guidance to determine area designations and boundaries?

In the notice of proposed rulemaking for the revised NO_2 NAAQS (73 FR 29184), the EPA issued proposed guidance, on its approach to implementing the standard, including its approach to initial area designations. The EPA solicited comment on that guidance and, in the notice of final rulemaking (75 FR 6475), adopted guidance concerning how to designate areas for the NO_2 NAAQS. In that guidance the EPA recommended that monitoring data using the 3 most recent years of quality-assured air quality data from the current monitoring network, which would be for the years 2008–2010, be used to identify violations of

[1] This view was confirmed in *Catawba County* v. *EPA,* 571 F.3d 20 (DC Cir. 2009).

the NO_2 NAAQS. The EPA is basing these final designations on monitored NO_2 concentrations from Federal Reference Method (FRM) monitors from calendar years 2008–2010.

In the guidance, the EPA stated that in the event that a current NO_2 monitor indicates a violation of the revised standards, the EPA intends to designate such areas ''nonattainment'' no later than 2 years following promulgation of the revised standards. The EPA also stated that it intends to designate the rest of the country as ''unclassifiable'' for the revised NO_2 NAAQS until sufficient air quality data is collected from a near-roadway monitoring network. Once the near-roadway network is fully deployed and 3 years of air quality data are available, the EPA has authority under the CAA to redesignate areas as appropriate from ''unclassifiable'' to ''attainment'' or ''nonattainment.'' The EPA anticipates that sufficient data to conduct redesignations would be available after 2015.

In the EPA's June 2011 response letters to state and tribal recommendations, the EPA stated that in response to recommendations and review of the 2008–2010 monitored NO_2 concentrations, it intended to designate all areas of the U.S. as ''unclassifiable/attainment.'' The EPA uses this designation in practice for initial designations to mean that available information does not indicate that the air quality in these areas exceeds the 2010 NO_2 NAAQS.

VII. Comments

In the EPA's June 2011 response letters to state and tribal recommendations, the EPA recommended that states and tribes consider implications for the prevention of significant deterioration of air quality (PSD) program when proposing their boundaries. Several states responded by providing suggested changes to their recommended boundaries. The EPA has accepted these changes and has applied them in these final designations.

The EPA received comments from one state and one trade association, both indicating that the EPA should designate areas as ''attainment'' rather than ''unclassifiable/attainment.''

The trade association commenter stated that a designation of ''attainment'' signifies the air is healthy while a designation of ''unclassifiable'' does not. The commenter acknowledges the concern that the current monitoring network is inadequate in many instances to determine if an area meets the 2010 NO_2 NAAQS. Nonetheless, the commenter believes a designation of ''attainment'' is appropriate where current monitoring shows no violations. The commenter acknowledges that redesignation to ''nonattainment'' would be appropriate if new monitors show violations of the 2010 NO_2 NAAQS.

The second comment, from a state, restated their recommendation that their entire state should be designated as ''attainment.'' In their comment, they provide 2007–2010 data from seven NO_2 monitors operated in the state. The commenter points out that no single year 98th percentile has exceeded 44 percent of the 2010 NO_2 NAAQS and design values have not exceeded 42 percent of the 2010 NO_2 NAAQS.

After considering state and public comments on the EPA's June 2011 response letters to state and tribal recommendations, the EPA is finalizing designations for all areas of the U.S. as ''unclassifiable/attainment.'' This designation is intended to indicate that for the purposes of initial area designations, available information does not indicate that air quality in these areas exceeds the NAAQS.

Although all existing community-based monitoring sites indicate attainment with the NO_2 NAAQS, the existing NO_2 monitoring network does not fully portray or represent the NO_2 concentrations near roadways. Until more complete information on NAAQS compliance is available, the EPA does not believe a designation of ''attainment'' is appropriate.

VIII. Implications of Designations for Compliance With PSD Increments for NO_2

The CAA's PSD requirements are designed to ensure that economic growth will occur in a manner consistent with preserving clean air in areas not currently violating the NAAQS (*see* CAA sections 160–169). In such areas, new or modified major sources of NO_2 must comply with maximum allowable increases (increments) in concentrations of NO_2. In some parts of the U.S., ''baseline areas'' have already been established for NO_2 increment analysis under the designations associated with the existing NO_2 annual NAAQS.[2] The boundaries for such areas are not affected by the newly designated areas listed as ''unclassifiable/attainment'' for the 1-hour NO_2 NAAQS. In addition, any increment baseline areas created in the future for the annual NO_2 standard should be based on the existing designations that are associated with (and continue to apply to) the NO_2 annual NAAQS.

[2] The concept of ''baseline areas'' and their relationship to the area designations is described in 40 CFR 81.300(b). The definition of baseline area appears in PSD regulations at 40 CFR 52.21(b)(15)(i).

IX. What air quality data has the EPA used?

The final NO_2 designations contained in this action are based upon air quality monitoring data from calendar years 2008–2010.

X. How do designations affect Indian country?

All counties, partial counties or Air Quality Control Regions listed in the table at the end of this document are designated as indicated. There are no areas of Indian country being designated nonattainment at this time.

XI. Where can I find information forming the basis for this rule and exchanges between the EPA, states, and tribes related to this rule?

Information providing the basis for this action and related decisions are provided in the docket for this rulemaking. The applicable EPA guidance memoranda, and copies of correspondence regarding this process between the EPA and the states, tribes, and other parties are available for review at the EPA Docket Center listed above in the addresses section of this document and on our designation Web site at *http://www.epa.gov/airquality/nitrogenoxides/designations/index.html.* State-specific information is available from the EPA Regional Offices.

XII. Statutory and Executive Order Reviews

Upon promulgation of a new or revised NAAQS, the CAA requires the EPA to designate areas as attaining or not attaining the NAAQS. The CAA then specifies requirements for areas based on whether such areas are attaining or not attaining the NAAQS. In this final rule, the EPA assigns designations to areas as required.

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action will respond to the requirement to promulgate air quality designations after promulgation of a NAAQS. This type of action is exempt from review under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011).

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the *Paperwork Reduction*

Act, 44 U.S.C. 3501 *et seq.* Burden is defined at 5 CFR 1320.3(b). This rule responds to the requirement to promulgate air quality designations after promulgation of a new or revised NAAQS. This requirement is prescribed in the CAA section 107. The present final rule does not establish any new information collection requirements.

C. Regulatory Flexibility Act

This final rule is not subject to the Regulatory Flexibility Act (RFA), which generally requires an agency to prepare a regulatory flexibility analysis for any rule that will have a significant economic impact on a substantial number of small entities. The RFA applies only to rules subject to notice-and-comment rulemaking requirements under the Administrative Procedure Act (APA) or any other statute. This rule is not subject to notice-and-comment requirements under the APA or any other statute because the rule is subject to CAA section 107(d)(2)(B), which does not require that the agency issue a notice of proposed rulemaking before issuing this rule.

D. Unfunded Mandates Reform Act

This action contains no federal mandate under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538 for state, local, or tribal governments or the private sector. The action imposes no enforceable duty on any state, local or tribal governments or the private sector. Therefore, this action is not subject to the requirements of sections 202 and 205 of the UMRA.

This action is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. It does not create any additional requirements beyond those of the CAA and NO_2 NAAQS (40 CFR 50.11). The CAA establishes the process whereby states take primary responsibility in developing plans to meet the NO_2 NAAQS.

E. Executive Order 13132: Federalism

This final rule does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. The CAA establishes the process whereby states take primary responsibility in developing plans to meet the NO_2 NAAQS. This rule will not modify the relationship of the states and the EPA for purposes of developing programs to implement the NO_2 NAAQS. Thus, Executive Order 13132 does not apply to this rule.

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

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). This rule concerns the designation of areas for the 1-hour NO_2 NAAQS. The CAA provides for states and eligible tribes to develop plans to regulate emissions of air pollutants within their areas, as necessary, based on the designations. The TAR provides tribes the opportunity to apply for eligibility to develop and implement CAA programs such as programs to attain and maintain the NO_2 NAAQS, but it leaves to the discretion of the tribe the decision of whether to apply to develop these programs and which programs, or appropriate elements of a program, the tribe will seek to adopt. This rule does not have a substantial direct effect on one or more Indian tribes. It does not create any additional requirements beyond those of the NO_2 NAAQS (40 CFR section 50.11). This rule establishes the designation for certain areas of the country for the NO_2 NAAQS but no areas in Indian country are being designated nonattainment under this rule. Consequently, no tribe has any immediate requirement to implement a CAA program to attain the 1-hour NO_2 NAAQS in Indian Country at this time. Furthermore, this rule does not affect the relationship or distribution of power and responsibilities between the federal government and Indian tribes. The CAA and the TAR establish the relationship of the federal government and tribes in developing plans to attain the NAAQS, and this rule does nothing to modify that relationship. Thus, Executive Order 13175 does not apply to this action.

Although Executive Order 13175 does not apply to this action, the EPA communicated with tribal leaders and environmental staff regarding the designations process. The EPA also sent individualized letters to all federally recognized tribes to explain the designation process for the 2010 NO_2 NAAQS, to provide the EPA designations guidance, and to offer consultation with the EPA. The EPA provided further information to tribes through presentations at the National Tribal Forum and through participation in National Tribal Air Association conference calls. The EPA also sent individualized letters to all federally recognized tribes that submitted recommendations to the EPA about the EPA's intended designations for the NO_2 standards and offered tribal leaders the opportunity for consultation. These communications provided opportunities for tribes to voice concerns to the EPA about the general designations process for the NO_2 NAAQS, as well as concerns specific to a tribe, and informed the EPA about key tribal concerns regarding designations as the rule was under development.

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

The EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act (NTTAA)

Section 12(d) of the NTTAA of 1995, Public Law 104–113, section 12(d) (15 U.S.C. 272 note) directs the EPA to use voluntary consensus standards (VCS) in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impracticable. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by VCS bodies. The NTTAA directs the EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable VCS.

This action does not involve technical standards. Therefore, the EPA did not consider the use of any VCS.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629 (Feb. 16, 1994)) establishes federal executive policy on environmental justice. Its main provision directs

federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the U.S.

The CAA requires that the EPA designate as nonattainment ''any area that does not meet (or that contributes to ambient air quality in a nearby area that does not meet) the national primary or secondary ambient air quality standard for the pollutant.'' By designating as nonattainment all areas where available information indicates a violation of the NO_2 NAAQS, this action protects all those residing, working, attending school, or otherwise present in those areas regardless of minority or economic status.

EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it increases the level of environmental protection for all affected populations without having any disproportionately high and adverse human health or environmental effects on any population, including any minority or low-income population

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, 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 U.S. The EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the U.S. prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2). This rule will be effective February 29, 2012.

L. Judicial Review

Section 307(b)(1) of the CAA indicates which Federal Courts of Appeal have venue for petitions of review of final actions by EPA. This section provides, in part, that petitions for review must be filed in the Court of Appeals for the District of Columbia Circuit: (i) When the agency action consists of ''nationally applicable regulations promulgated, or final actions taken, by the Administrator,'' or (ii) when such action is locally or regionally applicable, if ''such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination.''

This rule designating areas for the 2010 NO_2 NAAQS is ''nationally applicable'' within the meaning of section 307(b)(1). This rule establishes designations for areas across the U.S. for the 2010 NO_2 NAAQS. At the core of this rulemaking is EPA's interpretation of the definition of nonattainment under section 107(d)(1) of the CAA, and its application of that interpretation to areas across the country.

For the same reasons, the Administrator also is determining that the final designations are of nationwide scope and effect for the purposes of section 307(b)(1). This is particularly appropriate because, in the report on the 1977 Amendments that revised section 307(b)(1) of the CAA, Congress noted that the Administrator's determination that an action is of ''nationwide scope or effect'' would be appropriate for any action that has a scope or effect beyond a single judicial circuit. H.R. Rep. No. 95–294 at 323, 324, *reprinted* in 1977 U.S.C.C.A.N. 1402–03. Here, the scope and effect of this rulemaking extends to numerous judicial circuits since the designations apply to areas across the country. In these circumstances, section 307(b)(1) and its legislative history calls for the Administrator to find the rule to be of ''nationwide scope or effect'' and for venue to be in the D.C. Circuit.

Thus, any petitions for review of final designations must be filed in the Court of Appeals for the District of Columbia Circuit within 60 days from the date final action is published in the **Federal Register**.

List of Subjects in 40 CFR Part 81

Environmental protection, Air pollution control, National parks, Wilderness areas.

Dated: January 20, 2012.

Lisa P. Jackson,

Administrator.

For the reasons set forth in the preamble, 40 CFR Part 81, is amended as follows:

PART 81—DESIGNATIONS OF AREAS FOR AIR QUALITY PLANNING PURPOSES

■ 1. The authority citation for part 81 continues to read as follows:

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

Subpart C—Section 107 Attainment Status Designations

* * * * *

■ 2. Section 81.301 is amended as follows:

■ a. By revising the table heading ''Alabama—NO_2'' to read ''Alabama—NO_2 (1971 Annual Standard).''

■ b. By adding a table entitled ''Alabama—NO_2 (2010 1-Hour Standard)'' in alphabetical order to read as follows:

§ 81.301 Alabama.

* * * * *

ALABAMA—NO_2 (2010 1-HOUR STANDARD)

Designated area	Designation [a]	
	Date [1]	Type
Autauga County		Unclassifiable/Attainment.
Baldwin County		Unclassifiable/Attainment.
Barbour County		Unclassifiable/Attainment.
Bibb County		Unclassifiable/Attainment.
Blount County		Unclassifiable/Attainment.
Bullock County		Unclassifiable/Attainment.
Butler County		Unclassifiable/Attainment.
Calhoun County		Unclassifiable/Attainment.
Chambers County		Unclassifiable/Attainment.
Cherokee County		Unclassifiable/Attainment.
Chilton County		Unclassifiable/Attainment.
Choctaw County		Unclassifiable/Attainment.

ALABAMA—NO^2 (2010 1-HOUR STANDARD)—Continued

Designated area	Designation [a]	
	Date [1]	Type
Clarke County		Unclassifiable/Attainment.
Clay County		Unclassifiable/Attainment.
Cleburne County		Unclassifiable/Attainment.
Coffee County		Unclassifiable/Attainment.
Colbert County		Unclassifiable/Attainment.
Conecuh County		Unclassifiable/Attainment.
Coosa County		Unclassifiable/Attainment.
Covington County		Unclassifiable/Attainment.
Crenshaw County		Unclassifiable/Attainment.
Cullman County		Unclassifiable/Attainment.
Dale County		Unclassifiable/Attainment.
Dallas County		Unclassifiable/Attainment.
De Kalb County		Unclassifiable/Attainment.
Elmore County		Unclassifiable/Attainment.
Escambia County		Unclassifiable/Attainment.
Fayette County		Unclassifiable/Attainment.
Franklin County		Unclassifiable/Attainment.
Geneva County		Unclassifiable/Attainment.
Greene County		Unclassifiable/Attainment.
Hale County		Unclassifiable/Attainment.
Henry County		Unclassifiable/Attainment.
Houston County		Unclassifiable/Attainment.
Jackson County		Unclassifiable/Attainment.
Jefferson County		Unclassifiable/Attainment.
Lamar County		Unclassifiable/Attainment.
Lauderdale County		Unclassifiable/Attainment.
Lawrence County		Unclassifiable/Attainment.
Lee County		Unclassifiable/Attainment.
Limestone County		Unclassifiable/Attainment.
Lowndes County		Unclassifiable/Attainment.
Macon County		Unclassifiable/Attainment.
Madison County		Unclassifiable/Attainment.
Marengo County		Unclassifiable/Attainment.
Marion County		Unclassifiable/Attainment.
Marshall County		Unclassifiable/Attainment.
Mobile County		Unclassifiable/Attainment.
Monroe County		Unclassifiable/Attainment.
Montgomery County		Unclassifiable/Attainment.
Morgan County		Unclassifiable/Attainment.
Perry County		Unclassifiable/Attainment.
Pickens County		Unclassifiable/Attainment.
Pike County		Unclassifiable/Attainment.
Randolph County		Unclassifiable/Attainment.
Russell County		Unclassifiable/Attainment.
Shelby County		Unclassifiable/Attainment.
St. Clair County		Unclassifiable/Attainment.
Sumter County		Unclassifiable/Attainment.
Talladega County		Unclassifiable/Attainment.
Tallapoosa County		Unclassifiable/Attainment.
Tuscaloosa County		Unclassifiable/Attainment.
Walker County		Unclassifiable/Attainment.
Washington County		Unclassifiable/Attainment.
Wilcox County		Unclassifiable/Attainment.
Winston County		Unclassifiable/Attainment.

[a] Includes Indian Country located in each county or area, except as otherwise specified.
[1] This date is 90 days after October 31, 2011, unless otherwise noted.

■ 3. Section 81.302 is amended as follows:

■ a. By revising the table heading ''Alaska—NO_2'' to read ''Alaska—NO_2 (1971 Annual Standard).''

■ b. By adding a table entitled ''Alaska—NO_2 (2010 1-Hour Standard)'' in alphabetical order to read as follows:

§ 81.302 Alaska.

* * * * *

ALASKA—NO_2 (2010 1-HOUR STANDARD)

Designated area	Designation [a]	
	Date [1]	Type
State of Alaska		Unclassifiable/Attainment.

[a] Includes Indian Country located in each county or area, except as otherwise specified.
[1] This date is 90 days after October 31, 2011, unless otherwise noted.

■ 4. Section 81.303 is amended as follows:

■ a. By revising the table heading ''Arizona—NO_2'' to read ''Arizona—NO_2 (1971 Annual Standard).''

■ b. By adding a table entitled ''Arizona—NO_2 (2010 1-Hour Standard)'' in alphabetical order to read as follows:

§ 81.303 Arizona.

* * * * *

ARIZONA—NO_2 (2010 1-HOUR STANDARD)

Designated area	Designation [a]	
	Date [1]	Type
Apache County		Unclassifiable/Attainment.
Cochise County		Unclassifiable/Attainment.
Coconino County		Unclassifiable/Attainment.
Gila County		Unclassifiable/Attainment.
Graham County		Unclassifiable/Attainment.
Greenlee County		Unclassifiable/Attainment.
La Paz County		Unclassifiable/Attainment.
Maricopa County		Unclassifiable/Attainment.
Mohave County		Unclassifiable/Attainment.
Navajo County		Unclassifiable/Attainment.
Pima County		Unclassifiable/Attainment.
Pinal County		Unclassifiable/Attainment.
Santa Cruz County		Unclassifiable/Attainment.
Yavapai County		Unclassifiable/Attainment.
Yuma County		Unclassifiable/Attainment.

[a] Includes Indian Country located in each county or area, except as otherwise specified.
[1] This date is 90 days after October 31, 2011, unless otherwise noted.

■ 5. Section 81.304 is amended as follows:

■ a. By revising the table heading ''Arkansas—NO_2'' to read ''Arkansas—NO_2 (1971 Annual Standard).''

■ b. By adding a table entitled ''Arkansas—NO_2 (2010 1-Hour Standard)'' in alphabetical order to read as follows:

§ 81.304 Arkansas.

* * * * *

ARKANSAS—NO_2 (2010 1-HOUR STANDARD)

Designated area	Designation [a]	
	Date [1]	Type
Ashley County		Unclassifiable/Attainment.
Arkansas County		Unclassifiable/Attainment.
Baxter County		Unclassifiable/Attainment.
Benton County		Unclassifiable/Attainment.
Boone County		Unclassifiable/Attainment.
Bradley County		Unclassifiable/Attainment.
Calhoun County		Unclassifiable/Attainment.
Carroll County		Unclassifiable/Attainment.
Chicot County		Unclassifiable/Attainment.
Clark County		Unclassifiable/Attainment.
Clay County		Unclassifiable/Attainment.
Cleburne County		Unclassifiable/Attainment.
Cleveland County		Unclassifiable/Attainment.
Columbia County		Unclassifiable/Attainment.
Conway County		Unclassifiable/Attainment.
Craighead County		Unclassifiable/Attainment.
Crawford County		Unclassifiable/Attainment.
Crittenden County		Unclassifiable/Attainment.
Cross County		Unclassifiable/Attainment.
Dallas County		Unclassifiable/Attainment.

ARKANSAS—NO_2 (2010 1-HOUR STANDARD)—Continued

Designated area	Designation [a]	
	Date [1]	Type
Desha County		Unclassifiable/Attainment.
Drew County		Unclassifiable/Attainment.
Faulkner County		Unclassifiable/Attainment.
Franklin County		Unclassifiable/Attainment.
Fulton County		Unclassifiable/Attainment.
Garland County.		Unclassifiable/Attainment.
Grant County		Unclassifiable/Attainment.
Greene County		Unclassifiable/Attainment.
Hempstead County		Unclassifiable/Attainment.
Hot Spring County		Unclassifiable/Attainment.
Howard County.		Unclassifiable/Attainment.
Independence County		Unclassifiable/Attainment.
Izard Count		Unclassifiable/Attainment.
Jackson County		Unclassifiable/Attainment.
Jefferson County.		Unclassifiable/Attainment.
Johnson County		Unclassifiable/Attainment.
Lafayette County		Unclassifiable/Attainment.
Lawrence County		Unclassifiable/Attainment.
Lee County		Unclassifiable/Attainment.
Lincoln County		Unclassifiable/Attainment.
Little River County		Unclassifiable/Attainment.
Logan County		Unclassifiable/Attainment.
Lonoke County		Unclassifiable/Attainment.
Madison County		Unclassifiable/Attainment.
Marion County		Unclassifiable/Attainment.
Miller County		Unclassifiable/Attainment.
Mississippi County		Unclassifiable/Attainment.
Monroe County		Unclassifiable/Attainment.
Montgomery County		Unclassifiable/Attainment.
Nevada County		Unclassifiable/Attainment.
Newton County		Unclassifiable/Attainment.
Ouachita County		Unclassifiable/Attainment.
Perry County		Unclassifiable/Attainment.
Phillips County		Unclassifiable/Attainment.
Pike County		Unclassifiable/Attainment.
Poinsett County		Unclassifiable/Attainment.
Polk County		Unclassifiable/Attainment.
Pope County		Unclassifiable/Attainment.
Prairie County		Unclassifiable/Attainment.
Pulaski County		Unclassifiable/Attainment.
Randolph County		Unclassifiable/Attainment.
St. Francis County		Unclassifiable/Attainment.
Saline County		Unclassifiable/Attainment.
Scott County		Unclassifiable/Attainment.
Searcy County		Unclassifiable/Attainment.
Sebastian County		Unclassifiable/Attainment
Sevier County		Unclassifiable/Attainment.
Sharp County		Unclassifiable/Attainment.
Stone County		Unclassifiable/Attainment.
Union County		Unclassifiable/Attainment.
Van Buren County		Unclassifiable/Attainment.
Washington County		Unclassifiable/Attainment.
White County		Unclassifiable/Attainment.
Woodruff County		Unclassifiable/Attainment.
Yell County		Unclassifiable/Attainment.

[a] Includes Indian Country located in each county or area, except as otherwise specified.
[1] This date is 90 days after October 31, 2011, unless otherwise noted.

■ 6. Section 81.305 is amended as follows:

■ a. By revising the table heading ''California—NO_2'' to read ''California—NO_2 (1971 Annual Standard).''

■ b. By adding a table entitled ''California—NO_2 (2010 1-Hour Standard)'' in alphabetical order to read as follows:

§ 81.305 California.

* * * * *

CALIFORNIA—NO_2 (2010 1-HOUR STANDARD)

Designated area	Designation [a]	
	Date [1]	Type
Amador County APCD:		
Amador County		Unclassifiable/Attainment.
Antelope Valley AQMD:		
Los Angeles County (part)		Unclassifiable/Attainment.
That portion of Los Angeles County which lies north and east of a line described as follows: Beginning at the Los Angeles-San Bernardino County boundary and running west along the township line common to T. 3 N and T. 2 N, San Bernardino Base and Meridian; then north along the range line common to R. 8 W and R. 9 W; then west along the township line common to T. 4 N and T. 3 N; then north along the range Line Common to R. 12 W and R. 13 W to the southeast corner of Section 12, T. 5 N, R. 13 W; then west along the south boundaries of Sections 12, 11, 10, 9, 8, 7, T. 5 N, R. 13 W to the boundary of the Angeles National Forest which is collinear with the range line common to R. 13 W and R. 14 W; then north and west along the Angeles National Forest boundary to the point of intersection with the township line common to T. 7 N and T. 6 N (point is at the northwest corner of Section 4 in T. 6 N, R. 14 W); then west along the township line common to T. 7 N and T. 6 N; then north along the range line common to R. 15 W and R. 16 W to the southeast corner of Section 13, T. 7 N, R. 16 W; then along the south boundaries of Sections 13, 14, 15, 16, 17, 18, T. 7 N, R. 16 W; then north along the range line common to R. 16 W and R. 17 W to the north boundary of the Angeles National Forest (collinear with township line common to T. 8 N and T. 7 N) then west and north along the Angeles National Forest boundary to the point of intersection with the south boundary of the Rancho La Liebre Land Grant; then west and north along this land grant boundary to the Los Angeles-Kern County boundary.		
Bay Area AQMD:		
Alameda County		Unclassifiable/Attainment.
Contra Costa County		Unclassifiable/Attainment.
Marin County		Unclassifiable/Attainment.
Napa County		Unclassifiable/Attainment.
San Francisco County		Unclassifiable/Attainment.
San Mateo County		Unclassifiable/Attainment.
Santa Clara County		Unclassifiable/Attainment.
Solano County (part)		Unclassifiable/Attainment.
That portion of Solano County which lies south and west of a line described as follows: Beginning at the intersection of the westerly boundary of Solano County and the ¼ section line running east and west through the center of Section 34, T. 6 N, R. 2.W, Mount Diablo Base and Meridian, thence east along said ¼ section line to the east boundary of Section 36, T. 6 N, R. 2 W, thence south ½ mile and east 2.0 miles, more or less, along the west and south boundary of Los Putos Rancho to the northwest corner of Section 4, T. 5 N, R. 1 W, thence east along a line common to T. 5 N and T. 6 N to the northeast corner of Section 3, T. 5 N, R. 1 E, thence south along section lines to the southeast corner of Section 10, T. 3 N, R. 1 E, thence east along section lines to the south ¼ corner of Section 8, T. 3 N, R. 2 E, thence east to the boundary between Solano and Sacramento Counties.		
Sonoma County (part)		Unclassifiable/Attainment.
That portion of Sonoma County which lies south and east of a line described as follows: Beginning at the southeasterly corner of the Rancho Estero Americano, being on the boundary line between Marin and Sonoma Counties, California; thence running northerly along the easterly boundary line of said Rancho Estero Americano to the northeasterly corner thereof, being an angle corner in the westerly boundary line of Rancho Canada de Jonive; thence running along said boundary of Rancho Canada de Jonive westerly, northerly and easterly to its intersection with the easterly line of Graton Road; thence running along the easterly and southerly line of Graton Road, northerly and easterly to its intersection with the easterly line of Sullivan Road; thence running northerly along said easterly line of Sullivan Road to the southerly line of Green Valley Road; thence running easterly along the said southerly line of Green Valley Road and easterly along the southerly line of State Highway 116, to the westerly line of Vine Hill Road; thence running along the westerly and northerly line of Vine Hill Road, northerly and easterly to its intersection with the westerly line of Laguna Road; thence running northerly along the westerly line of Laguna Road and the northerly projection thereof to the northerly line of Trenton Road; thence running westerly along the northerly line of said Trenton Road to the easterly line of Trenton-Healdsburg Road; thence running northerly along said easterly line of Trenton-Healdsburg Road to the easterly line of Eastside Road; thence running northerly along said easterly line of Eastside Road to its intersection with the southerly line of Rancho Sotoyome; thence running easterly along said southerly line of Rancho Sotoyome to its intersection with the Township line common to Townships 8 and 9 North, Mount Diablo Meridian; thence running easterly along said township line to its intersection with the boundary line between Sonoma and Napa Counties.		
Butte County AQMD:		

CALIFORNIA—NO_2 (2010 1-HOUR STANDARD)—Continued

Designated area	Designation [a]	
	Date [1]	Type
Butte County		Unclassifiable/Attainment.
Calaveras County AQMD:		
Calaveras County		Unclassifiable/Attainment.
Colusa County AQMD:		
Colusa County		Unclassifiable/Attainment.
Eastern Kern APCD:		
Kern County (part)		Unclassifiable/Attainment.
That portion of Kern County east and south of a line described as follows: Beginning at the Kern-Los Angeles County boundary and running north and east along the northwest boundary of the Rancho La Libre Land Grant to the point of intersection with the range line common to R. 16 W and R. 17 W, San Bernardino Base and Meridian; north along the range line to the point of intersection with the Rancho El Tejon Land Grant boundary; then southeast, northeast, and northwest along the boundary of the Rancho El Tejon Land Grant to the northwest corner of Section 3, T. 11 N, R. 17 W; then west 1.2 miles; then north to the Rancho El Tejon Land Grant boundary; then northwest along the Rancho El Tejon line to the southeast corner of Section 34, T. 32 S, R. 30 E, Mount Diablo Base and Meridian; then north to the northwest corner of Section 35, T. 31 S, R. 30 E; then northeast along the boundary of the Rancho El Tejon Land Grant to the southwest corner of Section 18, T. 31 S, R. 31 E; then east to the southeast corner of Section 13, T. 31 S, R. 31 E; then north along the range line common to R. 31 E and R. 32 E, Mount Diablo Base and Meridian, to the northwest corner of Section 6, T. 29 S, R. 32 E; then east to the southwest corner of Section 31 T. 28 S, R. 32 E; then north along the range line common to R. 31 E and R. 32 E to the northwest corner of Section 6, T. 28 S, R. 32 E, then west to the southeast corner of Section 36, T. 27 S, R. 31 E, then north along the range line common to R. 31 E and R. 32 E to the Kern-Tulare County boundary.		
El Dorado County AQMD:		
El Dorado County		Unclassifiable/Attainment.
Feather River AQMD:		
Sutter County		Unclassifiable/Attainment.
Yuba County		Unclassifiable/Attainment.
Glenn County APCD:		
Glenn County		Unclassifiable/Attainment.
Great Basin Unified APCD:		
Alpine County		Unclassifiable/Attainment.
Inyo County		Unclassifiable/Attainment.
Mono County		Unclassifiable/Attainment.
Imperial County APCD:		
Imperial County		Unclassifiable/Attainment.
Lake County AQMD:		
Lake County		Unclassifiable/Attainment.
Lassen County APCD:		
Lassen County		Unclassifiable/Attainment.
Mariposa County APCD:		
Mariposa County		Unclassifiable/Attainment.
Mendocino County AQMD:		
Mendocino County		Unclassifiable/Attainment.
Modoc County APCD:		
Modoc County		Unclassifiable/Attainment.
Mojave Desert AQMD:		
Riverside County (part)		Unclassifiable/Attainment.
That portion of Riverside County which lies east of a line described as follows: Beginning at the southwest corner of Section 32, T. 8 S, R. 20 E, San Bernardino Base and Meridian, on the Riverside-Imperial County Boundary; then northerly along section lines to the northwest corner of Section 5, T. 7 S, R. 20 E; then westerly along the township line to the southwest corner of Section 31, T. 6 S, R. 19 E; then northerly along the range line to the northwest corner of Section 6, T. 5 S, R. 19 E; then easterly along the township line to the southwest corner of Section 33, T. 4 S, R. 19 E; then northerly along section lines to the northwest corner of Section 4, T. 4 S, R. 19 E; then westerly along the township lines to the southwest corner of Section 32, T. 3 S, R. 19 E; then northerly along section lines to the northwest corner of Section 17, T. 3 S, R. 19 E; then westerly along the township line to the southwest corner of Section 7, T. 3 S, R. 19 E; then northerly along section lines to the northwest corner of Section 30, T. 2 S, R. 19 E; then westerly along the southerly line of Section 24, T. 2 S, R. 18 E, to the southwest corner thereof; then northerly along section lines to the northwest corner of Section 13, T. 2 S, R. 18 E; then westerly along section lines to the southwest corner of Section 10, T. 2 S, R. 18 E; then northerly along section lines to the Riverside-San Bernardino County boundary.		
San Bernardino County (part)		Unclassifiable/Attainment.

CALIFORNIA—NO_2 (2010 1-HOUR STANDARD)—Continued

Designated area	Designation [a]	
	Date [1]	Type
That portion of San Bernardino County east and north of a line described as follows: Beginning at the San Bernardino-Riverside County boundary and running north along the range line common to R. 3 E and R. 2 E, San Bernardino Base and Meridian; then west along the township line common to T. 3 N and T. 2 N to the San Bernardino-Los Angeles County boundary.		
Monterey Bay Unified APCD:		
Monterey County		Unclassifiable/Attainment.
San Benito County		Unclassifiable/Attainment.
Santa Cruz County		Unclassifiable/Attainment.
North Coast Unified AQMD:		
Del Norte County		Unclassifiable/Attainment.
Humboldt Count		Unclassifiable/Attainment.
Trinity County		Unclassifiable/Attainment.
Northern Sierra AQMD:		
Nevada County		Unclassifiable/Attainment.
Plumas County		Unclassifiable/Attainment.
Sierra County		Unclassifiable/Attainment.
Northern Sonoma County APCD:		
Sonoma County (part)		Unclassifiable/Attainment.
That portion of Sonoma County which lies north and west of a line described as follows: Beginning at the southeasterly corner of the Rancho Estero Americano, being on the boundary line between Marin and Sonoma Counties, California; thence running northerly along the easterly boundary line of said Rancho Estero Americano to the northeasterly corner thereof, being an angle corner in the westerly boundary line of Rancho Canada de Jonive; thence running along said boundary of Rancho Canada de Jonive westerly, northerly and easterly to its intersection with the easterly line of Graton Road; thence running along the easterly and southerly line of Graton Road, northerly and easterly to its intersection with the easterly line of Sullivan Road; thence running northerly along said easterly line of Sullivan Road to the southerly line of Green Valley Road; thence running easterly along the said southerly line of Green Valley Road and easterly along the southerly line of State Highway 116, to the westerly line of Vine Hill Road; thence running along the westerly and northerly line of Vine Hill Road, northerly and easterly to its intersection with the westerly line of Laguna Road; thence running northerly along the westerly line of Laguna Road and the northerly projection thereof to the northerly line of Trenton Road; thence running westerly along the northerly line of said Trenton Road to the easterly line of Trenton-Healdsburg Road; thence running northerly along said easterly line of Trenton-Healdsburg Road to the easterly line of Eastside Road; thence running northerly along said easterly line of Eastside Road to its intersection with the southerly line of Rancho Sotoyome; thence running easterly along said southerly line of Rancho Sotoyome to its intersection with the Township line common to Townships 8 and 9 North, Mount Diablo Meridian; thence running easterly along said township line to its intersection with the boundary line between Sonoma and Napa Counties.		
Placer County APCD:		
Placer County		Unclassifiable/Attainment.
Sacramento Metropolitan AQMD:		
Sacramento County		Unclassifiable/Attainment.
San Diego County APCD:		
San Diego County		Unclassifiable/Attainment.
San Joaquin Valley Unified APCD:		
Fresno County		Unclassifiable/Attainment.
Kern County (part)		Unclassifiable/Attainment.

CALIFORNIA—NO_2 (2010 1-HOUR STANDARD)—Continued

Designated area	Designation [a]	
	Date [1]	Type
That portion of Kern County which lies west and north of a line described as follows: Beginning at the Kern-Los Angeles County boundary and running north and east along the northwest boundary of the Rancho La Libre Land Grant to the point of intersection with the range line common to R. 16 W and R. 17 W, San Bernardino Base and Meridian; north along the range line to the point of intersection with the Rancho El Tejon Land Grant boundary; then southeast, northeast, and northwest along the boundary of the Rancho El Tejon Land Grant to the northwest corner of Section 3, T. 11 N, R. 17 W; then west 1.2 miles; then north to the Rancho El Tejon Land Grant boundary; then northwest along the Rancho El Tejon line to the southeast corner of Section 34, T. 32 S, R. 30 E, Mount Diablo Base and Meridian; then north to the northwest corner of Section 35, T. 31 S, R. 30 E; then northeast along the boundary of the Rancho El Tejon Land Grant to the southwest corner of Section 18, T. 31 S, R. 31 E; then east to the southeast corner of Section 13, T. 31 S, R. 31 E; then north along the range line common to R. 31 E and R. 32 E, Mount Diablo Base and Meridian, to the northwest corner of Section 6, T. 29 S, R. 32 E; then east to the southwest corner of Section 31, T. 28 S, R. 32 E; then north along the range line common to R. 31 E and R. 32 E to the northwest corner of Section 6, T. 28 S, R. 32 E, then west to the southeast corner of Section 36, T. 27 S, R. 31 E, then north along the range line common to R. 31 E and R. 32 E to the Kern-Tulare County boundary.		
Kings County		Unclassifiable/Attainment.
Madera County		Unclassifiable/Attainment.
Merced County		Unclassifiable/Attainment.
San Joaquin County		Unclassifiable/Attainment.
Stanislaus County		Unclassifiable/Attainment.
Tulare County		Unclassifiable/Attainment.
San Luis Obispo County APCD:		
San Luis Obispo County		Unclassifiable/Attainment.
Santa Barbara County APCD:		
Santa Barbara County		Unclassifiable/Attainment.
Shasta County AQMD:		
Shasta County		Unclassifiable/Attainment.
Siskiyou County APCD:		
Siskiyou County		Unclassifiable/Attainment.
South Coast AQMD:		
Los Angeles County (part)		Unclassifiable/Attainment.
That portion of Los Angeles County which lies south and west of a line described as follows: Beginning at the Los Angeles-San Bernardino County boundary and running west along the township line common to T.3 N and T.2 N, San Bernardino Base and Meridian; then north along the range line common to R.8 W and R.9 W; then west along the township line common to T.4 N and T.3 N; then north along the range line common to R.12 W and R.13 W to the southeast corner of Section 12, T.5 N, R. 13 W; then west along the south boundaries of Sections 12, 11, 10, 9, 8, 7, T.5 N, R. 13 W to the boundary of the Angeles National Forest which is collinear with the range line common to R. 13 W and R. 14 W; then north and west along the Angeles National Forest boundary to the point of intersection with the township line common to T.7 N and T. 6 N (point is at the northwest corner of Section 4 in T.6 N, R. 14 W); then west along the township line common to T.7 N and T.6 N; then north along the range line common to R. 15 W and R. 16 W to the southeast corner of Section 13, T.7 N, R. 16 W; then along the south boundaries of Sections 13, 14, 15, 16, 17, 18, T.7 N, R. 16 W; then north along the range line common to R.16 W and R. 17 W to the north boundary of the Angeles National Forest (collinear with township line common to T.8 N and T.7 N); then west and north along the Angeles National Forest boundary to the point of intersection with the south boundary of the Rancho La Liebre Land Grant; then west and north along this land grant boundary to the Los Angeles-Kern County boundary.		
Orange County		Unclassifiable/Attainment.
Riverside County (part)		Unclassifiable/Attainment.

CALIFORNIA—NO_2 (2010 1-HOUR STANDARD)—Continued

Designated area	Designation [a]	
	Date [1]	Type
That portion of Riverside County which lies west of a line described as follows: Beginning at the southwest corner of Section 32, T. 8 S, R. 20 E, San Bernardino Base and Meridian, on the Riverside-Imperial County Boundary; then northerly along section lines to the northwest corner of Section 5, T. 7 S, R. 20 E; then westerly along the township line to the southwest corner of Section 31, T. 6 S, R. 19 E; then northerly along the range line to the northwest corner of Section 6, T. 5 S, R. 19 E; then easterly along the township line to the southwest corner of Section 33, T. 4 S, R. 19 E; then northerly along section lines to the northwest corner of Section 4, T. 4 S, R. 19 E; then westerly along the township lines to the southwest corner of Section 32, T. 3 S, R. 19 E; then northerly along section lines to the northwest corner of Section 17, T. 3 S, R. 19 E; then westerly along the township line to the southwest corner of Section 7, T. 3 S, R. 19 E; then northerly along section lines to the northwest corner of Section 30, T. 2 S, R. 19 E; then westerly along the southerly line of Section 24, T. 2 S, R. 18 E, to the southwest corner thereof; then northerly along section lines to the northwest corner of Section 13, T. 2 S, R. 18 E; then westerly along section lines to the southwest corner of Section 10, T. 2 S, R. 18 E; then northerly along section lines to the Riverside-San Bernardino County boundary.		
San Bernardino County (part)	.....	Unclassifiable/Attainment.
That portion of San Bernardino County west and south of a line described as follows: Beginning at the San Bernardino-Riverside County boundary and running north along the range line common to R. 3 E and R. 2 E; then west along the township line common to T. 3 N and T. 2 N to the San Bernardino-Los Angeles County boundary.		
Tehama County APCD:		
Tehama County	.....	Unclassifiable/Attainment.
Tuolumne County APCD:		
Tuolumne County	.....	Unclassifiable/Attainment.
Ventura County APCD:		
Ventura County	.....	Unclassifiable/Attainment.
Yolo-Solano AQMD:		
Solano County	.....	Unclassifiable/Attainment.
That portion of Solano County which lies north and east of a line described as follows: Beginning at the intersection of the westerly boundary of Solano County and the ¼ section line running east and west through the center of Section 34, T. 6 N, R. 2 W, Mount Diablo Base and Meridian, thence east along said ¼ section line to the east boundary of Section 36, T. 6 N, R. 2 W, thence south ½ mile and east 2.0 miles, more or less, along the west and south boundary of Los Putos Rancho to the northwest corner of Section 4, T. 5 N, R. 1 W, thence east along a line common to T. 5 N and T. 6 N to the northeast corner of Section 3, T. 5 N, R. 1 E, thence south along section lines to the southeast corner of Section 10, T. 3 N, R. 1 E, thence east along section lines to the south ¼ corner of Section 8, T. 3 N, R. 2 E, thence east to the boundary between Solano and Sacramento Counties.		
Yolo County	.....	Unclassifiable/Attainment.

[a] Includes Indian Country located in each county or area, except as otherwise specified.
[1] This date is 90 days after October 31, 2011, unless otherwise noted.

■ 7. Section 81.306 is amended as follows:

■ a. By revising the table heading ''Colorado—NO_2'' to read ''Colorado—NO_2 (1971 Annual Standard).''

■ b. By adding a table entitled ''Colorado—NO_2 (2010 1-Hour Standard)'' in alphabetical order to read as follows:

§ 81.306 Colorado.

* * * * *

COLORADO—NO_2 (2010 1-HOUR STANDARD)

Designated area	Designation [a]	
	Date [1]	Type
State AQCR 01:		
Logan County	.....	Unclassifiable/Attainment.
Morgan County	.....	Unclassifiable/Attainment.
Phillips County	.....	Unclassifiable/Attainment.
Sedgwick County	.....	Unclassifiable/Attainment.
Washington County	.....	Unclassifiable/Attainment.
Yuma County	.....	Unclassifiable/Attainment.
State AQCR 02:		
Larimer County	.....	Unclassifiable/Attainment.
Weld County	.....	Unclassifiable/Attainment.
State AQCR 03:		

COLORADO—NO_2 (2010 1-HOUR STANDARD)—Continued

Designated area	Designation [a]	
	Date [1]	Type
Adams County		Unclassifiable/Attainment.
Arapahoe County		Unclassifiable/Attainment.
Boulder County		Unclassifiable/Attainment.
Broomfield County		Unclassifiable/Attainment.
Clear Creek County		Unclassifiable/Attainment.
Denver County		Unclassifiable/Attainment.
Douglas County		Unclassifiable/Attainment.
Jefferson County		Unclassifiable/Attainment.
Gilpin County		Unclassifiable/Attainment.
State AQCR 04:		
El Paso County		Unclassifiable/Attainment.
Park County		Unclassifiable/Attainment.
Teller County		Unclassifiable/Attainment.
State AQCR 05:		
Cheyenne County		Unclassifiable/Attainment.
Elbert County		Unclassifiable/Attainment.
Kit Carson County		Unclassifiable/Attainment.
Lincoln County		Unclassifiable/Attainment.
State AQCR 06:		
Baca County		Unclassifiable/Attainment.
Bent County		Unclassifiable/Attainment.
Crowley County		Unclassifiable/Attainment.
Kiowa County		Unclassifiable/Attainment.
Otero County		Unclassifiable/Attainment.
Prowers County		Unclassifiable/Attainment.
State AQCR 07:		
Huerfano County		Unclassifiable/Attainment.
Las Animas County		Unclassifiable/Attainment.
Pueblo County		Unclassifiable/Attainment.
State AQCR 08:		
Alamosa County		Unclassifiable/Attainment.
Conejos County		Unclassifiable/Attainment.
Costilla County		Unclassifiable/Attainment.
Mineral County		Unclassifiable/Attainment.
Rio Grande County		Unclassifiable/Attainment.
Saguache County		Unclassifiable/Attainment.
State AQCR 09:		
Archuleta County		Unclassifiable/Attainment.
Dolores County		Unclassifiable/Attainment.
La Plata County		Unclassifiable/Attainment.
Montezuma County		Unclassifiable/Attainment.
San Juan County		Unclassifiable/Attainment.
State AQCR 10:		
Delta County		Unclassifiable/Attainment.
Gunnison County		Unclassifiable/Attainment.
Hinsdale County		Unclassifiable/Attainment.
Montrose County		Unclassifiable/Attainment.
Ouray County		Unclassifiable/Attainment.
San Miguel County		Unclassifiable/Attainment.
State AQCR 11:		
Garfield County		Unclassifiable/Attainment.
Mesa County		Unclassifiable/Attainment.
Moffat County		Unclassifiable/Attainment.
Rio Blanco County		Unclassifiable/Attainment.
State AQCR 12:		
Eagle County		Unclassifiable/Attainment.
Grand County		Unclassifiable/Attainment.
Jackson County		Unclassifiable/Attainment.
Pitkin County		Unclassifiable/Attainment.
Routt County		Unclassifiable/Attainment.
Summit County		Unclassifiable/Attainment.
State AQCR 13:		
Chaffee County		Unclassifiable/Attainment.
Custer County		Unclassifiable/Attainment.
Fremont County		Unclassifiable/Attainment.
Lake County		Unclassifiable/Attainment.

[a] Includes Indian Country located in each county or area, except as otherwise specified.
[1] This date is 90 days after October 31, 2011, unless otherwise noted.

■ 8. Section 81.307 is amended as follows:

■ a. By revising the table heading ''Connecticut—NO_2'' to read ''Connecticut—NO_2 (1971 Annual Standard).''

■ b. By adding a table entitled ''Connecticut—NO_2 (2010 1-Hour Standard)'' in alphabetical order to read as follows:

§ 81.307 Connecticut.

* * * * *

CONNECTICUT—NO_2 (2010 1-HOUR STANDARD)

Designated area	Designation [a]	
	Date [1]	Type
State of Connecticut		Unclassifiable/Attainment.

[a] Includes Indian Country located in each county or area, except as otherwise specified.
[1] This date is 90 days after October 31, 2011, unless otherwise noted.

■ 9. Section 81.308 is amended as follows:

■ a. By revising the table heading ''Delaware—NO_2'' to read ''Delaware—NO_2 (1971 Annual Standard).''

■ b. By adding a table entitled ''Delaware—NO_2 (2010 1-Hour Standard)'' in alphabetical order to read as follows:

§ 81.308 Delaware.

* * * * *

DELAWARE—NO_2 (2010 1-HOUR STANDARD)

Designated area	Designation [a]	
	Date [1]	Type
Kent County		Unclassifiable/Attainment.
New Castle County		Unclassifiable/Attainment.
Sussex County		Unclassifiable/Attainment.

[a] Includes Indian Country located in each county or area, except as otherwise specified.
[1] This date is 90 days after October 31, 2011, unless otherwise noted.

■ 10. Section 81.309 is amended as follows:

■ a. By revising the table heading ''District of Columbia—NO_2'' to read ''District of Columbia—NO_2 (1971 Annual Standard).''

■ b. By adding a table entitled ''District of Columbia—NO_2 (2010 1-Hour Standard)'' in alphabetical order to read as follows:

§ 81.309 District of Columbia.

* * * * *

DISTRICT OF COLUMBIA—NO_2 (2010 1-HOUR STANDARD)

Designated area	Designation [a]	
	Date [1]	Type
District of Columbia		Unclassifiable/Attainment.

[a] Includes Indian Country located in each county or area, except as otherwise specified.
[1] This date is 90 days after October 31, 2011, unless otherwise noted.

■ 11. Section 81.310 is amended as follows:

■ a. By revising the table heading ''Florida—NO_2'' to read ''Florida—NO_2 (1971 Annual Standard).''

■ b. By adding a table entitled ''Florida—NO_2 (2010 1-Hour Standard)'' in alphabetical order to read as follows:

§ 81.310 Florida.

* * * * *

FLORIDA—NO_2 (2010 1-HOUR STANDARD)

Designated area	Designation [a]	
	Date [1]	Type
State of Florida		Unclassifiable/Attainment.

[a] Includes Indian Country located in each county or area, except as otherwise specified.
[1] This date is 90 days after October 31, 2011, unless otherwise noted.

■ 12. Section 81.311 is amended as follows:

■ a. By revising the table heading ''Georgia—NO_2'' to read ''Georgia—NO_2 (1971 Annual Standard).''

■ b. By adding a table entitled ''Georgia—NO_2 (2010 1-Hour Standard)'' in alphabetical order to read as follows:

§ 81.311 Georgia.

* * * * *

GEORGIA—NO_2 (2010 1-HOUR STANDARD)

Designated area	Designation [a]	
	Date [1]	Type
Appling County		Unclassifiable/Attainment.
Atkinson County		Unclassifiable/Attainment.
Bacon County		Unclassifiable/Attainment.
Baker County		Unclassifiable/Attainment.
Baldwin County		Unclassifiable/Attainment.
Banks County		Unclassifiable/Attainment.
Barrow County		Unclassifiable/Attainment.
Bartow County		Unclassifiable/Attainment.
Ben Hill County		Unclassifiable/Attainment.
Berrien County		Unclassifiable/Attainment.
Bibb County		Unclassifiable/Attainment.
Bleckley County		Unclassifiable/Attainment.
Brantley County		Unclassifiable/Attainment.
Brooks County		Unclassifiable/Attainment.
Bryan County		Unclassifiable/Attainment.
Bulloch County		Unclassifiable/Attainment.
Burke County		Unclassifiable/Attainment.
Butts County		Unclassifiable/Attainment.
Calhoun County		Unclassifiable/Attainment.
Camden County		Unclassifiable/Attainment.
Candler County		Unclassifiable/Attainment.
Carroll County		Unclassifiable/Attainment.
Catoosa County		Unclassifiable/Attainment.
Charlton County		Unclassifiable/Attainment.
Chatham County		Unclassifiable/Attainment.
Chattahoochee County		Unclassifiable/Attainment.
Chattooga County		Unclassifiable/Attainment.
Cherokee County		Unclassifiable/Attainment.
Clarke County		Unclassifiable/Attainment.
Clay County		Unclassifiable/Attainment.
Clayton County		Unclassifiable/Attainment.
Clinch County		Unclassifiable/Attainment.
Cobb County		Unclassifiable/Attainment.
Coffee County		Unclassifiable/Attainment.
Colquitt County		Unclassifiable/Attainment.
Columbia County		Unclassifiable/Attainment.
Cook County		Unclassifiable/Attainment.
Coweta County		Unclassifiable/Attainment.
Crawford County		Unclassifiable/Attainment.
Crisp County		Unclassifiable/Attainment.
Dade County		Unclassifiable/Attainment.
Dawson County		Unclassifiable/Attainment.
Decatur County		Unclassifiable/Attainment.
DeKalb County		Unclassifiable/Attainment.
Dodge County		Unclassifiable/Attainment.
Dooly County		Unclassifiable/Attainment.
Dougherty County		Unclassifiable/Attainment.
Douglass County		Unclassifiable/Attainment.
Early County		Unclassifiable/Attainment.
Echols County		Unclassifiable/Attainment.
Effingham County		Unclassifiable/Attainment.
Elbert County		Unclassifiable/Attainment.
Emanuel County		Unclassifiable/Attainment.
Evans County		Unclassifiable/Attainment.
Fannin County		Unclassifiable/Attainment.
Fayette County		Unclassifiable/Attainment.
Floyd County		Unclassifiable/Attainment.
Forsyth County		Unclassifiable/Attainment.
Franklin County		Unclassifiable/Attainment.
Fulton County		Unclassifiable/Attainment.
Gilmer County		Unclassifiable/Attainment.
Glascock County		Unclassifiable/Attainment.
Glynn County		Unclassifiable/Attainment.
Gordon County		Unclassifiable/Attainment.

GEORGIA—NO_2 (2010 1-HOUR STANDARD)—Continued

Designated area	Designation [a]	
	Date [1]	Type
Grady County		Unclassifiable/Attainment.
Greene County		Unclassifiable/Attainment.
Gwinnett County		Unclassifiable/Attainment.
Habersham County		Unclassifiable/Attainment.
Hall County		Unclassifiable/Attainment.
Hancock County		Unclassifiable/Attainment.
Haralson County		Unclassifiable/Attainment.
Harris County		Unclassifiable/Attainment.
Hart County		Unclassifiable/Attainment.
Heard County		Unclassifiable/Attainment.
Henry County		Unclassifiable/Attainment.
Houston County		Unclassifiable/Attainment.
Irwin County		Unclassifiable/Attainment.
Jackson County		Unclassifiable/Attainment.
Jasper County		Unclassifiable/Attainment.
Jeff Davis County		Unclassifiable/Attainment.
Jefferson County		Unclassifiable/Attainment.
Jenkins County		Unclassifiable/Attainment.
Johnson County		Unclassifiable/Attainment.
Jones County		Unclassifiable/Attainment.
Lamar County		Unclassifiable/Attainment.
Lanier County		Unclassifiable/Attainment.
Laurens County		Unclassifiable/Attainment.
Lee County		Unclassifiable/Attainment.
Liberty County		Unclassifiable/Attainment.
Lincoln County		Unclassifiable/Attainment.
Long County		Unclassifiable/Attainment.
Lowndes County		Unclassifiable/Attainment.
Lumpkin County		Unclassifiable/Attainment.
McDuffie County		Unclassifiable/Attainment.
McIntosh County		Unclassifiable/Attainment.
Macon County		Unclassifiable/Attainment.
Madison County		Unclassifiable/Attainment.
Marion County		Unclassifiable/Attainment.
Meriwether County		Unclassifiable/Attainment.
Miller County		Unclassifiable/Attainment.
Mitchell County		Unclassifiable/Attainment.
Monroe County		Unclassifiable/Attainment.
Montgomery County		Unclassifiable/Attainment.
Morgan County		Unclassifiable/Attainment.
Murray County		Unclassifiable/Attainment.
Muscogee County		Unclassifiable/Attainment.
Newton County		Unclassifiable/Attainment.
Oconee County		Unclassifiable/Attainment.
Oglethorpe County		Unclassifiable/Attainment.
Pauling County		Unclassifiable/Attainment.
Peach County		Unclassifiable/Attainment.
Pickens County		Unclassifiable/Attainment.
Pierce County		Unclassifiable/Attainment.
Pike County		Unclassifiable/Attainment.
Polk County		Unclassifiable/Attainment.
Pulaski County		Unclassifiable/Attainment.
Putnam County		Unclassifiable/Attainment.
Quitman County		Unclassifiable/Attainment.
Rabun County		Unclassifiable/Attainment.
Randolph County		Unclassifiable/Attainment.
Richmond County		Unclassifiable/Attainment.
Rockdale County		Unclassifiable/Attainment.
Schley County		Unclassifiable/Attainment.
Screven County		Unclassifiable/Attainment.
Seminole County		Unclassifiable/Attainment.
Spalding County		Unclassifiable/Attainment.
Stephens County		Unclassifiable/Attainment.
Stewart County		Unclassifiable/Attainment.
Sumter County		Unclassifiable/Attainment.
Talbot County		Unclassifiable/Attainment.
Taliaferro County		Unclassifiable/Attainment.
Tattnall County		Unclassifiable/Attainment.
Taylor County		Unclassifiable/Attainment.
Telfair County		Unclassifiable/Attainment.

GEORGIA—NO_2 (2010 1-HOUR STANDARD)—Continued

Designated area	Designation [a]	
	Date [1]	Type
Terrell County		Unclassifiable/Attainment.
Thomas County		Unclassifiable/Attainment.
Tift County		Unclassifiable/Attainment.
Toombs County		Unclassifiable/Attainment.
Towns County		Unclassifiable/Attainment.
Treutlen County		Unclassifiable/Attainment.
Troup County		Unclassifiable/Attainment.
Turner County		Unclassifiable/Attainment.
Twiggs County		Unclassifiable/Attainment.
Union County		Unclassifiable/Attainment.
Upson County		Unclassifiable/Attainment.
Walker County		Unclassifiable/Attainment.
Walton County		Unclassifiable/Attainment.
Ware County		Unclassifiable/Attainment.
Warren County		Unclassifiable/Attainment.
Washington County		Unclassifiable/Attainment.
Wayne County		Unclassifiable/Attainment.
Webster County		Unclassifiable/Attainment.
Wheeler County		Unclassifiable/Attainment.
White County		Unclassifiable/Attainment.
Whitfield County		Unclassifiable/Attainment.
Wilcox County		Unclassifiable/Attainment.
Wilkes County		Unclassifiable/Attainment.
Wilkinson County		Unclassifiable/Attainment.
Worth County		Unclassifiable/Attainment.

[a] Includes Indian Country located in each county or area, except as otherwise specified.
[1] This date is 90 days after October 31, 2011, unless otherwise noted.

■ 13. Section 81.312 is amended as follows:

■ a. By revising the table heading ''Hawaii—NO_2'' to read ''Hawaii—NO_2 (1971 Annual Standard).''

■ b. By adding a table entitled ''Hawaii—NO_2 (2010 1-Hour Standard)'' in alphabetical order to read as follows:

§ 81.312 Hawaii.

* * * * *

HAWAII—NO_2 (2010 1-HOUR STANDARD)

Designated area	Designation [a]	
	Date [1]	Type
Hawaii County		Unclassifiable/Attainment.
Honolulu County		Unclassifiable/Attainment.
Kalawao County		Unclassifiable/Attainment.
Kauai County		Unclassifiable/Attainment.
Maui County		Unclassifiable/Attainment.

[a] Includes Indian Country located in each county or area, except as otherwise specified.
[1] This date is 90 days after October 31, 2011, unless otherwise noted.

■ 14. Section 81.313 is amended as follows:

■ a. By revising the table heading ''Idaho—NO_2'' to read ''Idaho—NO_2 (1971 Annual Standard).''

■ b. By adding a table entitled ''Idaho—NO_2 (2010 1-Hour Standard)'' in alphabetical order to read as follows:

§ 81.314 Idaho.

* * * * *

IDAHO—NO_2 (2010 1-HOUR STANDARD)

Designated area	Designation [a]	
	Date [1]	Type
AQCR 61 Eastern Idaho Intrastate:		
Bannock County		Unclassifiable/Attainment.
Bear Lake County		Unclassifiable/Attainment.
Bingham County		Unclassifiable/Attainment.
Bonneville County		Unclassifiable/Attainment.
Butte County		Unclassifiable/Attainment.

IDAHO—NO_2 (2010 1-HOUR STANDARD)—Continued

Designated area	Designation [a]	
	Date [1]	Type
Caribou County		Unclassifiable/Attainment.
Clark County		Unclassifiable/Attainment.
Franklin County		Unclassifiable/Attainment.
Fremont County		Unclassifiable/Attainment.
Jefferson County		Unclassifiable/Attainment.
Madison County		Unclassifiable/Attainment.
Oneida County		Unclassifiable/Attainment.
Power County		Unclassifiable/Attainment.
Teton County		Unclassifiable/Attainment.
AQCR 62 E Washington-N Idaho Interstate:		
Benewah County		Unclassifiable/Attainment.
Kootenai County		Unclassifiable/Attainment.
Latah County		Unclassifiable/Attainment.
Nez Perce County		Unclassifiable/Attainment.
Shoshone County		Unclassifiable/Attainment.
AQCR 63 Idaho Interstate:		
Adams County		Unclassifiable/Attainment.
Blaine County		Unclassifiable/Attainment.
Boise County		Unclassifiable/Attainment.
Bonner County		Unclassifiable/Attainment.
Boundary County		Unclassifiable/Attainment.
Camas County		Unclassifiable/Attainment.
Cassia County		Unclassifiable/Attainment.
Clearwater County		Unclassifiable/Attainment.
Custer County		Unclassifiable/Attainment.
Elmore County		Unclassifiable/Attainment.
Gem County		Unclassifiable/Attainment.
Gooding County		Unclassifiable/Attainment.
Idaho County		Unclassifiable/Attainment.
Jerome County		Unclassifiable/Attainment.
Lewis County		Unclassifiable/Attainment.
Lincoln County		Unclassifiable/Attainment.
Minidoka County		Unclassifiable/Attainment.
Owyhee County		Unclassifiable/Attainment.
Payette County		Unclassifiable/Attainment.
Twin Falls County		Unclassifiable/Attainment.
Valley County		Unclassifiable/Attainment.
Washington County		Unclassifiable/Attainment.
AQCR 64 Metropolitan Boise Interstate:		
Ada County		Unclassifiable/Attainment.
Canyon County		Unclassifiable/Attainment.

[a] Includes Indian Country located in each county or area, except as otherwise specified.
[1] This date is 90 days after October 31, 2011, unless otherwise noted.

■ 15. Section 81.314 is amended as follows:

■ a. By revising the table heading ''Illinois—NO_2'' to read ''Illinois—NO_2 (1971 Annual Standard).''

■ b. By adding a table entitled ''Illinois—NO_2 (2010 1-Hour Standard)'' in alphabetical order to read as follows:

§ 81.314 Illinois.

* * * * *

ILLINOIS—NO_2 (2010 1-HOUR STANDARD)

Designated area	Designation [a]	
	Date [1]	Type
Adams County		Unclassifiable/Attainment.
Alexander County		Unclassifiable/Attainment.
Bond County		Unclassifiable/Attainment.
Boone County		Unclassifiable/Attainment.
Brown County		Unclassifiable/Attainment.
Bureau County		Unclassifiable/Attainment.
Calhoun County		Unclassifiable/Attainment.
Carroll County		Unclassifiable/Attainment.
Cass County		Unclassifiable/Attainment.
Champaign County		Unclassifiable/Attainment.
Christian County		Unclassifiable/Attainment.
Clark County		Unclassifiable/Attainment.

ILLINOIS—NO_2 (2010 1-HOUR STANDARD)—Continued

Designated area	Designation [a]	
	Date [1]	Type
Clay County		Unclassifiable/Attainment.
Clinton County		Unclassifiable/Attainment.
Coles County		Unclassifiable/Attainment.
Cook County		Unclassifiable/Attainment.
Crawford County		Unclassifiable/Attainment.
Cumberland County		Unclassifiable/Attainment.
DeKalb County		Unclassifiable/Attainment.
De Witt County		Unclassifiable/Attainment.
Douglas County		Unclassifiable/Attainment.
DuPage County		Unclassifiable/Attainment.
Edgar County		Unclassifiable/Attainment.
Edwards County		Unclassifiable/Attainment.
Effingham County		Unclassifiable/Attainment.
Fayette County		Unclassifiable/Attainment.
Ford County		Unclassifiable/Attainment.
Franklin County		Unclassifiable/Attainment.
Fulton County		Unclassifiable/Attainment.
Gallatin County		Unclassifiable/Attainment.
Greene County		Unclassifiable/Attainment.
Grundy County		Unclassifiable/Attainment.
Hamilton County		Unclassifiable/Attainment.
Hancock County		Unclassifiable/Attainment.
Hardin County		Unclassifiable/Attainment.
Henderson County		Unclassifiable/Attainment.
Henry County		Unclassifiable/Attainment.
Iroquois County		Unclassifiable/Attainment.
Jackson County		Unclassifiable/Attainment.
Jasper County		Unclassifiable/Attainment.
Jefferson County		Unclassifiable/Attainment.
Jersey County		Unclassifiable/Attainment.
Jo Daviess County		Unclassifiable/Attainment.
Johnson County		Unclassifiable/Attainment.
Kane County		Unclassifiable/Attainment.
Kankakee County		Unclassifiable/Attainment.
Kendall County		Unclassifiable/Attainment.
Knox County		Unclassifiable/Attainment.
La Salle County		Unclassifiable/Attainment.
Lake County		Unclassifiable/Attainment.
Lawrence County		Unclassifiable/Attainment.
Lee County		Unclassifiable/Attainment.
Livingston County		Unclassifiable/Attainment.
Logan County		Unclassifiable/Attainment.
Madison County		Unclassifiable/Attainment.
McDonough County		Unclassifiable/Attainment.
McLean County		Unclassifiable/Attainment.
Macon County		Unclassifiable/Attainment.
Macoupin County		Unclassifiable/Attainment.
Marion County		Unclassifiable/Attainment.
Marshall County		Unclassifiable/Attainment.
Mason County		Unclassifiable/Attainment.
Massac County		Unclassifiable/Attainment.
McHenry County		Unclassifiable/Attainment.
Menard County		Unclassifiable/Attainment.
Mercer County		Unclassifiable/Attainment.
Monroe County		Unclassifiable/Attainment.
Montgomery County		Unclassifiable/Attainment.
Morgan County		Unclassifiable/Attainment.
Moultrie County		Unclassifiable/Attainment.
Ogle County		Unclassifiable/Attainment.
Peoria County		Unclassifiable/Attainment.
Perry County		Unclassifiable/Attainment.
Piatt County		Unclassifiable/Attainment.
Pike County		Unclassifiable/Attainment.
Pope County		Unclassifiable/Attainment.
Pulaski County		Unclassifiable/Attainment.
Putnam County		Unclassifiable/Attainment.
Randolph County		Unclassifiable/Attainment.
Richland County		Unclassifiable/Attainment.
Rock Island County		Unclassifiable/Attainment.
St. Clair County		Unclassifiable/Attainment.

ILLINOIS—NO_2 (2010 1-HOUR STANDARD)—Continued

Designated area	Designation [a]	
	Date [1]	Type
Saline County		Unclassifiable/Attainment.
Sangamon County		Unclassifiable/Attainment.
Schuyler County		Unclassifiable/Attainment.
Scott County		Unclassifiable/Attainment.
Shelby County		Unclassifiable/Attainment.
Stark County		Unclassifiable/Attainment.
Stephenson County		Unclassifiable/Attainment.
Tazewell County		Unclassifiable/Attainment.
Union County		Unclassifiable/Attainment.
Vermilion County		Unclassifiable/Attainment.
Wabash County		Unclassifiable/Attainment.
Warren County		Unclassifiable/Attainment.
Washington County		Unclassifiable/Attainment.
Wayne County		Unclassifiable/Attainment.
White County		Unclassifiable/Attainment.
Whiteside County		Unclassifiable/Attainment.
Will County		Unclassifiable/Attainment.
Williamson County		Unclassifiable/Attainment.
Winnebago County		Unclassifiable/Attainment.
Woodford County		Unclassifiable/Attainment.

[a] Includes Indian Country located in each county or area, except as otherwise specified.
[1] This date is 90 days after October 31, 2011, unless otherwise noted.

■ 16. Section 81.315 is amended as follows:

■ a. By revising the table heading ''Indiana—NO_2'' to read ''Indiana—NO_2 (1971 Annual Standard).''

■ b. By adding a table entitled ''Indiana—NO_2 (2010 1-Hour Standard)'' in alphabetical order to read as follows:

§ 81.315 Indiana.

INDIANA—NO_2 (2010 1-HOUR STANDARD)

Designated area	Designation [a]	
	Date [1]	Type
Lake County		Unclassifiable/Attainment.
Marion County		Unclassifiable/Attainment.
St. Joseph County		Unclassifiable/Attainment.
Vanderburgh County		Unclassifiable/Attainment.
Rest of State		Unclassifiable/Attainment.

[a] Includes Indian Country located in each county or area, except as otherwise specified.
[1] This date is 90 days after October 31, 2011, unless otherwise noted.

■ 17. Section 81.316 is amended as follows:

■ a. By revising the table heading ''Iowa—NO_2'' to read ''Iowa—NO_2 (1971 Annual Standard).''

■ b. By adding a table entitled ''Iowa—NO_2 (2010 1-Hour Standard)'' in alphabetical order to read as follows:

§ 81.316 Iowa.

* * * * *

IOWA—NO_2 (2010 1-HOUR STANDARD)

Designated area	Designation [a]	
	Date [1]	Type
Adair County		Unclassifiable/Attainment.
Adams County		Unclassifiable/Attainment.
Allamakee County		Unclassifiable/Attainment.
Appanoose County		Unclassifiable/Attainment.
Audubon County		Unclassifiable/Attainment.
Benton County		Unclassifiable/Attainment.
Black Hawk County		Unclassifiable/Attainment.
Boone County		Unclassifiable/Attainment.
Bremer County		Unclassifiable/Attainment.
Buchanan County		Unclassifiable/Attainment.
Buena Vista County		Unclassifiable/Attainment.

IOWA—NO_2 (2010 1-HOUR STANDARD)—Continued

Designated area	Designation [a]	
	Date [1]	Type
Butler County		Unclassifiable/Attainment.
Calhoun County		Unclassifiable/Attainment.
Carroll County		Unclassifiable/Attainment.
Cass County		Unclassifiable/Attainment.
Cedar County		Unclassifiable/Attainment.
Cerro Gordo County		Unclassifiable/Attainment.
Cherokee County		Unclassifiable/Attainment.
Chickasaw County		Unclassifiable/Attainment.
Clarke County		Unclassifiable/Attainment.
Clay County		Unclassifiable/Attainment.
Clayton County		Unclassifiable/Attainment.
Clinton County		Unclassifiable/Attainment.
Crawford County		Unclassifiable/Attainment.
Dallas County		Unclassifiable/Attainment.
Davis County		Unclassifiable/Attainment.
Decatur County		Unclassifiable/Attainment.
Delaware County		Unclassifiable/Attainment.
Des Moines County		Unclassifiable/Attainment.
Dickinson County		Unclassifiable/Attainment.
Dubuque County		Unclassifiable/Attainment.
Emmet County		Unclassifiable/Attainment.
Fayette County		Unclassifiable/Attainment.
Floyd County		Unclassifiable/Attainment.
Franklin County		Unclassifiable/Attainment.
Fremont County		Unclassifiable/Attainment.
Greene County		Unclassifiable/Attainment.
Grundy County		Unclassifiable/Attainment.
Guthrie County		Unclassifiable/Attainment.
Hamilton County		Unclassifiable/Attainment.
Hancock County		Unclassifiable/Attainment.
Hardin County		Unclassifiable/Attainment.
Harrison County		Unclassifiable/Attainment.
Henry County		Unclassifiable/Attainment.
Howard County		Unclassifiable/Attainment.
Humboldt County		Unclassifiable/Attainment.
Ida County		Unclassifiable/Attainment.
Iowa County		Unclassifiable/Attainment.
Jackson County		Unclassifiable/Attainment.
Jasper County		Unclassifiable/Attainment.
Jefferson County		Unclassifiable/Attainment.
Johnson County		Unclassifiable/Attainment.
Jones County		Unclassifiable/Attainment.
Keokuk County		Unclassifiable/Attainment.
Kossuth County		Unclassifiable/Attainment.
Lee County		Unclassifiable/Attainment.
Linn County		Unclassifiable/Attainment.
Louisa County		Unclassifiable/Attainment.
Lucas County		Unclassifiable/Attainment.
Lyon County		Unclassifiable/Attainment.
Madison County		Unclassifiable/Attainment.
Mahaska County		Unclassifiable/Attainment.
Marion County		Unclassifiable/Attainment.
Marshall County		Unclassifiable/Attainment.
Mills County		Unclassifiable/Attainment.
Mitchell County		Unclassifiable/Attainment.
Monona County		Unclassifiable/Attainment.
Monroe County		Unclassifiable/Attainment.
Montgomery County		Unclassifiable/Attainment.
Muscatine County		Unclassifiable/Attainment.
O'Brien County		Unclassifiable/Attainment.
Osceola County		Unclassifiable/Attainment.
Page County		Unclassifiable/Attainment.
Palo Alto County		Unclassifiable/Attainment.
Plymouth County		Unclassifiable/Attainment.
Pocahontas County		Unclassifiable/Attainment.
Polk County		Unclassifiable/Attainment.
Pottawattamie County		Unclassifiable/Attainment.
Poweshiek County		Unclassifiable/Attainment.
Ringgold County		Unclassifiable/Attainment.
Sac County		Unclassifiable/Attainment.

IOWA—NO_2 (2010 1-HOUR STANDARD)—Continued

Designated area	Designation [a]	
	Date [1]	Type
Scott County		Unclassifiable/Attainment.
Shelby County		Unclassifiable/Attainment.
Sioux County		Unclassifiable/Attainment.
Story County		Unclassifiable/Attainment.
Tama County		Unclassifiable/Attainment.
Taylor County		Unclassifiable/Attainment.
Union County		Unclassifiable/Attainment.
Van Buren County		Unclassifiable/Attainment.
Wapello County		Unclassifiable/Attainment.
Warren County		Unclassifiable/Attainment.
Washington County		Unclassifiable/Attainment.
Wayne County		Unclassifiable/Attainment.
Webster County		Unclassifiable/Attainment.
Winnebago County		Unclassifiable/Attainment.
Winneshiek County		Unclassifiable/Attainment.
Woodbury County		Unclassifiable/Attainment.
Worth County		Unclassifiable/Attainment.
Wright County		Unclassifiable/Attainment.

[a] Includes Indian Country located in each county or area, except as otherwise specified.
[1] This date is 90 days after October 31, 2011, unless otherwise noted.

■ 18. Section 81.317 is amended as follows:

■ a. By revising the table heading ''Kansas—NO_2'' to read ''Kansas—NO_2 (1971 Annual Standard).''

■ b. By adding a table entitled ''Kansas—NO_2 (2010 1-Hour Standard)'' in alphabetical order to read as follows:

§ 81.317 Kansas.

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KANSAS—NO_2 (2010 1-HOUR STANDARD)

Designated area	Designation [a]	
	Date [1]	Type
Allen County		Unclassifiable/Attainment.
Anderson County		Unclassifiable/Attainment.
Atchison County		Unclassifiable/Attainment.
Barber County		Unclassifiable/Attainment.
Barton County		Unclassifiable/Attainment.
Bourbon County		Unclassifiable/Attainment.
Brown County		Unclassifiable/Attainment.
Butler County		Unclassifiable/Attainment.
Chase County		Unclassifiable/Attainment.
Chautauqua County		Unclassifiable/Attainment.
Cherokee County		Unclassifiable/Attainment.
Cheyenne County		Unclassifiable/Attainment.
Clark County		Unclassifiable/Attainment.
Clay County		Unclassifiable/Attainment.
Cloud County		Unclassifiable/Attainment.
Coffey County		Unclassifiable/Attainment.
Comanche County		Unclassifiable/Attainment.
Cowley County		Unclassifiable/Attainment.
Crawford County		Unclassifiable/Attainment.
Decatur County		Unclassifiable/Attainment.
Dickinson County		Unclassifiable/Attainment.
Doniphan County		Unclassifiable/Attainment.
Douglas County		Unclassifiable/Attainment.
Edwards County		Unclassifiable/Attainment.
Elk County		Unclassifiable/Attainment.
Ellis County		Unclassifiable/Attainment.
Ellsworth County		Unclassifiable/Attainment.
Finney County		Unclassifiable/Attainment.
Ford County		Unclassifiable/Attainment.
Franklin County		Unclassifiable/Attainment.
Geary County		Unclassifiable/Attainment.
Gove County		Unclassifiable/Attainment.
Graham County		Unclassifiable/Attainment.
Grant County		Unclassifiable/Attainment.
Gray County		Unclassifiable/Attainment.

KANSAS—NO_2 (2010 1-HOUR STANDARD)—Continued

Designated area	Designation [a]	
	Date [1]	Type
Greeley County		Unclassifiable/Attainment.
Greenwood County		Unclassifiable/Attainment.
Hamilton County		Unclassifiable/Attainment.
Harper County		Unclassifiable/Attainment.
Harvey County		Unclassifiable/Attainment.
Haskell County		Unclassifiable/Attainment.
Hodgeman County		Unclassifiable/Attainment.
Jackson County		Unclassifiable/Attainment.
Jefferson County		Unclassifiable/Attainment.
Jewell County		Unclassifiable/Attainment.
Johnson County		Unclassifiable/Attainment.
Kearny County		Unclassifiable/Attainment.
Kingman County		Unclassifiable/Attainment.
Kiowa County		Unclassifiable/Attainment.
Labette County		Unclassifiable/Attainment.
Lane County		Unclassifiable/Attainment.
Leavenworth County		Unclassifiable/Attainment.
Lincoln County		Unclassifiable/Attainment.
Linn County		Unclassifiable/Attainment.
Logan County		Unclassifiable/Attainment.
Lyon County		Unclassifiable/Attainment.
McPherson County		Unclassifiable/Attainment.
Marion County		Unclassifiable/Attainment.
Marshall County		Unclassifiable/Attainment.
Meade County		Unclassifiable/Attainment.
Miami County		Unclassifiable/Attainment.
Mitchell County		Unclassifiable/Attainment.
Montgomery County		Unclassifiable/Attainment.
Morris County		Unclassifiable/Attainment.
Morton County		Unclassifiable/Attainment.
Nemaha County		Unclassifiable/Attainment.
Neosho County		Unclassifiable/Attainment.
Ness County		Unclassifiable/Attainment.
Norton County		Unclassifiable/Attainment.
Osage County		Unclassifiable/Attainment.
Osborne County		Unclassifiable/Attainment.
Ottawa County		Unclassifiable/Attainment.
Pawnee County		Unclassifiable/Attainment.
Phillips County		Unclassifiable/Attainment.
Pottawatomie County		Unclassifiable/Attainment.
Pratt County		Unclassifiable/Attainment.
Rawlins County		Unclassifiable/Attainment.
Reno County		Unclassifiable/Attainment.
Republic County		Unclassifiable/Attainment.
Rice County		Unclassifiable/Attainment.
Riley County		Unclassifiable/Attainment.
Rooks County		Unclassifiable/Attainment.
Rush County		Unclassifiable/Attainment.
Russell County		Unclassifiable/Attainment.
Saline County		Unclassifiable/Attainment.
Scott County		Unclassifiable/Attainment.
Sedgwick County		Unclassifiable/Attainment.
Seward County		Unclassifiable/Attainment.
Shawnee County		Unclassifiable/Attainment.
Sheridan County		Unclassifiable/Attainment.
Sherman County		Unclassifiable/Attainment.
Smith County		Unclassifiable/Attainment.
Stafford County		Unclassifiable/Attainment.
Stanton County		Unclassifiable/Attainment.
Stevens County		Unclassifiable/Attainment.
Sumner County		Unclassifiable/Attainment.
Thomas County		Unclassifiable/Attainment.
Trego County		Unclassifiable/Attainment.
Wabaunsee County		Unclassifiable/Attainment.
Wallace County		Unclassifiable/Attainment.
Washington County		Unclassifiable/Attainment.
Wichita County		Unclassifiable/Attainment.
Wilson County		Unclassifiable/Attainment.
Woodson County		Unclassifiable/Attainment.

KANSAS—NO_2 (2010 1-HOUR STANDARD)—Continued

Designated area	Designation [a]	
	Date [1]	Type
Wyandotte County		Unclassifiable/Attainment.

[a] Includes Indian Country located in each county or area, except as otherwise specified.
[1] This date is 90 days after October 31, 2011, unless otherwise noted.

■ 19. Section 81.318 is amended as follows:

■ a. By revising the table heading ''Kentucky—NO_2'' to read ''Kentucky—NO_2 (1971 Annual Standard).''

■ b. By adding a table entitled ''Kentucky—NO_2 (2010 1-Hour Standard)'' in alphabetical order to read as follows:

§ 81.318 Kentucky.

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KENTUCKY—NO_2 (2010 1-HOUR STANDARD)

Designated area	Designation [a]	
	Date [1]	Type
Adair County		Unclassifiable/Attainment.
Allen County		Unclassifiable/Attainment.
Anderson County		Unclassifiable/Attainment.
Ballard County		Unclassifiable/Attainment.
Barren County		Unclassifiable/Attainment.
Bath County		Unclassifiable/Attainment.
Bell County		Unclassifiable/Attainment.
Boone County		Unclassifiable/Attainment.
Bourbon County		Unclassifiable/Attainment.
Boyd County		Unclassifiable/Attainment.
Boyle County		Unclassifiable/Attainment.
Bracken County		Unclassifiable/Attainment.
Breathitt County		Unclassifiable/Attainment.
Breckinridge County		Unclassifiable/Attainment.
Bullitt County		Unclassifiable/Attainment.
Butler County		Unclassifiable/Attainment.
Caldwell County		Unclassifiable/Attainment.
Calloway County		Unclassifiable/Attainment.
Campbell County		Unclassifiable/Attainment.
Carlisle County		Unclassifiable/Attainment.
Carroll County		Unclassifiable/Attainment.
Carter County		Unclassifiable/Attainment.
Casey County		Unclassifiable/Attainment.
Christian County		Unclassifiable/Attainment.
Clark County		Unclassifiable/Attainment.
Clay County		Unclassifiable/Attainment.
Clinton County		Unclassifiable/Attainment.
Crittenden County		Unclassifiable/Attainment.
Cumberland County		Unclassifiable/Attainment.
Daviess County		Unclassifiable/Attainment.
Edmonson County		Unclassifiable/Attainment.
Elliott County		Unclassifiable/Attainment.
Estill County		Unclassifiable/Attainment.
Fayette County		Unclassifiable/Attainment.
Fleming County		Unclassifiable/Attainment.
Floyd County		Unclassifiable/Attainment.
Franklin County		Unclassifiable/Attainment.
Fulton County		Unclassifiable/Attainment.
Gallatin County		Unclassifiable/Attainment.
Garrard County		Unclassifiable/Attainment.
Grant County		Unclassifiable/Attainment.
Graves County		Unclassifiable/Attainment.
Grayson County		Unclassifiable/Attainment.
Green County		Unclassifiable/Attainment.
Greenup County		Unclassifiable/Attainment.
Hancock County		Unclassifiable/Attainment.
Hardin County		Unclassifiable/Attainment.
Harlan County		Unclassifiable/Attainment.
Harrison County		Unclassifiable/Attainment.
Hart County		Unclassifiable/Attainment.
Henderson County		Unclassifiable/Attainment.
Henry County		Unclassifiable/Attainment.

KENTUCKY—NO_2 (2010 1-HOUR STANDARD)—Continued

Designated area	Designation [a]	
	Date [1]	Type
Hickman County		Unclassifiable/Attainment.
Hopkins County		Unclassifiable/Attainment.
Jackson County		Unclassifiable/Attainment.
Jefferson County		Unclassifiable/Attainment.
Jessamine County		Unclassifiable/Attainment.
Johnson County		Unclassifiable/Attainment.
Kenton County		Unclassifiable/Attainment.
Knott County		Unclassifiable/Attainment.
Knox County		Unclassifiable/Attainment.
Larue County		Unclassifiable/Attainment.
Laurel County		Unclassifiable/Attainment.
Lawrence County		Unclassifiable/Attainment.
Lee County		Unclassifiable/Attainment.
Leslie County		Unclassifiable/Attainment.
Letcher County		Unclassifiable/Attainment.
Lewis County		Unclassifiable/Attainment.
Lincoln County		Unclassifiable/Attainment.
Livingston County		Unclassifiable/Attainment.
Logan County		Unclassifiable/Attainment.
Lyon County		Unclassifiable/Attainment.
McCracken County		Unclassifiable/Attainment.
McCreary County		Unclassifiable/Attainment.
McLean County		Unclassifiable/Attainment.
Madison County		Unclassifiable/Attainment.
Magoffin County		Unclassifiable/Attainment.
Marion County		Unclassifiable/Attainment.
Marshall County		Unclassifiable/Attainment.
Martin County		Unclassifiable/Attainment.
Mason County		Unclassifiable/Attainment.
Meade County		Unclassifiable/Attainment.
Menifee County		Unclassifiable/Attainment.
Mercer County		Unclassifiable/Attainment.
Metcalfe County		Unclassifiable/Attainment.
Monroe County		Unclassifiable/Attainment.
Montgomery County		Unclassifiable/Attainment.
Morgan County		Unclassifiable/Attainment.
Muhlenberg County		Unclassifiable/Attainment.
Nelson County		Unclassifiable/Attainment.
Nicholas County		Unclassifiable/Attainment.
Ohio County		Unclassifiable/Attainment.
Oldham County		Unclassifiable/Attainment.
Owen County		Unclassifiable/Attainment.
Owsley County		Unclassifiable/Attainment.
Pendleton County		Unclassifiable/Attainment.
Perry County		Unclassifiable/Attainment.
Pike County		Unclassifiable/Attainment.
Powell County		Unclassifiable/Attainment.
Pulaski County		Unclassifiable/Attainment.
Robertson County		Unclassifiable/Attainment.
Rockcastle County		Unclassifiable/Attainment.
Rowan County		Unclassifiable/Attainment.
Russell County		Unclassifiable/Attainment.
Scott County		Unclassifiable/Attainment.
Shelby County		Unclassifiable/Attainment.
Simpson County		Unclassifiable/Attainment.
Spencer County		Unclassifiable/Attainment.
Taylor County		Unclassifiable/Attainment.
Todd County		Unclassifiable/Attainment.
Trigg County		Unclassifiable/Attainment.
Trimble County		Unclassifiable/Attainment.
Union County		Unclassifiable/Attainment.
Warren County		Unclassifiable/Attainment.
Washington County		Unclassifiable/Attainment.
Wayne County		Unclassifiable/Attainment.
Webster County		Unclassifiable/Attainment.
Whitley County		Unclassifiable/Attainment.
Wolfe County		Unclassifiable/Attainment.
Woodford County		Unclassifiable/Attainment.

[a] Includes Indian Country located in each county or area, except as otherwise specified.
[1] This date is 90 days after October 31, 2011, unless otherwise noted.

■ 20. Section 81.319 is amended as follows:

■ a. By revising the table heading ''Louisiana—NO_2'' to read ''Louisiana—NO_2 (1971 Annual Standard).''

■ b. By adding a table entitled ''Louisiana—NO_2 (2010 1-Hour Standard)'' in alphabetical order to read as follows:

§ 81.319 Louisiana.

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LOUISIANA—NO_2 (2010 1-HOUR STANDARD)

Designated area	Designation [a]	
	Date [1]	Type
Acadia Parish		Unclassifiable/Attainment.
Allen Parish		Unclassifiable/Attainment.
Ascension Parish		Unclassifiable/Attainment.
Assumption Parish		Unclassifiable/Attainment.
Avoyelles Parish		Unclassifiable/Attainment.
Beauregard Parish		Unclassifiable/Attainment.
Bienville Parish		Unclassifiable/Attainment.
Bossier Parish		Unclassifiable/Attainment.
Caddo Parish		Unclassifiable/Attainment.
Calcasieu Parish		Unclassifiable/Attainment.
Caldwell Parish		Unclassifiable/Attainment.
Cameron Parish		Unclassifiable/Attainment.
Catahoula Parish		Unclassifiable/Attainment.
Claiborne Parish		Unclassifiable/Attainment.
Concordia Parish		Unclassifiable/Attainment.
De Soto Parish		Unclassifiable/Attainment.
East Baton Rouge Parish		Unclassifiable/Attainment.
East Carroll Parish		Unclassifiable/Attainment.
East Feliciana Parish		Unclassifiable/Attainment.
Evangeline Parish		Unclassifiable/Attainment.
Franklin Parish		Unclassifiable/Attainment.
Grant Parish		Unclassifiable/Attainment.
Iberia Parish		Unclassifiable/Attainment.
Iberville Parish		Unclassifiable/Attainment.
Jackson Parish		Unclassifiable/Attainment.
Jefferson Davis Parish		Unclassifiable/Attainment.
Jefferson Parish		Unclassifiable/Attainment.
La Salle Parish		Unclassifiable/Attainment.
Lafayette Parish		Unclassifiable/Attainment.
Lafourche Parish		Unclassifiable/Attainment.
Lincoln Parish		Unclassifiable/Attainment.
Livingston Parish		Unclassifiable/Attainment.
Madison Parish		Unclassifiable/Attainment.
Morehouse Parish		Unclassifiable/Attainment.
Natchitoches Parish		Unclassifiable/Attainment.
Orleans Parish		Unclassifiable/Attainment.
Ouachita Parish		Unclassifiable/Attainment.
Plaquemines Parish		Unclassifiable/Attainment.
Pointe Coupee Parish		Unclassifiable/Attainment.
Rapides Parish		Unclassifiable/Attainment.
Red River Parish		Unclassifiable/Attainment.
Richland Parish		Unclassifiable/Attainment.
Sabine Parish		Unclassifiable/Attainment.
St. Bernard Parish		Unclassifiable/Attainment.
St. Charles Parish		Unclassifiable/Attainment.
St. Helena Parish		Unclassifiable/Attainment.
St. James Parish		Unclassifiable/Attainment.
St. John the Baptist Parish		Unclassifiable/Attainment.
St. Landry Parish		Unclassifiable/Attainment.
St. Martin Parish		Unclassifiable/Attainment.
St. Tammany Parish		Unclassifiable/Attainment.
Tangipahoa Parish		Unclassifiable/Attainment.
Terrebonne Parish		Unclassifiable/Attainment.
Tensas Parish		Unclassifiable/Attainment.
Vermilion Parish		Unclassifiable/Attainment.
Vernon Parish		Unclassifiable/Attainment.
Union Parish		Unclassifiable/Attainment.
Washington Parish		Unclassifiable/Attainment.
Webster Parish		Unclassifiable/Attainment.
West Baton Rouge Parish		Unclassifiable/Attainment.
West Carroll Parish		Unclassifiable/Attainment.
West Feliciana Parish		Unclassifiable/Attainment.
Winn Parish		Unclassifiable/Attainment

[a] Includes Indian Country located in each county or area, except as otherwise specified.

[1] This date is 90 days after October 31, 2011, unless otherwise noted.

■ 21. Section 81.320 is amended as follows:

■ a. By revising the table heading ''Maine—NO_2'' to read ''Maine—NO_2 (1971 Annual Standard).''

■ b. By adding a table entitled ''Maine—NO_2 (2010 1-Hour Standard)'' in alphabetical order to read as follows:

§ 81.320 Maine.

* * * * *

MAINE—NO_2 (2010 1-HOUR STANDARD)

Designated area	Designation [a]	
	Date [1]	Type
State of Maine		Unclassifiable/Attainment.

[a] Includes Indian Country located in each county or area, except as otherwise specified.
[1] This date is 90 days after October 31, 2011, unless otherwise noted.

■ 22. Section 81.321 is amended as follows:

■ a. By revising the table heading ''Maryland—NO_2'' to read ''Maryland—NO_2 (1971 Annual Standard).''

■ b. By adding a table entitled ''Maryland—NO_2 (2010 1-Hour Standard)'' in alphabetical order to read as follows:

§ 81.321 Maryland.

* * * * *

MARYLAND—NO_2 (2010 1-HOUR STANDARD)

Designated area	Designation [a]	
	Date [1]	Type
Allegany County		Unclassifiable/Attainment.
Anne Arundel County		Unclassifiable/Attainment.
Baltimore County		Unclassifiable/Attainment.
City of Baltimore		Unclassifiable/Attainment.
Calvert County		Unclassifiable/Attainment.
Caroline County		Unclassifiable/Attainment.
Carroll County		Unclassifiable/Attainment.
Cecil County		Unclassifiable/Attainment.
Charles County		Unclassifiable/Attainment.
Dorchester County		Unclassifiable/Attainment.
Frederick County		Unclassifiable/Attainment.
Garrett County		Unclassifiable/Attainment.
Harford County		Unclassifiable/Attainment.
Howard County		Unclassifiable/Attainment.
Kent County		Unclassifiable/Attainment.
Montgomery County		Unclassifiable/Attainment.
Prince George's County		Unclassifiable/Attainment.
Queene Anne's County		Unclassifiable/Attainment.
St. Mary's County		Unclassifiable/Attainment.
Somerset County		Unclassifiable/Attainment.
Talbot County		Unclassifiable/Attainment.
Washington County		Unclassifiable/Attainment.
Wicomico County		Unclassifiable/Attainment.
Worchester County		Unclassifiable/Attainment.

[a] Includes Indian Country located in each county or area, except as otherwise specified.
[1] This date is 90 days after October 31, 2011, unless otherwise noted.

■ 23. Section 81.322 is amended as follows:

■ a. By revising the table heading ''Massachusetts—NO_2'' to read ''Massachusetts—NO_2 (1971 Annual Standard).''

■ b. By adding a table entitled ''Massachusetts—NO_2 (2010 1-Hour Standard)'' in alphabetical order to read as follows:

§ 81.322 Massachusetts.

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MASSACHUSETTS—NO_2 (2010 1-HOUR STANDARD)

Designated area	Designation [a]	
	Date [1]	Type
State of Massachusetts		Unclassifiable/Attainment.

[a] Includes Indian Country located in each county or area, except as otherwise specified.
[1] This date is 90 days after October 31, 2011, unless otherwise noted.

■ 24. Section 81.323 is amended as follows:

■ a. By revising the table heading ''Michigan—NO_2'' to read ''Michigan—NO_2 (1971 Annual Standard).''

■ b. By adding a table entitled ''Michigan—NO_2 (2010 1-Hour Standard)'' in alphabetical order to read as follows:

§ 81.323 Michigan.

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MICHIGAN—NO_2 (2010 1-HOUR STANDARD)

Designated area	Designation [a]	
	Date [1]	Type
Alcona County		Unclassifiable/Attainment.
Alger County		Unclassifiable/Attainment.
Allegan County		Unclassifiable/Attainment.
Alpena County		Unclassifiable/Attainment.
Antrim County		Unclassifiable/Attainment.
Arenac County		Unclassifiable/Attainment.
Baraga County		Unclassifiable/Attainment.
Barry County		Unclassifiable/Attainment.
Bay County		Unclassifiable/Attainment.
Benzie County		Unclassifiable/Attainment.
Berrien County		Unclassifiable/Attainment.
Branch County		Unclassifiable/Attainment.
Calhoun County		Unclassifiable/Attainment.
Cass County		Unclassifiable/Attainment.
Charlevoix County		Unclassifiable/Attainment.
Cheboygan County		Unclassifiable/Attainment.
Chippewa County		Unclassifiable/Attainment.
Clare County		Unclassifiable/Attainment.
Clinton County		Unclassifiable/Attainment.
Crawford County		Unclassifiable/Attainment.
Delta County		Unclassifiable/Attainment.
Dickinson County		Unclassifiable/Attainment.
Eaton County		Unclassifiable/Attainment.
Emmet County		Unclassifiable/Attainment.
Genesee County		Unclassifiable/Attainment.
Gladwin County		Unclassifiable/Attainment.
Gogebic County		Unclassifiable/Attainment.
Grand Traverse County		Unclassifiable/Attainment.
Gratiot County		Unclassifiable/Attainment.
Hillsdale County		Unclassifiable/Attainment.
Houghton County		Unclassifiable/Attainment.
Huron County		Unclassifiable/Attainment.
Ingham County		Unclassifiable/Attainment.
Ionia County		Unclassifiable/Attainment.
Iosco County		Unclassifiable/Attainment.
Iron County		Unclassifiable/Attainment.
Isabella County		Unclassifiable/Attainment.
Jackson County		Unclassifiable/Attainment.
Kalamazoo County		Unclassifiable/Attainment.
Kalkaska County		Unclassifiable/Attainment.
Kent County		Unclassifiable/Attainment.
Keweenaw County		Unclassifiable/Attainment.
Lake County		Unclassifiable/Attainment.
Lapeer County		Unclassifiable/Attainment.
Leelanau County		Unclassifiable/Attainment.
Lenawee County		Unclassifiable/Attainment.
Livingston County		Unclassifiable/Attainment.
Luce County		Unclassifiable/Attainment.
Mackinac County		Unclassifiable/Attainment.
Macomb County		Unclassifiable/Attainment.
Manistee County		Unclassifiable/Attainment.
Marquette County		Unclassifiable/Attainment.

MICHIGAN—NO_2 (2010 1-HOUR STANDARD)—Continued

Designated area	Designation [a]	
	Date [1]	Type
Mason County		Unclassifiable/Attainment.
Mecosta County		Unclassifiable/Attainment.
Menominee County		Unclassifiable/Attainment.
Midland County		Unclassifiable/Attainment.
Missaukee County		Unclassifiable/Attainment.
Monroe County		Unclassifiable/Attainment.
Montcalm County		Unclassifiable/Attainment.
Montmorency County		Unclassifiable/Attainment.
Muskegon County		Unclassifiable/Attainment.
Newaygo County		Unclassifiable/Attainment.
Oakland County		Unclassifiable/Attainment.
Oceana County		Unclassifiable/Attainment.
Ogemaw County		Unclassifiable/Attainment.
Ontonagon County		Unclassifiable/Attainment.
Osceola County		Unclassifiable/Attainment.
Oscoda County		Unclassifiable/Attainment.
Otsego County		Unclassifiable/Attainment.
Ottawa County		Unclassifiable/Attainment.
Presque Isle County		Unclassifiable/Attainment.
Roscommon County		Unclassifiable/Attainment.
Saginaw County		Unclassifiable/Attainment.
St. Clair County		Unclassifiable/Attainment.
St. Joseph County		Unclassifiable/Attainment.
Sanilac County		Unclassifiable/Attainment.
Schoolcraft County		Unclassifiable/Attainment.
Shiawassee County		Unclassifiable/Attainment.
Tuscola County		Unclassifiable/Attainment.
Van Buren County		Unclassifiable/Attainment.
Washtenaw County		Unclassifiable/Attainment.
Wayne County		Unclassifiable/Attainment.
Wexford County		Unclassifiable/Attainment.

[a] Includes Indian Country located in each county or area, except as otherwise specified.
[1] This date is 90 days after October 31, 2011, unless otherwise noted.

■ 25. Section 81.324 is amended as follows:

■ a. By revising the table heading ''Minnesota—NO_2'' to read ''Minnesota—NO_2 (1971 Annual Standard).''

■ b. By adding a table entitled ''Minnesota—NO_2 (2010 1-Hour Standard)'' in alphabetical order to read as follows:

§ 81.324 Minnesota.

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MINNESOTA—NO_2 (2010 1-HOUR STANDARD)

Designated area	Designation [a]	
	Date [1]	Type
State of Minnesota		Unclassifiable/Attainment.

[a] Includes Indian Country located in each county or area, except as otherwise specified.
[1] This date is 90 days after October 31, 2011, unless otherwise noted.

■ 26. Section 81.325 is amended as follows:

■ a. By revising the table heading ''Mississippi—NO_2'' to read ''Mississippi—NO_2 (1971 Annual Standard).''

■ b. By adding a table entitled ''Mississippi—NO_2 (2010 1-Hour Standard)'' in alphabetical order to read as follows:

§ 81.325 Mississippi.

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MISSISSIPPI—NO_2 (2010 1-HOUR STANDARD)

Designated area	Designation [a]	
	Date [1]	Type
Adams County		Unclassifiable/Attainment.
Alcorn County		Unclassifiable/Attainment.
Amite County		Unclassifiable/Attainment.
Attala County		Unclassifiable/Attainment.

MISSISSIPPI—NO_2 (2010 1-HOUR STANDARD)—Continued

Designated area	Designation [a]	
	Date [1]	Type
Benton County		Unclassifiable/Attainment.
Bolivar County		Unclassifiable/Attainment.
Calhoun County		Unclassifiable/Attainment.
Carroll County		Unclassifiable/Attainment.
Chickasaw County		Unclassifiable/Attainment.
Choctaw County		Unclassifiable/Attainment.
Claiborne County		Unclassifiable/Attainment.
Clarke County		Unclassifiable/Attainment.
Clay County		Unclassifiable/Attainment.
Coahoma County		Unclassifiable/Attainment.
Copiah County		Unclassifiable/Attainment.
Covington County		Unclassifiable/Attainment.
DeSoto County		Unclassifiable/Attainment.
Forrest County		Unclassifiable/Attainment.
Franklin County		Unclassifiable/Attainment.
George County		Unclassifiable/Attainment.
Greene County		Unclassifiable/Attainment.
Grenada County		Unclassifiable/Attainment.
Hancock County		Unclassifiable/Attainment.
Harrison County		Unclassifiable/Attainment.
Hinds County		Unclassifiable/Attainment.
Holmes County		Unclassifiable/Attainment.
Humphreys County		Unclassifiable/Attainment.
Issaquena County		Unclassifiable/Attainment.
Itawamba County		Unclassifiable/Attainment.
Jackson County		Unclassifiable/Attainment.
Jasper County		Unclassifiable/Attainment.
Jefferson County		Unclassifiable/Attainment.
Jefferson Davis County		Unclassifiable/Attainment.
Jones County		Unclassifiable/Attainment.
Kemper County		Unclassifiable/Attainment.
Lafayette County		Unclassifiable/Attainment.
Lamar County		Unclassifiable/Attainment.
Lauderdale County		Unclassifiable/Attainment.
Lawrence County		Unclassifiable/Attainment.
Leake County		Unclassifiable/Attainment.
Lee County		Unclassifiable/Attainment.
Leflore County		Unclassifiable/Attainment.
Lincoln County		Unclassifiable/Attainment.
Lowndes County		Unclassifiable/Attainment.
Madison County		Unclassifiable/Attainment.
Marion County		Unclassifiable/Attainment.
Marshall County		Unclassifiable/Attainment.
Monroe County		Unclassifiable/Attainment.
Montgomery County		Unclassifiable/Attainment.
Neshoba County		Unclassifiable/Attainment.
Newton County		Unclassifiable/Attainment.
Noxubee County		Unclassifiable/Attainment.
Oktibbeha County		Unclassifiable/Attainment.
Panola County		Unclassifiable/Attainment.
Pearl River County		Unclassifiable/Attainment.
Perry County		Unclassifiable/Attainment.
Pike County		Unclassifiable/Attainment.
Pontotoc County		Unclassifiable/Attainment.
Prentiss County		Unclassifiable/Attainment.
Quitman County		Unclassifiable/Attainment.
Rankin County		Unclassifiable/Attainment.
Scott County		Unclassifiable/Attainment.
Sharkey County		Unclassifiable/Attainment.
Simpson County		Unclassifiable/Attainment.
Smith County		Unclassifiable/Attainment.
Stone County		Unclassifiable/Attainment.
Sunflower County		Unclassifiable/Attainment.
Tallahatchie County		Unclassifiable/Attainment.
Tate County		Unclassifiable/Attainment.
Tippah County		Unclassifiable/Attainment.
Tishomingo County		Unclassifiable/Attainment.
Tunica County		Unclassifiable/Attainment.
Union County		Unclassifiable/Attainment.
Walthall County		Unclassifiable/Attainment.

MISSISSIPPI—NO_2 (2010 1-HOUR STANDARD)—Continued

Designated area	Designation [a]	
	Date [1]	Type
Warren County		Unclassifiable/Attainment.
Washington County		Unclassifiable/Attainment.
Wayne County		Unclassifiable/Attainment.
Webster County		Unclassifiable/Attainment.
Wilkinson County		Unclassifiable/Attainment.
Winston County		Unclassifiable/Attainment.
Yalobusha County		Unclassifiable/Attainment.
Yazoo County		Unclassifiable/Attainment.

[a] Includes Indian Country located in each county or area, except as otherwise specified.
[1] This date is 90 days after October 31, 2011, unless otherwise noted.

■ 27. Section 81.326 is amended as follows:

■ a. By revising the table heading ''Missouri—NO_2'' to read ''Missouri—NO_2 (1971 Annual Standard).''

■ b. By adding a table entitled ''Missouri—NO_2 (2010 1-Hour Standard)'' in alphabetical order to read as follows:

§ 81.326 Missouri.

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MISSOURI—NO_2 (2010 1-HOUR STANDARD)

Designated area	Designation [a]	
	Date [1]	Type
Adair County		Unclassifiable/Attainment.
Andrew County		Unclassifiable/Attainment.
Atchison County		Unclassifiable/Attainment.
Audrain County		Unclassifiable/Attainment.
Barry County		Unclassifiable/Attainment.
Barton County		Unclassifiable/Attainment.
Bates County		Unclassifiable/Attainment.
Benton County		Unclassifiable/Attainment.
Bollinger County		Unclassifiable/Attainment.
Boone County		Unclassifiable/Attainment.
Buchanan County		Unclassifiable/Attainment.
Butler County		Unclassifiable/Attainment.
Caldwell County		Unclassifiable/Attainment.
Callaway County		Unclassifiable/Attainment.
Camden County		Unclassifiable/Attainment.
Cape Girardeau County		Unclassifiable/Attainment.
Carroll County		Unclassifiable/Attainment.
Carter County		Unclassifiable/Attainment.
Cass County		Unclassifiable/Attainment.
Cedar County		Unclassifiable/Attainment.
Chariton County		Unclassifiable/Attainment.
Christian County		Unclassifiable/Attainment.
Clark County		Unclassifiable/Attainment.
Clay County		Unclassifiable/Attainment.
Clinton County		Unclassifiable/Attainment.
Cole County		Unclassifiable/Attainment.
Cooper County		Unclassifiable/Attainment.
Crawford County		Unclassifiable/Attainment.
Dade County		Unclassifiable/Attainment.
Dallas County		Unclassifiable/Attainment.
Daviess County		Unclassifiable/Attainment.
DeKalb County		Unclassifiable/Attainment.
Dent County		Unclassifiable/Attainment.
Douglas County		Unclassifiable/Attainment.
Dunklin County		Unclassifiable/Attainment.
Franklin County		Unclassifiable/Attainment.
Gasconade County		Unclassifiable/Attainment.
Gentry County		Unclassifiable/Attainment.
Greene County		Unclassifiable/Attainment.
Grundy County		Unclassifiable/Attainment.
Harrison County		Unclassifiable/Attainment.
Henry County		Unclassifiable/Attainment.
Hickory County		Unclassifiable/Attainment.
Holt County		Unclassifiable/Attainment.
Howard County		Unclassifiable/Attainment.

MISSOURI—NO_2 (2010 1-HOUR STANDARD)—Continued

Designated area	Designation [a]	
	Date [1]	Type
Howell County		Unclassifiable/Attainment.
Iron County		Unclassifiable/Attainment.
Jackson County		Unclassifiable/Attainment.
Jasper County		Unclassifiable/Attainment.
Jefferson County		Unclassifiable/Attainment.
Johnson County		Unclassifiable/Attainment.
Knox County		Unclassifiable/Attainment.
Laclede County		Unclassifiable/Attainment.
Lafayette County		Unclassifiable/Attainment.
Lawrence County		Unclassifiable/Attainment.
Lewis County		Unclassifiable/Attainment.
Lincoln County		Unclassifiable/Attainment.
Linn County		Unclassifiable/Attainment.
Livingston County		Unclassifiable/Attainment.
McDonald County		Unclassifiable/Attainment.
Macon County		Unclassifiable/Attainment.
Madison County		Unclassifiable/Attainment.
Maries County		Unclassifiable/Attainment.
Marion County		Unclassifiable/Attainment.
Mercer County		Unclassifiable/Attainment.
Miller County		Unclassifiable/Attainment.
Mississippi County		Unclassifiable/Attainment.
Moniteau County		Unclassifiable/Attainment.
Monroe County		Unclassifiable/Attainment.
Montgomery County		Unclassifiable/Attainment.
Morgan County		Unclassifiable/Attainment.
New Madrid County		Unclassifiable/Attainment.
Newton County		Unclassifiable/Attainment.
Nodaway County		Unclassifiable/Attainment.
Oregon County		Unclassifiable/Attainment.
Osage County		Unclassifiable/Attainment.
Ozark County		Unclassifiable/Attainment.
Pemiscot County		Unclassifiable/Attainment.
Perry County		Unclassifiable/Attainment.
Pettis County		Unclassifiable/Attainment.
Phelps County		Unclassifiable/Attainment.
Pike County		Unclassifiable/Attainment.
Platte County		Unclassifiable/Attainment.
Polk County		Unclassifiable/Attainment.
Pulaski County		Unclassifiable/Attainment.
Putnam County		Unclassifiable/Attainment.
Ralls County		Unclassifiable/Attainment.
Randolph County		Unclassifiable/Attainment.
Ray County		Unclassifiable/Attainment.
Reynolds County		Unclassifiable/Attainment.
Ripley County		Unclassifiable/Attainment.
St. Charles County		Unclassifiable/Attainment.
St. Clair County		Unclassifiable/Attainment.
St. Genevieve County		Unclassifiable/Attainment.
St. Francois County		Unclassifiable/Attainment.
St. Louis County		Unclassifiable/Attainment.
St. Louis City		Unclassifiable/Attainment.
Saline County		Unclassifiable/Attainment.
Schuyler County		Unclassifiable/Attainment.
Scotland County		Unclassifiable/Attainment.
Scott County		Unclassifiable/Attainment.
Shannon County		Unclassifiable/Attainment.
Shelby County		Unclassifiable/Attainment.
Stoddard County		Unclassifiable/Attainment.
Stone County		Unclassifiable/Attainment.
Sullivan County		Unclassifiable/Attainment.
Taney County		Unclassifiable/Attainment.
Texas County		Unclassifiable/Attainment.
Vernon County		Unclassifiable/Attainment.
Warren County		Unclassifiable/Attainment.
Washington County		Unclassifiable/Attainment.
Wayne County		Unclassifiable/Attainment.
Webster County		Unclassifiable/Attainment.
Worth County		Unclassifiable/Attainment.

MISSOURI—NO_2 (2010 1-HOUR STANDARD)—Continued

Designated area	Designation [a]	
	Date [1]	Type
Wright County		Unclassifiable/Attainment.

[a] Includes Indian Country located in each county or area, except as otherwise specified.
[1] This date is 90 days after October 31, 2011, unless otherwise noted.

■ 28. Section 81.327 is amended as follows:

■ a. By revising the table heading ''Montana—NO_2'' to read ''Montana—NO_2 (1971 Annual Standard).''

■ b. By adding a table entitled ''Montana—NO_2 (2010 1-Hour Standard)'' in alphabetical order to read as follows:

§ 81.327 Montana.

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MONTANA—NO_2 (2010 1-HOUR STANDARD)

Designated area	Designation [a]	
	Date [1]	Type
Beaverhead County		Unclassifiable/Attainment.
Big Horn County		Unclassifiable/Attainment.
Blaine County		Unclassifiable/Attainment.
Broadwater County		Unclassifiable/Attainment.
Carbon County		Unclassifiable/Attainment.
Carter County		Unclassifiable/Attainment.
Cascade County		Unclassifiable/Attainment.
Chouteau County		Unclassifiable/Attainment.
Custer County		Unclassifiable/Attainment.
Daniels County		Unclassifiable/Attainment.
Dawson County		Unclassifiable/Attainment.
Deer Lodge County		Unclassifiable/Attainment.
Fallon County		Unclassifiable/Attainment.
Fergus County		Unclassifiable/Attainment.
Flathead County		Unclassifiable/Attainment.
Gallatin County		Unclassifiable/Attainment.
Garfield County		Unclassifiable/Attainment.
Glacier County		Unclassifiable/Attainment.
Golden Valley County		Unclassifiable/Attainment.
Granite County		Unclassifiable/Attainment.
Hill County		Unclassifiable/Attainment.
Jefferson County		Unclassifiable/Attainment.
Judith Basin County		Unclassifiable/Attainment.
Lake County		Unclassifiable/Attainment.
Lewis and Clark County		Unclassifiable/Attainment.
Liberty County		Unclassifiable/Attainment.
Lincoln County		Unclassifiable/Attainment.
McCone County		Unclassifiable/Attainment.
Madison County		Unclassifiable/Attainment.
Meagher County		Unclassifiable/Attainment.
Mineral County		Unclassifiable/Attainment.
Missoula County		Unclassifiable/Attainment.
Musselshell County		Unclassifiable/Attainment.
Park County		Unclassifiable/Attainment.
Petroleum County		Unclassifiable/Attainment.
Phillips County		Unclassifiable/Attainment.
Pondera County		Unclassifiable/Attainment.
Powder River County		Unclassifiable/Attainment.
Powell County		Unclassifiable/Attainment.
Prairie County		Unclassifiable/Attainment.
Ravalli County		Unclassifiable/Attainment.
Richland County		Unclassifiable/Attainment.
Roosevelt County		Unclassifiable/Attainment.
Rosebud County		Unclassifiable/Attainment.
Sanders County		Unclassifiable/Attainment.
Sheridan County		Unclassifiable/Attainment.
Silver Bow County		Unclassifiable/Attainment.
Stillwater County		Unclassifiable/Attainment.
Sweet Grass County		Unclassifiable/Attainment.
Teton County		Unclassifiable/Attainment.
Toole County		Unclassifiable/Attainment.
Treasure County		Unclassifiable/Attainment.

MONTANA—NO_2 (2010 1-HOUR STANDARD)—Continued

Designated area	Designation [a]	
	Date [1]	Type
Valley County		Unclassifiable/Attainment.
Wheatland County		Unclassifiable/Attainment.
Wibaux County		Unclassifiable/Attainment.
Yellowstone County		Unclassifiable/Attainment.

[a] Includes Indian Country located in each county or area, except as otherwise specified.
[1] This date is 90 days after October 31, 2011, unless otherwise noted.

■ 29. Section 81.328 is amended as follows:

■ a. By revising the table heading ''Nebraska—NO_2'' to read ''Nebraska—NO_2 (1971 Annual Standard).''

■ b. By adding a table entitled ''Nebraska—NO_2 (2010 1-Hour Standard)'' in alphabetical order to read as follows:

§ 81.328 Nebraska.

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NEBRASKA—NO_2 (2010 1-HOUR STANDARD)

Designated area	Designation [a]	
	Date [1]	Type
Adams County		Unclassifiable/Attainment.
Antelope County		Unclassifiable/Attainment.
Arthur County		Unclassifiable/Attainment.
Banner County		Unclassifiable/Attainment.
Blaine County		Unclassifiable/Attainment.
Boone County		Unclassifiable/Attainment.
Box Butte County		Unclassifiable/Attainment.
Boyd County		Unclassifiable/Attainment.
Brown County		Unclassifiable/Attainment.
Buffalo County		Unclassifiable/Attainment.
Burt County		Unclassifiable/Attainment.
Butler County		Unclassifiable/Attainment.
Cass County		Unclassifiable/Attainment.
Cedar County		Unclassifiable/Attainment.
Chase County		Unclassifiable/Attainment.
Cherry County		Unclassifiable/Attainment.
Cheyenne County		Unclassifiable/Attainment.
Clay County		Unclassifiable/Attainment.
Colfax County		Unclassifiable/Attainment.
Cuming County		Unclassifiable/Attainment.
Custer County		Unclassifiable/Attainment.
Dakota County		Unclassifiable/Attainment.
Dawes County		Unclassifiable/Attainment.
Dawson County		Unclassifiable/Attainment.
Deuel County		Unclassifiable/Attainment.
Dixon County		Unclassifiable/Attainment.
Dodge County		Unclassifiable/Attainment.
Douglas County		Unclassifiable/Attainment.
Dundy County		Unclassifiable/Attainment.
Fillmore County		Unclassifiable/Attainment.
Franklin County		Unclassifiable/Attainment.
Frontier County		Unclassifiable/Attainment.
Furnas County		Unclassifiable/Attainment.
Gage County		Unclassifiable/Attainment.
Garden County		Unclassifiable/Attainment.
Garfield County		Unclassifiable/Attainment.
Gosper County		Unclassifiable/Attainment.
Grant County		Unclassifiable/Attainment.
Greeley County		Unclassifiable/Attainment.
Hall County		Unclassifiable/Attainment.
Hamilton County		Unclassifiable/Attainment.
Harlan County		Unclassifiable/Attainment.
Hayes County		Unclassifiable/Attainment.
Hitchcock County		Unclassifiable/Attainment.
Holt County		Unclassifiable/Attainment.
Hooker County		Unclassifiable/Attainment.
Howard County		Unclassifiable/Attainment.
Jefferson County		Unclassifiable/Attainment.
Johnson County		Unclassifiable/Attainment.

NEBRASKA—NO_2 (2010 1-HOUR STANDARD)—Continued

Designated area	Designation [a]	
	Date [1]	Type
Kearney County		Unclassifiable/Attainment.
Keith County		Unclassifiable/Attainment.
Keya Paha County		Unclassifiable/Attainment.
Kimball County		Unclassifiable/Attainment.
Knox County		Unclassifiable/Attainment.
Lancaster County		Unclassifiable/Attainment.
Lincoln County		Unclassifiable/Attainment.
Logan County		Unclassifiable/Attainment.
Loup County		Unclassifiable/Attainment.
McPherson County		Unclassifiable/Attainment.
Madison County		Unclassifiable/Attainment.
Merrick County		Unclassifiable/Attainment.
Morrill County		Unclassifiable/Attainment.
Nance County		Unclassifiable/Attainment.
Nemaha County		Unclassifiable/Attainment.
Nuckolls County		Unclassifiable/Attainment.
Otoe County		Unclassifiable/Attainment.
Pawnee County		Unclassifiable/Attainment.
Perkins County		Unclassifiable/Attainment.
Phelps County		Unclassifiable/Attainment.
Pierce County		Unclassifiable/Attainment.
Platte County		Unclassifiable/Attainment.
Polk County		Unclassifiable/Attainment.
Red Willow County		Unclassifiable/Attainment.
Richardson County		Unclassifiable/Attainment.
Rock County		Unclassifiable/Attainment.
Saline County		Unclassifiable/Attainment.
Sarpy County		Unclassifiable/Attainment.
Saunders County		Unclassifiable/Attainment.
Scotts Bluff County		Unclassifiable/Attainment.
Seward County		Unclassifiable/Attainment.
Sheridan County		Unclassifiable/Attainment.
Sherman County		Unclassifiable/Attainment.
Sioux County		Unclassifiable/Attainment.
Stanton County		Unclassifiable/Attainment.
Thayer County		Unclassifiable/Attainment.
Thomas County		Unclassifiable/Attainment.
Thurston County		Unclassifiable/Attainment.
Valley County		Unclassifiable/Attainment.
Washington County		Unclassifiable/Attainment.
Wayne County		Unclassifiable/Attainment.
Webster County		Unclassifiable/Attainment.
Wheeler County		Unclassifiable/Attainment.
York County		Unclassifiable/Attainment.

[a] Includes Indian Country located in each county or area, except as otherwise specified.
[1] This date is 90 days after October 31, 2011, unless otherwise noted.

■ 30. Section 81.329 is amended as follows:

■ a. By revising the table heading ''Nevada—NO_2'' to read ''Nevada—NO_2 (1971 Annual Standard).''

■ b. By adding a table entitled ''Nevada—NO_2 (2010 1-Hour Standard)'' in alphabetical order to read as follows:

§ 81.329 Nevada.

* * * * *

NEVADA—NO_2 (2010 1-HOUR STANDARD)

Designated area	Designation [a]	
	Date [1]	Type
State of Nevada [2]		Unclassifiable/Attainment.

[a] Includes Indian Country located in each county or area, except as otherwise specified.
[1] This date is 90 days after October 31, 2011, unless otherwise noted.
[2] Statewide refers to hydrographic areas as shown on the State of Nevada Division of Water Resources' map titled ''Water Resources and Inter-basin Flows'' (September 1971), as revised to include a division of Carson Desert (area 101) into two areas, a smaller area 101 and area 101A, and a division of Boulder Flat (area 61) into an Upper Unit 61 and a Lower Unit 61. See also 67 FR 12474 (March 19, 2002).

■ 31. Section 81.330 is amended as follows:

■ a. By revising the table heading ''New Hampshire—NO_2'' to read ''New Hampshire—NO_2 (1971 Annual Standard).''

■ b. By adding a table entitled ''New Hampshire—NO_2 (2010 1-Hour Standard)'' in alphabetical order to read as follows:

§ 81.330 New Hampshire.

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NEW HAMPSHIRE—NO_2 (2010 1-HOUR STANDARD)

Designated area	Designation [a]	
	Date [1]	Type
State of New Hampshire		Unclassifiable/Attainment.

[a] Includes Indian Country located in each county or area, except as otherwise specified.
[1] This date is 90 days after October 31, 2011, unless otherwise noted.

■ 32. Section 81.331 is amended as follows:

■ a. By revising the table heading ''New Jersey—NO_2'' to read ''New Jersey—NO_2 (1971 Annual Standard).''

■ b. By adding a table entitled ''New Jersey—NO_2 (2010 1-Hour Standard)'' in alphabetical order to read as follows:

§ 81.331 New Jersey.

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NEW JERSEY—NO_2 (2010 1-HOUR STANDARD)

Designated area	Designation [a]	
	Date [1]	Type
State of New Jersey		Unclassifiable/Attainment.

[a] Includes Indian Country located in each county or area, except as otherwise specified.
[1] This date is 90 days after October 31, 2011, unless otherwise noted.

■ 33. Section 81.332 is amended as follows:

■ a. By revising the table heading ''New Mexico—NO_2'' to read ''New Mexico—NO_2 (1971 Annual Standard).''

■ b. By adding a table entitled ''New Mexico—NO_2 (2010 1-Hour Standard)'' in alphabetical order to read as follows:

§ 81.332 New Mexico.

* * * * *

NEW MEXICO—NO_2 (2010 1-HOUR STANDARD)

Designated area	Designation [a]	
	Date [1]	Type
Bernalillo County		Unclassifiable/Attainment.
Catron County		Unclassifiable/Attainment.
Chaves County		Unclassifiable/Attainment.
Cibola County		Unclassifiable/Attainment.
Colfax County		Unclassifiable/Attainment.
Curry County		Unclassifiable/Attainment.
De Baca County		Unclassifiable/Attainment.
Doña Ana County		Unclassifiable/Attainment.
Eddy County		Unclassifiable/Attainment.
Grant County		Unclassifiable/Attainment.
Guadalupe County		Unclassifiable/Attainment.
Harding County		Unclassifiable/Attainment.
Hidalgo County		Unclassifiable/Attainment.
Lea County		Unclassifiable/Attainment.
Lincoln County		Unclassifiable/Attainment.
Los Alamos County		Unclassifiable/Attainment.
Luna County		Unclassifiable/Attainment.
McKinley County		Unclassifiable/Attainment.
Mora County		Unclassifiable/Attainment.
Otero County		Unclassifiable/Attainment.
Quay County		Unclassifiable/Attainment.
Río Arriba County		Unclassifiable/Attainment.
Roosevelt County		Unclassifiable/Attainment.
Sandoval County		Unclassifiable/Attainment.
San Juan County		Unclassifiable/Attainment.
San Miguel County		Unclassifiable/Attainment.
Santa Fe County		Unclassifiable/Attainment.
Sierra County		Unclassifiable/Attainment.

NEW MEXICO—NO_2 (2010 1-HOUR STANDARD)—Continued

Designated area	Designation [a]	
	Date [1]	Type
Socorro County		Unclassifiable/Attainment.
Taos County		Unclassifiable/Attainment.
Torrance County		Unclassifiable/Attainment.
Union County		Unclassifiable/Attainment.
Valencia County		Unclassifiable/Attainment.

[a] Includes Indian Country located in each county or area, except as otherwise specified.
[1] This date is 90 days after October 31, 2011, unless otherwise noted.

■ 34. Section 81.333 is amended as follows:

■ a. By revising the table heading ''New York—NO_2'' to read ''New York—NO_2 (1971 Annual Standard).''

■ b. By adding a table entitled ''New York—NO_2 (2010 1-Hour Standard)'' in alphabetical order to read as follows:

§ 81.333 New York.

* * * * *

NEW YORK—NO_2 (2010 1-HOUR STANDARD)

Designated area	Designation [a]	
	Date [1]	Type
Albany-Schenectady-Troy, NY:		
Albany County		Unclassifiable/Attainment.
Rensselaer County		Unclassifiable/Attainment.
Saratoga County		Unclassifiable/Attainment.
Schenectady County		Unclassifiable/Attainment.
Schoharie County		Unclassifiable/Attainment.
Buffalo-Niagara Falls, NY:		
Erie County		Unclassifiable/Attainment.
Niagara County		Unclassifiable/Attainment.
New York-Northern New Jersey-Long Island, NY:		
Bronx County		Unclassifiable/Attainment.
Kings County		Unclassifiable/Attainment.
Nassau County		Unclassifiable/Attainment.
New York County		Unclassifiable/Attainment.
Putnam County		Unclassifiable/Attainment.
Queens County		Unclassifiable/Attainment.
Richmond County		Unclassifiable/Attainment.
Rockland County		Unclassifiable/Attainment.
Suffolk County		Unclassifiable/Attainment.
Westchester County		Unclassifiable/Attainment.
Poughkeepsie-Newburgh-Middletown, NY:		
Dutchess County		Unclassifiable/Attainment.
Orange County		Unclassifiable/Attainment.
Rochester, NY:		
Livingston County		Unclassifiable/Attainment.
Monroe County		Unclassifiable/Attainment.
Ontario County		Unclassifiable/Attainment.
Orleans County		Unclassifiable/Attainment.
Wayne County		Unclassifiable/Attainment.
Syracuse, NY:		
Madison County		Unclassifiable/Attainment.
Onondaga County		Unclassifiable/Attainment.
Oswego County		Unclassifiable/Attainment.
Rest of State		Unclassifiable/Attainment.

[a] Includes Indian Country located in each county or area, except as otherwise specified.
[1] This date is 90 days after October 31, 2011, unless otherwise noted.

■ 35. Section 81.334 is amended as follows:

■ a. By revising the table heading ''North Carolina—NO_2'' to read ''North Carolina—NO_2 (1971 Annual Standard).''

■ b. By adding a table entitled ''North Carolina—NO_2 (2010 1-Hour Standard)'' in alphabetical order to read as follows:

§ 81.334 North Carolina.

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NORTH CAROLINA—NO_2 (2010 1-HOUR STANDARD)

Designated area	Designation [a]	
	Date [1]	Type
Buncombe County (part)		Unclassifiable/Attainment.
Asheville Township, Avery Creek Township, Limestone Township, Lower Hominy Township, Reems Creek Township, Swannanoa Township.		
Buncombe County (remainder of county)		Unclassifiable/Attainment.
Each Individual Township:		
Caswell County (part)		Unclassifiable/Attainment.
Dan River Township, Yanceyville Township.		
Caswell County (rest of county)		Unclassifiable/Attainment.
Each Individual Township.		
Forsyth County (part)		Unclassifiable/Attainment.
Abbotts Creek Township, Broadbay Township, Kernersville Township, Middle Fork Township, Old Town Township, South Fork Township, Winston Township.		
Forsyth County (rest of county)		Unclassifiable/Attainment.
Each Individual Township.		
Guilford County (part)		Unclassifiable/Attainment.
Bruce Township, Center Grove Township, Deep River Township, Fentress Township, Friendship Township, Gilmer Township, High Point Township, Jamestown Township, Jefferson Township, Monroe Township, Morehead Township, Sumner Township.		
Guilford County (rest of county)		Unclassifiable/Attainment.
Each Individual Township.		
Mecklenburg County (part)		Unclassifiable/Attainment.
Township 1 Charlotte, Township 2 Berryhill, Township 5 Providence, Township 7 Crab Orchard, Township 12 Paw Creek.		
Mecklenburg County (rest of county)		Unclassifiable/Attainment.
Each Individual Township.		
New Hanover County (part)		Unclassifiable/Attainment.
Harnett Township, Masonboro Township, Wilmington Township.		
New Hanover County (rest of county)		Unclassifiable/Attainment.
Each Individual Township.		
Wake County (part)		Unclassifiable/Attainment.
Cary Township, Meredith Township.		
Wake County (rest of county)		Unclassifiable/Attainment.
Each Individual Township.		
Rest of State:		
Each Individual Township		Unclassifiable/Attainment.

[a] Includes Indian Country located in each county or area, except as otherwise specified.
[1] This date is 90 days after October 31, 2011, unless otherwise noted.

■ 36. Section 81.335 is amended as follows:

■ a. By revising the table heading ''North Dakota—NO_2'' to read ''North Dakota—NO_2 (1971 Annual Standard).''

■ b. By adding a table entitled ''North Dakota—NO_2 (2010 1-Hour Standard)'' in alphabetical order to read as follows:

§ 81.335 North Dakota.

* * * * *

NORTH DAKOTA—NO_2 (2010 1-HOUR STANDARD)

Designated area	Designation [a]	
	Date [1]	Type
State of North Dakota		Unclassifiable/Attainment.

[a] Includes Indian Country located in each county or area, except as otherwise specified.
[1] This date is 90 days after October 31, 2011, unless otherwise noted.

■ 37. Section 81.336 is amended as follows:

■ a. By revising the table heading ''Ohio—NO_2'' to read ''Ohio—NO_2 (1971 Annual Standard).''

■ b. By adding a table entitled ''Ohio—NO_2 (2010 1-Hour Standard)'' in alphabetical order to read as follows:

§ 81.336 Ohio.

* * * * *

OHIO—NO_2 (2010 1-HOUR STANDARD)

Designated area	Designation [a]	
	Date [1]	Type
Adams County		Unclassifiable/Attainment.
Allen County		Unclassifiable/Attainment.
Ashland County		Unclassifiable/Attainment.
Ashtabula County		Unclassifiable/Attainment.
Athens County		Unclassifiable/Attainment.
Auglaize County		Unclassifiable/Attainment.
Belmont County		Unclassifiable/Attainment.
Brown County		Unclassifiable/Attainment.
Butler County		Unclassifiable/Attainment.
Carroll County		Unclassifiable/Attainment.
Champaign County		Unclassifiable/Attainment.
Clark County		Unclassifiable/Attainment.
Clermont County		Unclassifiable/Attainment.
Clinton County		Unclassifiable/Attainment.
Columbiana County		Unclassifiable/Attainment.
Coshocton County		Unclassifiable/Attainment.
Crawford County		Unclassifiable/Attainment.
Cuyahoga County		Unclassifiable/Attainment.
Darke County		Unclassifiable/Attainment.
Defiance County		Unclassifiable/Attainment.
Delaware County		Unclassifiable/Attainment.
Erie County		Unclassifiable/Attainment.
Fairfield County		Unclassifiable/Attainment.
Fayette County		Unclassifiable/Attainment.
Franklin County		Unclassifiable/Attainment.
Fulton County		Unclassifiable/Attainment.
Gallia County		Unclassifiable/Attainment.
Geauga County		Unclassifiable/Attainment.
Greene County		Unclassifiable/Attainment.
Guernsey County		Unclassifiable/Attainment.
Hamilton County		Unclassifiable/Attainment.
Hancock County		Unclassifiable/Attainment.
Hardin County		Unclassifiable/Attainment.
Harrison County		Unclassifiable/Attainment.
Henry County		Unclassifiable/Attainment.
Highland County		Unclassifiable/Attainment.
Hocking County		Unclassifiable/Attainment.
Holmes County		Unclassifiable/Attainment.
Huron County		Unclassifiable/Attainment.
Jackson County		Unclassifiable/Attainment.
Jefferson County		Unclassifiable/Attainment.
Knox County		Unclassifiable/Attainment.
Lake County		Unclassifiable/Attainment.
Lawrence County		Unclassifiable/Attainment.
Licking County		Unclassifiable/Attainment.
Logan County		Unclassifiable/Attainment.
Lorain County		Unclassifiable/Attainment.
Lucas County		Unclassifiable/Attainment.
Madison County		Unclassifiable/Attainment.
Mahoning County		Unclassifiable/Attainment.
Marion County		Unclassifiable/Attainment.
Medina County		Unclassifiable/Attainment.
Meigs County		Unclassifiable/Attainment.
Mercer County		Unclassifiable/Attainment.
Miami County		Unclassifiable/Attainment.
Monroe County		Unclassifiable/Attainment.
Montgomery County		Unclassifiable/Attainment.
Morgan County		Unclassifiable/Attainment.
Morrow County		Unclassifiable/Attainment.
Muskingum County		Unclassifiable/Attainment.
Noble County		Unclassifiable/Attainment.
Ottawa County		Unclassifiable/Attainment.
Paulding County		Unclassifiable/Attainment.
Perry County		Unclassifiable/Attainment.
Pickaway County		Unclassifiable/Attainment.
Pike County		Unclassifiable/Attainment.
Portage County		Unclassifiable/Attainment.
Preble County		Unclassifiable/Attainment.
Putnam County		Unclassifiable/Attainment.
Richland County		Unclassifiable/Attainment.

OHIO—NO_2 (2010 1-HOUR STANDARD)—Continued

Designated area	Designation [a]	
	Date [1]	Type
Ross County		Unclassifiable/Attainment.
Sandusky County		Unclassifiable/Attainment.
Scioto County		Unclassifiable/Attainment.
Seneca County		Unclassifiable/Attainment.
Shelby County		Unclassifiable/Attainment.
Stark County		Unclassifiable/Attainment.
Summit County		Unclassifiable/Attainment.
Trumbull County		Unclassifiable/Attainment.
Tuscarawas County		Unclassifiable/Attainment.
Union County		Unclassifiable/Attainment.
Van Wert County		Unclassifiable/Attainment.
Vinton County		Unclassifiable/Attainment.
Warren County		Unclassifiable/Attainment.
Washington County		Unclassifiable/Attainment.
Wayne County		Unclassifiable/Attainment.
Williams County		Unclassifiable/Attainment.
Wood County		Unclassifiable/Attainment.
Wyandot County		Unclassifiable/Attainment.

[a] Includes Indian Country located in each county or area, except as otherwise specified.
[1] This date is 90 days after October 31, 2011, unless otherwise noted.

■ 38. Section 81.337 is amended as follows:

■ a. By revising the table heading ''Oklahoma—NO_2'' to read ''Oklahoma—NO_2 (1971 Annual Standard).''

■ b. By adding a table entitled ''Oklahoma—NO_2 (2010 1-Hour Standard)'' in alphabetical order to read as follows:

§ 81.337 Oklahoma.

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OKLAHOMA—NO_2 (2010 1-HOUR STANDARD)

Designated area	Designation [a]	
	Date [1]	Type
Adair County		Unclassifiable/Attainment.
Alfalfa County		Unclassifiable/Attainment.
Atoka County		Unclassifiable/Attainment.
Beaver County		Unclassifiable/Attainment.
Beckham County		Unclassifiable/Attainment.
Blaine County		Unclassifiable/Attainment.
Bryan County		Unclassifiable/Attainment.
Caddo County		Unclassifiable/Attainment.
Canadian County		Unclassifiable/Attainment.
Carter County		Unclassifiable/Attainment.
Cherokee County		Unclassifiable/Attainment.
Choctaw County		Unclassifiable/Attainment.
Cimarron County		Unclassifiable/Attainment.
Cleveland County		Unclassifiable/Attainment.
Coal County		Unclassifiable/Attainment.
Comanche County		Unclassifiable/Attainment.
Cotton County		Unclassifiable/Attainment.
Craig County		Unclassifiable/Attainment.
Creek County		Unclassifiable/Attainment.
Custer County		Unclassifiable/Attainment.
Delaware County		Unclassifiable/Attainment.
Dewey County		Unclassifiable/Attainment.
Ellis County		Unclassifiable/Attainment.
Garfield County		Unclassifiable/Attainment.
Garvin County		Unclassifiable/Attainment.
Grady County		Unclassifiable/Attainment.
Grant County		Unclassifiable/Attainment.
Greer County		Unclassifiable/Attainment.
Harmon County		Unclassifiable/Attainment.
Harper County		Unclassifiable/Attainment.
Haskell County		Unclassifiable/Attainment.
Hughes County		Unclassifiable/Attainment.
Jackson County		Unclassifiable/Attainment.
Jefferson County		Unclassifiable/Attainment.
Johnston County		Unclassifiable/Attainment.

OKLAHOMA—NO_2 (2010 1-HOUR STANDARD)—Continued

Designated area	Designation [a]	
	Date [1]	Type
Kay County		Unclassifiable/Attainment.
Kingfisher County		Unclassifiable/Attainment.
Kiowa County		Unclassifiable/Attainment.
Latimer County		Unclassifiable/Attainment.
Le Flore County		Unclassifiable/Attainment.
Lincoln County		Unclassifiable/Attainment.
Logan County		Unclassifiable/Attainment.
Love County		Unclassifiable/Attainment.
Major County		Unclassifiable/Attainment.
Marshall County		Unclassifiable/Attainment.
Mayes County		Unclassifiable/Attainment.
McClain County		Unclassifiable/Attainment.
McCurtain County		Unclassifiable/Attainment.
McIntosh County		Unclassifiable/Attainment.
Murray County		Unclassifiable/Attainment.
Muskogee County		Unclassifiable/Attainment.
Noble County		Unclassifiable/Attainment.
Nowata County		Unclassifiable/Attainment.
Okfuskee County		Unclassifiable/Attainment.
Oklahoma County		Unclassifiable/Attainment.
Okmulgee County		Unclassifiable/Attainment.
Osage County		Unclassifiable/Attainment.
Ottawa County		Unclassifiable/Attainment.
Pawnee County		Unclassifiable/Attainment.
Payne County		Unclassifiable/Attainment.
Pittsburg County		Unclassifiable/Attainment.
Pontotoc County		Unclassifiable/Attainment.
Pottawatomie County		Unclassifiable/Attainment.
Pushmataha County		Unclassifiable/Attainment.
Roger Mills County		Unclassifiable/Attainment.
Rogers County		Unclassifiable/Attainment.
Seminole County		Unclassifiable/Attainment.
Sequoyah County		Unclassifiable/Attainment.
Stephens County		Unclassifiable/Attainment.
Texas County		Unclassifiable/Attainment.
Tillman County		Unclassifiable/Attainment.
Tulsa County		Unclassifiable/Attainment.
Wagoner County		Unclassifiable/Attainment.
Washington County		Unclassifiable/Attainment.
Washita County		Unclassifiable/Attainment.
Woods County		Unclassifiable/Attainment.
Woodward County		Unclassifiable/Attainment.

[a] Includes Indian Country located in each county or area, except as otherwise specified.
[1] This date is 90 days after October 31, 2011, unless otherwise noted.

■ 39. Section 81.338 is amended as follows:

■ a. By revising the table heading ''Oregon—NO_2'' to read ''Oregon—NO_2 (1971 Annual Standard).''

■ b. By adding a table entitled ''Oregon—NO_2 (2010 1-Hour Standard)'' in alphabetical order to read as follows:

§ 81.338 Oregon.

* * * * *

OREGON—NO_2 (2010 1-HOUR STANDARD)

Designated area	Designation [a]	
	Date [1]	Type
Baker County		Unclassifiable/Attainment.
Benton County		Unclassifiable/Attainment.
Clackamas County		Unclassifiable/Attainment.
Clatsop County		Unclassifiable/Attainment.
Columbia County		Unclassifiable/Attainment.
Coos County		Unclassifiable/Attainment.
Crook County		Unclassifiable/Attainment.
Curry County		Unclassifiable/Attainment.
Deschutes County		Unclassifiable/Attainment.
Douglas County		Unclassifiable/Attainment.
Gilliam County		Unclassifiable/Attainment.

OREGON—NO_2 (2010 1-HOUR STANDARD)—Continued

Designated area	Designation [a]	
	Date [1]	Type
Grant County		Unclassifiable/Attainment.
Harney County		Unclassifiable/Attainment.
Hood River County		Unclassifiable/Attainment.
Jackson County		Unclassifiable/Attainment.
Jefferson County		Unclassifiable/Attainment.
Josephine County		Unclassifiable/Attainment.
Klamath County		Unclassifiable/Attainment.
Lake County		Unclassifiable/Attainment.
Lane County		Unclassifiable/Attainment.
Lincoln County		Unclassifiable/Attainment.
Linn County		Unclassifiable/Attainment.
Malheur County		Unclassifiable/Attainment.
Marion County		Unclassifiable/Attainment.
Morrow County		Unclassifiable/Attainment.
Multnomah County		Unclassifiable/Attainment.
Polk County		Unclassifiable/Attainment.
Sherman County		Unclassifiable/Attainment.
Tillamook County		Unclassifiable/Attainment.
Umatilla County		Unclassifiable/Attainment.
Union County		Unclassifiable/Attainment.
Wallowa County		Unclassifiable/Attainment.
Wasco County		Unclassifiable/Attainment.
Washington County	0	Unclassifiable/Attainment.
Wheeler County		Unclassifiable/Attainment.
Yamhill County		Unclassifiable/Attainment.

[a] Includes Indian Country located in each county or area, except as otherwise specified.
[1] This date is 90 days after October 31, 2011, unless otherwise noted.

■ 40. Section 81.339 is amended as follows:

■ a. By revising the table heading ''Pennsylvania—NO_2'' to read ''Pennsylvania—NO_2 (1971 Annual Standard).''

■ b. By adding a table entitled ''Pennsylvania—NO_2 (2010 1-Hour Standard)'' in alphabetical order to read as follows:

§ 81.339 Pennsylvania.

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PENNSYLVANIA—NO_2 (2010 1-HOUR STANDARD)

Designated area	Designation [a]	
	Date [1]	Type
Adams County		Unclassifiable/Attainment.
Allegheny County		Unclassifiable/Attainment.
Armstrong County		Unclassifiable/Attainment.
Beaver County		Unclassifiable/Attainment.
Bedford County		Unclassifiable/Attainment.
Berks County		Unclassifiable/Attainment.
Blair County		Unclassifiable/Attainment.
Bradford County		Unclassifiable/Attainment.
Bucks County		Unclassifiable/Attainment.
Butler County		Unclassifiable/Attainment.
Cambria County		Unclassifiable/Attainment.
Cameron County		Unclassifiable/Attainment.
Carbon County		Unclassifiable/Attainment.
Centre County		Unclassifiable/Attainment.
Chester County		Unclassifiable/Attainment.
Clarion County		Unclassifiable/Attainment.
Clearfield County		Unclassifiable/Attainment.
Clinton County		Unclassifiable/Attainment.
Columbia County		Unclassifiable/Attainment.
Crawford County		Unclassifiable/Attainment.
Cumberland County		Unclassifiable/Attainment.
Dauphin County		Unclassifiable/Attainment.
Delaware County		Unclassifiable/Attainment.
Elk County		Unclassifiable/Attainment.
Erie County		Unclassifiable/Attainment.
Fayette County		Unclassifiable/Attainment.
Forest County		Unclassifiable/Attainment.
Franklin County		Unclassifiable/Attainment.

PENNSYLVANIA—NO_2 (2010 1-HOUR STANDARD)—Continued

Designated area	Designation [a]	
	Date [1]	Type
Fulton County		Unclassifiable/Attainment.
Greene County		Unclassifiable/Attainment.
Huntingdon County		Unclassifiable/Attainment.
Indiana County		Unclassifiable/Attainment.
Jefferson County		Unclassifiable/Attainment.
Juniata County		Unclassifiable/Attainment.
Lackawanna County		Unclassifiable/Attainment.
Lancaster County		Unclassifiable/Attainment.
Lawrence County		Unclassifiable/Attainment.
Lebanon County		Unclassifiable/Attainment.
Lehigh County		Unclassifiable/Attainment.
Luzerne County		Unclassifiable/Attainment.
Lycoming County		Unclassifiable/Attainment.
McKean County		Unclassifiable/Attainment.
Mercer County		Unclassifiable/Attainment.
Mifflin County		Unclassifiable/Attainment.
Monroe County		Unclassifiable/Attainment.
Montgomery County		Unclassifiable/Attainment.
Montour County		Unclassifiable/Attainment.
Northampton County		Unclassifiable/Attainment.
Northumberland County		Unclassifiable/Attainment.
Perry County		Unclassifiable/Attainment.
Philadelphia County		Unclassifiable/Attainment.
Pike County		Unclassifiable/Attainment.
Potter County		Unclassifiable/Attainment.
Schuylkill County		Unclassifiable/Attainment.
Snyder County		Unclassifiable/Attainment.
Somerset County		Unclassifiable/Attainment.
Sullivan County		Unclassifiable/Attainment.
Susquehanna County		Unclassifiable/Attainment.
Tioga County		Unclassifiable/Attainment.
Union County		Unclassifiable/Attainment.
Venango County		Unclassifiable/Attainment.
Warren County		Unclassifiable/Attainment.
Washington County		Unclassifiable/Attainment.
Wayne County		Unclassifiable/Attainment.
Westmoreland County		Unclassifiable/Attainment.
Wyoming County		Unclassifiable/Attainment.
York County		Unclassifiable/Attainment.

[a] Includes Indian Country located in each county or area, except as otherwise specified.
[1] This date is 90 days after October 31, 2011, unless otherwise noted.

■ 41. Section 81.340 is amended as follows:

■ a. By revising the table heading ''Rhode Island—NO_2'' to read ''Rhode Island—NO_2 (1971 Annual Standard).''

■ b. By adding a table entitled ''Rhode Island—NO_2 (2010 1-Hour Standard)'' in alphabetical order to read as follows:

§ 81.340 Rhode Island.

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RHODE ISLAND—NO_2 (2010 1-HOUR STANDARD)

Designated area	Designation [a]	
	Date [1]	Type
State of Rhode Island		Unclassifiable/Attainment.

[a] Includes Indian Country located in each county or area, except as otherwise specified.
[1] This date is 90 days after October 31, 2011, unless otherwise noted.

■ 42. Section 81.341 is amended as follows:

■ a. By revising the table heading ''South Carolina—NO_2'' to read ''South Carolina—NO_2 (1971 Annual Standard).''

■ b. By adding a table entitled ''South Carolina—NO_2 (2010 1-Hour Standard)'' in alphabetical order to read as follows:

§ 81.341 South Carolina.

* * * * *

SOUTH CAROLINA—NO_2 (2010 1-HOUR STANDARD)

Designated area	Designation [a]	
	Date [1]	Type
Abbeville County		Unclassifiable/Attainment.
Aiken County		Unclassifiable/Attainment.
Allendale County		Unclassifiable/Attainment.
Anderson County		Unclassifiable/Attainment.
Bamberg County		Unclassifiable/Attainment.
Barnwell County		Unclassifiable/Attainment.
Beaufort County		Unclassifiable/Attainment.
Berkeley County		Unclassifiable/Attainment.
Calhoun County		Unclassifiable/Attainment.
Charleston County		Unclassifiable/Attainment.
Cherokee County		Unclassifiable/Attainment.
Chester County		Unclassifiable/Attainment.
Chesterfield County		Unclassifiable/Attainment.
Clarendon County		Unclassifiable/Attainment.
Colleton County		Unclassifiable/Attainment.
Darlington County		Unclassifiable/Attainment.
Dillon County		Unclassifiable/Attainment.
Dorchester County		Unclassifiable/Attainment.
Edgefield County		Unclassifiable/Attainment.
Fairfield County		Unclassifiable/Attainment.
Florence County		Unclassifiable/Attainment.
Georgetown County		Unclassifiable/Attainment.
Greenwood County		Unclassifiable/Attainment.
Greenville County		Unclassifiable/Attainment.
Hampton County		Unclassifiable/Attainment.
Horry County		Unclassifiable/Attainment.
Jasper County		Unclassifiable/Attainment.
Kershaw County		Unclassifiable/Attainment.
Lancaster County		Unclassifiable/Attainment.
Laurens County		Unclassifiable/Attainment.
Lee County		Unclassifiable/Attainment.
Lexington County		Unclassifiable/Attainment.
McCormick County		Unclassifiable/Attainment.
Marion County		Unclassifiable/Attainment.
Marlboro County		Unclassifiable/Attainment.
Newberry County		Unclassifiable/Attainment.
Oconee County		Unclassifiable/Attainment.
Orangeburg County		Unclassifiable/Attainment.
Pickens County		Unclassifiable/Attainment.
Richland County		Unclassifiable/Attainment.
Saluda County		Unclassifiable/Attainment.
Spartanburg County		Unclassifiable/Attainment.
Sumter County		Unclassifiable/Attainment.
Union County		Unclassifiable/Attainment.
Williamsburg County		Unclassifiable/Attainment.
York County		Unclassifiable/Attainment.

[a] Includes Indian Country located in each county or area, except as otherwise specified.
[1] This date is 90 days after October 31, 2011, unless otherwise noted.

■ 43. Section 81.342 is amended as follows:

■ a. By revising the table heading ''South Dakota—NO_2'' to read ''South Dakota—NO_2 (1971 Annual Standard).''

■ b. By adding a table entitled ''South Dakota—NO_2 (2010 1-Hour Standard)'' in alphabetical order to read as follows:

§ 81.342 South Dakota.

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SOUTH DAKOTA—NO_2 (2010 1-HOUR STANDARD)

Designated area	Designation [a]	
	Date [1]	Type
Aurora County		Unclassifiable/Attainment.
Beadle County		Unclassifiable/Attainment.
Bennett County		Unclassifiable/Attainment.
Bon Homme County		Unclassifiable/Attainment.
Brookings County		Unclassifiable/Attainment.
Brown County		Unclassifiable/Attainment.
Brule County		Unclassifiable/Attainment.

SOUTH DAKOTA—NO_2 (2010 1-HOUR STANDARD)—Continued

Designated area	Designation [a]	
	Date [1]	Type
Buffalo County		Unclassifiable/Attainment.
Butte County		Unclassifiable/Attainment.
Campbell County		Unclassifiable/Attainment.
Charles Mix County		Unclassifiable/Attainment.
Clark County		Unclassifiable/Attainment.
Clay County		Unclassifiable/Attainment.
Codington County		Unclassifiable/Attainment.
Corson County		Unclassifiable/Attainment.
Custer County		Unclassifiable/Attainment.
Davison County		Unclassifiable/Attainment.
Day County		Unclassifiable/Attainment.
Deuel County		Unclassifiable/Attainment.
Dewey County		Unclassifiable/Attainment.
Douglas County		Unclassifiable/Attainment.
Edmunds County		Unclassifiable/Attainment.
Fall River County		Unclassifiable/Attainment.
Faulk County		Unclassifiable/Attainment.
Grant County		Unclassifiable/Attainment.
Gregory County		Unclassifiable/Attainment.
Haakon County		Unclassifiable/Attainment.
Hamlin County		Unclassifiable/Attainment.
Hand County		Unclassifiable/Attainment.
Hanson County		Unclassifiable/Attainment.
Harding County		Unclassifiable/Attainment.
Hughes County		Unclassifiable/Attainment.
Hutchinson County		Unclassifiable/Attainment.
Hyde County		Unclassifiable/Attainment.
Jackson County		Unclassifiable/Attainment.
Jerauld County		Unclassifiable/Attainment.
Jones County		Unclassifiable/Attainment.
Kingsbury County		Unclassifiable/Attainment.
Lake County		Unclassifiable/Attainment.
Lawrence County		Unclassifiable/Attainment.
Lincoln County		Unclassifiable/Attainment.
Lyman County		Unclassifiable/Attainment.
McCook County		Unclassifiable/Attainment.
McPherson County		Unclassifiable/Attainment.
Marshall County		Unclassifiable/Attainment.
Meade County		Unclassifiable/Attainment.
Mellette County		Unclassifiable/Attainment.
Miner County		Unclassifiable/Attainment.
Minnehaha County		Unclassifiable/Attainment.
Moody County		Unclassifiable/Attainment.
Pennington County		Unclassifiable/Attainment.
Perkins County		Unclassifiable/Attainment.
Potter County		Unclassifiable/Attainment.
Roberts County		Unclassifiable/Attainment.
Sanborn County		Unclassifiable/Attainment.
Shannon County		Unclassifiable/Attainment.
Spink County		Unclassifiable/Attainment.
Stanley County		Unclassifiable/Attainment.
Sully County		Unclassifiable/Attainment.
Todd County		Unclassifiable/Attainment.
Tripp County		Unclassifiable/Attainment.
Turner County		Unclassifiable/Attainment.
Union County		Unclassifiable/Attainment.
Walworth County		Unclassifiable/Attainment.
Yankton County		Unclassifiable/Attainment.
Ziebach County		Unclassifiable/Attainment.

[a] Includes Indian Country located in each county or area, except as otherwise specified.
[1] This date is 90 days after October 31, 2011, unless otherwise noted.

■ 44. Section 81.343 is amended as follows:

■ a. By revising the table heading ''Tennessee—NO_2'' to read ''Tennessee—NO_2 (1971 Annual Standard).''

■ b. By adding a table entitled ''Tennessee—NO_2 (2010 1-Hour Standard)'' in alphabetical order to read as follows:

§ 81.343 Tennessee.

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TENNESSEE—NO_2 (2010 1-HOUR STANDARD)

Designated area	Designation [a]	
	Date [1]	Type
Bradley County		Unclassifiable/Attainment.
Davidson County		Unclassifiable/Attainment.
McMinn County		Unclassifiable/Attainment.
Sullivan County		Unclassifiable/Attainment.
Rest of State		Unclassifiable/Attainment.

[a] Includes Indian Country located in each county or area, except as otherwise specified.
[1] This date is 90 days after October 31, 2011, unless otherwise noted.

■ 45. Section 81.344 is amended as follows:

■ a. By revising the table heading ''Texas—NO_2'' to read ''Texas—NO_2 (1971 Annual Standard).''

■ b. By adding a table entitled ''Texas—NO_2 (2010 1-Hour Standard)'' in alphabetical order to read as follows:

§ 81.344 Texas.

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TEXAS—NO_2 (2010 1-HOUR STANDARD)

Designated area	Designation [a]	
	Date [1]	Type
Anderson County		Unclassifiable/Attainment.
Andrews County		Unclassifiable/Attainment.
Angelina County		Unclassifiable/Attainment.
Aransas County		Unclassifiable/Attainment.
Archer County		Unclassifiable/Attainment.
Armstrong County		Unclassifiable/Attainment.
Atascosa County		Unclassifiable/Attainment.
Austin County		Unclassifiable/Attainment.
Bailey County		Unclassifiable/Attainment.
Bandera County		Unclassifiable/Attainment.
Bastrop County		Unclassifiable/Attainment.
Baylor County		Unclassifiable/Attainment.
Bee County		Unclassifiable/Attainment.
Bell County		Unclassifiable/Attainment.
Bexar County		Unclassifiable/Attainment.
Blanco County		Unclassifiable/Attainment.
Borden County		Unclassifiable/Attainment.
Bosque County		Unclassifiable/Attainment.
Bowie County		Unclassifiable/Attainment.
Brazoria County		Unclassifiable/Attainment.
Brazos County		Unclassifiable/Attainment.
Brewster County		Unclassifiable/Attainment.
Briscoe County		Unclassifiable/Attainment.
Brooks County		Unclassifiable/Attainment.
Brown County		Unclassifiable/Attainment.
Burleson County		Unclassifiable/Attainment.
Burnet County		Unclassifiable/Attainment.
Caldwell County		Unclassifiable/Attainment.
Calhoun County		Unclassifiable/Attainment.
Callahan County		Unclassifiable/Attainment.
Cameron County		Unclassifiable/Attainment.
Camp County		Unclassifiable/Attainment.
Carson County		Unclassifiable/Attainment.
Cass County		Unclassifiable/Attainment.
Castro County		Unclassifiable/Attainment.
Cherokee County		Unclassifiable/Attainment.
Childress County		Unclassifiable/Attainment.
Chambers County		Unclassifiable/Attainment.
Clay County		Unclassifiable/Attainment.
Cochran County		Unclassifiable/Attainment.
Coke County		Unclassifiable/Attainment.
Coleman County		Unclassifiable/Attainment.
Collin County		Unclassifiable/Attainment.
Collingsworth County		Unclassifiable/Attainment.
Colorado County		Unclassifiable/Attainment.
Comal County		Unclassifiable/Attainment.
Comanche County		Unclassifiable/Attainment.
Concho County		Unclassifiable/Attainment.

TEXAS—NO_2 (2010 1-HOUR STANDARD)—Continued

Designated area	Designation [a]	
	Date [1]	Type
Cooke County		Unclassifiable/Attainment.
Coryell County		Unclassifiable/Attainment.
Cottle County		Unclassifiable/Attainment.
Crane County		Unclassifiable/Attainment.
Crockett County		Unclassifiable/Attainment.
Crosby County		Unclassifiable/Attainment.
Culberson County		Unclassifiable/Attainment.
Dallam County		Unclassifiable/Attainment.
Dallas County		Unclassifiable/Attainment.
Dawson County		Unclassifiable/Attainment.
Deaf Smith County		Unclassifiable/Attainment.
Delta County		Unclassifiable/Attainment.
Denton County		Unclassifiable/Attainment.
DeWitt County		Unclassifiable/Attainment.
Dickens County		Unclassifiable/Attainment.
Dimmit County		Unclassifiable/Attainment.
Donley County		Unclassifiable/Attainment.
Duval County		Unclassifiable/Attainment.
Eastland County		Unclassifiable/Attainment.
Ector County		Unclassifiable/Attainment.
Edwards County		Unclassifiable/Attainment.
El Paso County		Unclassifiable/Attainment.
Ellis County		Unclassifiable/Attainment.
Erath County		Unclassifiable/Attainment.
Falls County		Unclassifiable/Attainment.
Fannin County		Unclassifiable/Attainment.
Fayette County		Unclassifiable/Attainment.
Fisher County		Unclassifiable/Attainment.
Floyd County		Unclassifiable/Attainment.
Foard County		Unclassifiable/Attainment.
Fort Bend County		Unclassifiable/Attainment.
Franklin County		Unclassifiable/Attainment.
Freestone County		Unclassifiable/Attainment.
Frio County		Unclassifiable/Attainment.
Gaines County		Unclassifiable/Attainment.
Galveston County		Unclassifiable/Attainment.
Garza County		Unclassifiable/Attainment.
Gillespie County		Unclassifiable/Attainment.
Glasscock County		Unclassifiable/Attainment.
Goliad County		Unclassifiable/Attainment.
Gonzales County		Unclassifiable/Attainment.
Gray County		Unclassifiable/Attainment.
Grayson County		Unclassifiable/Attainment.
Gregg County		Unclassifiable/Attainment.
Grimes County		Unclassifiable/Attainment.
Guadalupe County		Unclassifiable/Attainment.
Hale County		Unclassifiable/Attainment.
Hall County		Unclassifiable/Attainment.
Hamilton County		Unclassifiable/Attainment.
Hansford County		Unclassifiable/Attainment.
Hardeman County		Unclassifiable/Attainment.
Hardin County		Unclassifiable/Attainment.
Harris County		Unclassifiable/Attainment.
Harrison County		Unclassifiable/Attainment.
Hartley County		Unclassifiable/Attainment.
Haskell County		Unclassifiable/Attainment.
Hays County		Unclassifiable/Attainment.
Hemphill County		Unclassifiable/Attainment.
Henderson County		Unclassifiable/Attainment.
Hidalgo County		Unclassifiable/Attainment.
Hill County		Unclassifiable/Attainment.
Hockley County		Unclassifiable/Attainment.
Hood County		Unclassifiable/Attainment.
Hopkins County		Unclassifiable/Attainment.
Houston County		Unclassifiable/Attainment.
Howard County		Unclassifiable/Attainment.
Hudspeth County		Unclassifiable/Attainment.
Hunt County		Unclassifiable/Attainment.
Hutchinson County		Unclassifiable/Attainment.
Irion County		Unclassifiable/Attainment.

TEXAS—NO_2 (2010 1-HOUR STANDARD)—Continued

Designated area	Designation [a]	
	Date [1]	Type
Jack County		Unclassifiable/Attainment.
Jackson County		Unclassifiable/Attainment.
Jasper County		Unclassifiable/Attainment.
Jeff Davis County		Unclassifiable/Attainment.
Jefferson County		Unclassifiable/Attainment.
Jim Hogg County		Unclassifiable/Attainment.
Jim Wells County		Unclassifiable/Attainment.
Johnson County		Unclassifiable/Attainment.
Jones County		Unclassifiable/Attainment.
Karnes County		Unclassifiable/Attainment.
Kaufman County		Unclassifiable/Attainment.
Kendall County		Unclassifiable/Attainment.
Kenedy County		Unclassifiable/Attainment.
Kent County		Unclassifiable/Attainment.
Kerr County		Unclassifiable/Attainment.
Kimble County		Unclassifiable/Attainment.
King County		Unclassifiable/Attainment.
Kinney County		Unclassifiable/Attainment.
Kleberg County		Unclassifiable/Attainment.
Knox County		Unclassifiable/Attainment.
La Salle County		Unclassifiable/Attainment.
Lamar County		Unclassifiable/Attainment.
Lamb County		Unclassifiable/Attainment.
Lampasas County		Unclassifiable/Attainment.
Lavaca County		Unclassifiable/Attainment.
Lee County		Unclassifiable/Attainment.
Leon County		Unclassifiable/Attainment.
Liberty County		Unclassifiable/Attainment.
Limestone County		Unclassifiable/Attainment.
Lipscomb County		Unclassifiable/Attainment.
Live Oak County		Unclassifiable/Attainment.
Llano County		Unclassifiable/Attainment.
Loving County		Unclassifiable/Attainment.
Lubbock County		Unclassifiable/Attainment.
Lynn County		Unclassifiable/Attainment.
McCulloch County		Unclassifiable/Attainment.
McLennan County		Unclassifiable/Attainment.
McMullen County		Unclassifiable/Attainment.
Madison County		Unclassifiable/Attainment.
Marion County		Unclassifiable/Attainment.
Martin County		Unclassifiable/Attainment.
Mason County		Unclassifiable/Attainment.
Matagorda County		Unclassifiable/Attainment.
Maverick County		Unclassifiable/Attainment.
Medina County		Unclassifiable/Attainment.
Menard County		Unclassifiable/Attainment.
Midland County		Unclassifiable/Attainment.
Milam County		Unclassifiable/Attainment.
Mills County		Unclassifiable/Attainment.
Mitchell County		Unclassifiable/Attainment.
Montague County		Unclassifiable/Attainment.
Montgomery County		Unclassifiable/Attainment.
Moore County		Unclassifiable/Attainment.
Morris County		Unclassifiable/Attainment.
Motley County		Unclassifiable/Attainment.
Nacogdoches County		Unclassifiable/Attainment.
Navarro County		Unclassifiable/Attainment.
Newton County		Unclassifiable/Attainment.
Nolan County		Unclassifiable/Attainment.
Nueces County		Unclassifiable/Attainment.
Ochiltree County		Unclassifiable/Attainment.
Oldham County		Unclassifiable/Attainment.
Orange County		Unclassifiable/Attainment.
Palo Pinto County		Unclassifiable/Attainment.
Panola County		Unclassifiable/Attainment.
Parker County		Unclassifiable/Attainment.
Parmer County		Unclassifiable/Attainment.
Pecos County		Unclassifiable/Attainment.
Polk County		Unclassifiable/Attainment.
Potter County		Unclassifiable/Attainment.

TEXAS—NO_2 (2010 1-HOUR STANDARD)—Continued

Designated area	Designation [a]	
	Date [1]	Type
Presidio County		Unclassifiable/Attainment.
Rains County		Unclassifiable/Attainment.
Randall County		Unclassifiable/Attainment.
Reagan County		Unclassifiable/Attainment.
Real County		Unclassifiable/Attainment.
Red River County		Unclassifiable/Attainment.
Reeves County		Unclassifiable/Attainment.
Refugio County		Unclassifiable/Attainment.
Roberts County		Unclassifiable/Attainment.
Robertson County		Unclassifiable/Attainment.
Rockwall County		Unclassifiable/Attainment.
Runnels County		Unclassifiable/Attainment.
Rusk County		Unclassifiable/Attainment.
Sabine County		Unclassifiable/Attainment.
San Augustine County		Unclassifiable/Attainment.
San Jacinto County		Unclassifiable/Attainment.
San Patricio County		Unclassifiable/Attainment.
San Saba County		Unclassifiable/Attainment.
Schleicher County		Unclassifiable/Attainment.
Scurry County		Unclassifiable/Attainment.
Shackelford County		Unclassifiable/Attainment.
Shelby County		Unclassifiable/Attainment.
Sherman County		Unclassifiable/Attainment.
Smith County		Unclassifiable/Attainment.
Somervell County		Unclassifiable/Attainment.
Starr County		Unclassifiable/Attainment.
Stephens County		Unclassifiable/Attainment.
Sterling County		Unclassifiable/Attainment.
Stonewall County		Unclassifiable/Attainment.
Sutton County		Unclassifiable/Attainment.
Swisher County		Unclassifiable/Attainment.
Tarrant County		Unclassifiable/Attainment.
Taylor County		Unclassifiable/Attainment.
Terrell County		Unclassifiable/Attainment.
Terry County		Unclassifiable/Attainment.
Throckmorton County		Unclassifiable/Attainment.
Titus County		Unclassifiable/Attainment.
Tom Green County		Unclassifiable/Attainment.
Travis County		Unclassifiable/Attainment.
Trinity County		Unclassifiable/Attainment.
Tyler County		Unclassifiable/Attainment.
Upshur County		Unclassifiable/Attainment.
Upton County		Unclassifiable/Attainment.
Uvalde County		Unclassifiable/Attainment.
Val Verde County		Unclassifiable/Attainment.
Van Zandt County		Unclassifiable/Attainment.
Victoria County		Unclassifiable/Attainment.
Walker County		Unclassifiable/Attainment.
Waller County		Unclassifiable/Attainment.
Ward County		Unclassifiable/Attainment.
Washington County		Unclassifiable/Attainment.
Webb County		Unclassifiable/Attainment.
Wharton County		Unclassifiable/Attainment.
Wheeler County		Unclassifiable/Attainment.
Wichita County		Unclassifiable/Attainment.
Wilbarger County		Unclassifiable/Attainment.
Willacy County		Unclassifiable/Attainment.
Williamson County		Unclassifiable/Attainment.
Wilson County		Unclassifiable/Attainment.
Winkler County		Unclassifiable/Attainment.
Wise County		Unclassifiable/Attainment.
Wood County		Unclassifiable/Attainment.
Yoakum County		Unclassifiable/Attainment.
Young County		Unclassifiable/Attainment.
Zapata County		Unclassifiable/Attainment.
Zavala County		Unclassifiable/Attainment.

[a] Includes Indian Country located in each county or area, except as otherwise specified.
[1] This date is 90 days after October 31, 2011, unless otherwise noted.

■ 46. Section 81.345 is amended as follows:

■ a. By revising the table heading ''Utah—NO_2'' to read ''Utah—NO_2 (1971 Annual Standard).''

■ b. By adding a table entitled ''Utah—NO_2 (2010 1-Hour Standard)'' in alphabetical order to read as follows:

§ 81.345 Utah.

* * * * *

UTAH—NO_2 (2010 1-HOUR STANDARD)

Designated area	Designation [a]	
	Date [1]	Type
Cache County		Unclassifiable/Attainment.
Davis County		Unclassifiable/Attainment.
Salt Lake County		Unclassifiable/Attainment.
Utah County		Unclassifiable/Attainment.
Weber County		Unclassifiable/Attainment.
Rest of State		Unclassifiable/Attainment.

[a] Includes Indian Country located in each county or area, except as otherwise specified.
[1] This date is 90 days after October 31, 2011, unless otherwise noted.

■ 47. Section 81.346 is amended as follows:

■ a. By revising the table heading ''Vermont—NO_2'' to read ''Vermont—NO_2 (1971 Annual Standard).''

■ b. By adding a table entitled ''Vermont—NO_2 (2010 1-Hour Standard)'' in alphabetical order to read as follows:

§ 81.346 Vermont.

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VERMONT—NO_2 (2010 1-HOUR STANDARD)

Designated area	Designation [a]	
	Date [1]	Type
State of Vermont		Unclassifiable/Attainment.

[a] Includes Indian Country located in each county or area, except as otherwise specified.
[1] This date is 90 days after October 31, 2011, unless otherwise noted.

■ 48. Section 81.347 is amended as follows:

■ a. By revising the table heading ''Virginia—NO_2'' to read ''Virginia—NO_2 (1971 Annual Standard).''

■ b. By adding a table entitled ''Virginia—NO_2 (2010 1-Hour Standard)'' in alphabetical order to read as follows:

§ 81.347 Virginia.

* * * * *

VIRGINIA—NO_2 (2010 1-HOUR STANDARD)

Designated area	Designation [a]	
	Date [1]	Type
State of Virginia		Unclassifiable/Attainment.

[a] Includes Indian Country located in each county or area, except as otherwise specified.
[1] This date is 90 days after October 31, 2011, unless otherwise noted.

■ 49. Section 81.348 is amended as follows:

■ a. By revising the table heading ''Washington—NO_2'' to read ''Washington—NO_2 (1971 Annual Standard).''

■ b. By adding a table entitled ''Washington—NO_2 (2010 1-Hour Standard)'' in alphabetical order to read as follows:

§ 81.348 Washington.

* * * * *

WASHINGTON—NO_2 (2010 1-HOUR STANDARD)

Designated area	Designation [a]	
	Date [1]	Type
State of Washington		Unclassifiable/Attainment.

[a] Includes Indian Country located in each county or area, except as otherwise specified.
[1] This date is 90 days after October 31, 2011, unless otherwise noted.

■ 50. Section 81.349 is amended as follows:

■ a. By revising the table heading ''West Virginia—NO_2'' to read ''West Virginia—NO_2 (1971 Annual Standard).''

■ b. By adding a table entitled ''West Virginia—NO_2 (2010 1-Hour Standard)'' in alphabetical order to read as follows:

§ 81.349 West Virginia.

* * * * *

WEST VIRGINIA—NO_2 (2010 1-HOUR STANDARD)

Designated area	Designation [a]	
	Date [1]	Type
State of West Virginia		Unclassifiable/Attainment.

[a] Includes Indian Country located in each county or area, except as otherwise specified.
[1] This date is 90 days after October 31, 2011, unless otherwise noted.

■ 51. Section 81.350 is amended as follows:

■ a. By revising the table heading ''Wisconsin—NO_2'' to read ''Wisconsin—NO_2 (1971 Annual Standard).''

■ b. By adding a table entitled ''Wisconsin—NO_2 (2010 1-Hour Standard)'' in alphabetical order to read as follows:

§ 81.350 Wisconsin.

* * * * *

WISCONSIN—NO_2 (2010 1-HOUR STANDARD)

Designated area	Designation [a]	
	Date [1]	Type
Adams County		Unclassifiable/Attainment.
Ashland County		Unclassifiable/Attainment.
Barron County		Unclassifiable/Attainment.
Bayfield County		Unclassifiable/Attainment.
Brown County		Unclassifiable/Attainment.
Buffalo County		Unclassifiable/Attainment.
Burnett County		Unclassifiable/Attainment.
Calumet County		Unclassifiable/Attainment.
Chippewa County		Unclassifiable/Attainment.
Clark County		Unclassifiable/Attainment.
Columbia County		Unclassifiable/Attainment.
Crawford County		Unclassifiable/Attainment.
Dane County		Unclassifiable/Attainment.
Dodge County		Unclassifiable/Attainment.
Door County		Unclassifiable/Attainment.
Douglas County		Unclassifiable/Attainment.
Dunn County		Unclassifiable/Attainment.
Eau Claire County		Unclassifiable/Attainment.
Florence County		Unclassifiable/Attainment.
Fond du Lac County		Unclassifiable/Attainment.
Forest County		Unclassifiable/Attainment.
Grant County		Unclassifiable/Attainment.
Green County		Unclassifiable/Attainment.
Green Lake County		Unclassifiable/Attainment.
Iowa County		Unclassifiable/Attainment.
Iron County		Unclassifiable/Attainment.
Jackson County		Unclassifiable/Attainment.
Jefferson County		Unclassifiable/Attainment.
Juneau County		Unclassifiable/Attainment.
Kenosha County		Unclassifiable/Attainment.
Kewaunee County		Unclassifiable/Attainment.
La Crosse County		Unclassifiable/Attainment.
Lafayette County		Unclassifiable/Attainment.
Langlade County		Unclassifiable/Attainment.
Lincoln County		Unclassifiable/Attainment.
Manitowoc County		Unclassifiable/Attainment.
Marathon County		Unclassifiable/Attainment.
Marinette County		Unclassifiable/Attainment.
Marquette County		Unclassifiable/Attainment.
Menominee County		Unclassifiable/Attainment.
Milwaukee County		Unclassifiable/Attainment.
Monroe County		Unclassifiable/Attainment.
Oconto County		Unclassifiable/Attainment.
Oneida County		Unclassifiable/Attainment.
Outagamie County		Unclassifiable/Attainment.
Ozaukee County		Unclassifiable/Attainment.

WISCONSIN—NO_2 (2010 1-HOUR STANDARD)—Continued

Designated area	Designation [a]	
	Date [1]	Type
Pepin County		Unclassifiable/Attainment.
Pierce County		Unclassifiable/Attainment.
Polk County		Unclassifiable/Attainment.
Portage County		Unclassifiable/Attainment.
Price County		Unclassifiable/Attainment.
Racine County		Unclassifiable/Attainment.
Richland County		Unclassifiable/Attainment.
Rock County		Unclassifiable/Attainment.
Rusk County		Unclassifiable/Attainment.
St. Croix County		Unclassifiable/Attainment.
Sauk County		Unclassifiable/Attainment.
Sawyer County		Unclassifiable/Attainment.
Shawano County		Unclassifiable/Attainment.
Sheboygan County		Unclassifiable/Attainment.
Taylor County		Unclassifiable/Attainment.
Trempealeau County		Unclassifiable/Attainment.
Vernon County		Unclassifiable/Attainment.
Vilas County		Unclassifiable/Attainment.
Walworth County		Unclassifiable/Attainment.
Washburn County		Unclassifiable/Attainment.
Washington County		Unclassifiable/Attainment.
Waukesha County		Unclassifiable/Attainment.
Waupaca County		Unclassifiable/Attainment.
Waushara County		Unclassifiable/Attainment.
Winnebago County		Unclassifiable/Attainment.
Wood County		Unclassifiable/Attainment.

[a] Includes Indian Country located in each county or area, except as otherwise specified.
[1] This date is 90 days after October 31, 2011, unless otherwise noted.

■ 52. Section 81.351 is amended as follows:

■ a. By revising the table heading ''Wyoming—NO_2'' to read ''Wyoming—NO_2 (1971 Annual Standard).''

■ b. By adding a table entitled ''Wyoming—NO_2 (2010 1-Hour Standard)'' in alphabetical order to read as follows:

§ 81.351 Wyoming.

* * * * *

WYOMING—NO_2 (2010 1-HOUR STANDARD)

Designated area	Designation [a]	
	Date [1]	Type
Albany County		Unclassifiable/Attainment.
Big Horn County		Unclassifiable/Attainment.
Campbell County		Unclassifiable/Attainment.
Carbon County		Unclassifiable/Attainment.
Converse County		Unclassifiable/Attainment.
Crook County		Unclassifiable/Attainment.
Fremont County		Unclassifiable/Attainment.
Goshen County		Unclassifiable/Attainment.
Hot Springs County		Unclassifiable/Attainment.
Johnson County		Unclassifiable/Attainment.
Laramie County		Unclassifiable/Attainment.
Lincoln County		Unclassifiable/Attainment.
Natrona County		Unclassifiable/Attainment.
Niobrara County		Unclassifiable/Attainment.
Park County		Unclassifiable/Attainment.
Platte County		Unclassifiable/Attainment.
Sheridan County		Unclassifiable/Attainment.
Sublette County		Unclassifiable/Attainment.
Sweetwater County		Unclassifiable/Attainment.
Teton County		Unclassifiable/Attainment.
Uinta County		Unclassifiable/Attainment.
Washakie County		Unclassifiable/Attainment.
Weston County		Unclassifiable/Attainment.

[a] Includes Indian Country located in each county or area, except as otherwise specified.
[1] This date is 90 days after October 31, 2011, unless otherwise noted.

■ 53. Section 81.352 is amended as follows:

■ a. By revising the table heading ''American Samoa—NO_2'' to read ''American Samoa—NO_2 (1971 Annual Standard).''

■ b. By adding a table entitled ''American Samoa—NO_2 (2010 1-Hour Standard)'' in alphabetical order to read as follows:

§ 81.352 American Samoa.

* * * * *

AMERICAN SAMOA—NO_2 (2010 1-HOUR STANDARD)

Designated area	Designation [a]	
	Date [1]	Type
State of American Samoa		Unclassifiable/Attainment.

[a] Includes Indian Country located in each county or area, except as otherwise specified.
[1] This date is 90 days after October 31, 2011, unless otherwise noted.

■ 54. Section 81.353 is amended as follows:

■ a. By revising the table heading ''Guam—NO_2'' to read ''Guam—NO_2 (1971 Annual Standard).''

■ b. By adding a table entitled ''Guam—NO_2 (2010 1-Hour Standard)'' in alphabetical order to read as follows:

§ 81.353 Guam.

* * * * *

GUAM—NO_2 (2010 1-HOUR STANDARD)

Designated area	Designation [a]	
	Date [1]	Type
State of Guam		Unclassifiable/Attainment.

[a] Includes Indian Country located in each county or area, except as otherwise specified.
[1] This date is 90 days after October 31, 2011, unless otherwise noted.

■ 55. Section 81.354 is amended as follows:

■ a. By revising the table heading ''Northern Mariana Islands—NO_2'' to read ''Northern Mariana Islands—NO_2 (1971 Annual Standard).''

■ b. By adding a table entitled ''Northern Mariana Islands—NO_2 (2010 1-Hour Standard)'' in alphabetical order to read as follows:

§ 81.354 Northern Mariana Islands.

* * * * *

NORTHERN MARIANA ISLANDS—NO_2 (2010 1-HOUR STANDARD)

Designated area	Designation [a]	
	Date [1]	Type
Northern Mariana Islands		Unclassifiable/Attainment.

[a] Includes Indian Country located in each county or area, except as otherwise specified.
[1] This date is 90 days after October 31, 2011, unless otherwise noted.

■ 56. Section 81.355 is amended as follows:

■ a. By revising the table heading ''Puerto Rico—NO_2'' to read ''Puerto Rico—NO_2 (1971 Annual Standard).''

■ b. By adding a table entitled ''Puerto Rico—NO_2 (2010 1-Hour Standard)'' in alphabetical order to read as follows:

§ 81.355 Puerto Rico.

* * * * *

PUERTO RICO—NO_2 (2010 1-HOUR STANDARD)

Designated area	Designation [a]	
	Date [1]	Type
Adjuntas Municipio		Unclassifiable/Attainment.
Aguada Municipio		Unclassifiable/Attainment.
Aguadilla Municipio		Unclassifiable/Attainment.
Aguas Buenas Municipio		Unclassifiable/Attainment.
Aibonito Municipio		Unclassifiable/Attainment.
Añasco Municipio		Unclassifiable/Attainment.
Arecibo Municipio		Unclassifiable/Attainment.
Arroyo Municipio		Unclassifiable/Attainment.
Barceloneta Municipio		Unclassifiable/Attainment.
Barranquitas Municipio		Unclassifiable/Attainment.

PUERTO RICO—NO_2 (2010 1-HOUR STANDARD)—Continued

Designated area	Designation [a]	
	Date [1]	Type
Bayamón County		Unclassifiable/Attainment.
Cabo Rojo Municipio		Unclassifiable/Attainment.
Caguas Municipio		Unclassifiable/Attainment.
Camuy Municipio		Unclassifiable/Attainment.
Canóvanas Municipio		Unclassifiable/Attainment.
Carolina Municipio		Unclassifiable/Attainment.
Cataño County		Unclassifiable/Attainment.
Cayey Municipio		Unclassifiable/Attainment.
Ceiba Municipio		Unclassifiable/Attainment.
Ciales Municipio		Unclassifiable/Attainment.
Cidra Municipio		Unclassifiable/Attainment.
Coamo Municipio		Unclassifiable/Attainment.
Comerío Municipio		Unclassifiable/Attainment.
Corozal Municipio		Unclassifiable/Attainment.
Culebra Municipio		Unclassifiable/Attainment.
Dorado Municipio		Unclassifiable/Attainment.
Fajardo Municipio		Unclassifiable/Attainment.
Florida Municipio		Unclassifiable/Attainment.
Guánica Municipio		Unclassifiable/Attainment.
Guayama Municipio		Unclassifiable/Attainment.
Guayanilla Municipio		Unclassifiable/Attainment.
Guaynabo County		Unclassifiable/Attainment.
Gurabo Municipio		Unclassifiable/Attainment.
Hatillo Municipio		Unclassifiable/Attainment.
Hormigueros Municipio		Unclassifiable/Attainment.
Humacao Municipio		Unclassifiable/Attainment.
Isabela Municipio		Unclassifiable/Attainment.
Jayuya Municipio		Unclassifiable/Attainment.
Juana Díaz Municipio		Unclassifiable/Attainment.
Juncos Municipio		Unclassifiable/Attainment.
Lajas Municipio		Unclassifiable/Attainment.
Lares Municipio		Unclassifiable/Attainment.
Las Marías Municipio		Unclassifiable/Attainment.
Las Piedras Municipio		Unclassifiable/Attainment.
Loíza Municipio		Unclassifiable/Attainment.
Luquillo Municipio		Unclassifiable/Attainment.
Manatí Municipio		Unclassifiable/Attainment.
Maricao Municipio		Unclassifiable/Attainment.
Maunabo Municipio		Unclassifiable/Attainment.
Mayagnez Municipio		Unclassifiable/Attainment.
Moca Municipio		Unclassifiable/Attainment.
Morovis Municipio		Unclassifiable/Attainment.
Naguabo Municipio		Unclassifiable/Attainment.
Naranjito Municipio		Unclassifiable/Attainment.
Orocovis Municipio		Unclassifiable/Attainment.
Patillas Municipio		Unclassifiable/Attainment.
Peñuelas Municipio		Unclassifiable/Attainment.
Ponce Municipio		Unclassifiable/Attainment.
Quebradillas Municipio		Unclassifiable/Attainment.
Rincón Municipio		Unclassifiable/Attainment.
Río Grande Municipio		Unclassifiable/Attainment.
Sabana Grande Municipio		Unclassifiable/Attainment.
Salinas Municipio		Unclassifiable/Attainment.
San Germán Municipio		Unclassifiable/Attainment.
San Juan Municipio		Unclassifiable/Attainment.
San Lorenzo Municipio		Unclassifiable/Attainment.
San Sebastián Municipio		Unclassifiable/Attainment.
Santa Isabel Municipio		Unclassifiable/Attainment.
Toa Alta Municipio		Unclassifiable/Attainment.
Toa Baja County		Unclassifiable/Attainment.
Trujillo Alto Municipio		Unclassifiable/Attainment.
Utuado Municipio		Unclassifiable/Attainment.
Vega Alta Municipio		Unclassifiable/Attainment.
Vega Baja Municipio		Unclassifiable/Attainment.
Vieques Municipio		Unclassifiable/Attainment.
Villalba Municipio		Unclassifiable/Attainment.
Yabucoa Municipio		Unclassifiable/Attainment.
Yauco Municipio		Unclassifiable/Attainment.

[a] Includes Indian Country located in each county or area, except as otherwise specified.
[1] This date is 90 days after October 31, 2011, unless otherwise noted.

■ 57. Section 81.356 is amended as follows:

■ a. By revising the table heading ''Virgin Islands—NO_2'' to read ''Virgin Islands—NO_2 (1971 Annual Standard).''

■ b. By adding a table entitled ''Virgin Islands—NO_2 (2010 1-Hour Standard)'' in alphabetical order to read as follows:

§ 81.356 Virgin Islands.

* * * * *

VIRGIN ISLANDS—NO_2 (2010 1-HOUR STANDARD)

Designated area	Designation [a]	
	Date [1]	Type
State of Virgin Islands		Unclassifiable/Attainment.

[a] Includes Indian Country located in each county or area, except as otherwise specified.
[1] This date is 90 days after October 31, 2011, unless otherwise noted.

[FR Doc. 2012–3150 Filed 2–16–12; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 101126522–0640–02]

RIN 0648–XB010

Fisheries of the Exclusive Economic Zone Off Alaska; Pollock in Statistical Area 630 in the Gulf of Alaska

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; modification of a closure.

SUMMARY: NMFS is opening directed fishing for pollock in Statistical Area 630 of the Gulf of Alaska (GOA). This action is necessary to fully use the A season allowance of the 2012 total allowable catch of pollock in Statistical Area 630 of the GOA.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), February 16, 2012, through 1200 hrs, A.l.t., March 10, 2012. Comments must be received at the following address no later than 4:30 p.m., A.l.t., February 29, 2012.

ADDRESSES: You may submit comments, identified by NOAA–NMFS–2012–0023, by any one of the following methods:

• *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal *http://www.regulations.gov.* To submit comments via the e-Rulemaking Portal, first click the ''submit a comment'' icon, then enter NOAA–NMFS–2012–0023 in the keyword search. Locate the document you wish to comment on from the resulting list and click on the ''Submit a Comment'' icon on that line.

• *Mail:* Address written comments to Glenn Merrill, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region NMFS, Attn: Ellen Sebastian. Mail comments to P.O. Box 21668, Juneau, AK 99802–1668.

• *Fax:* Address written comments to Glenn Merrill, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region NMFS, Attn: Ellen Sebastian. Fax comments to 907–586–7557.

• *Hand delivery to the Federal Building:* Address written comments to Glenn Merrill, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region NMFS, Attn: Ellen Sebastian. Deliver comments to 709 West 9th Street, Room 420A, Juneau, AK.

Instructions: Comments must be submitted by one of the above methods to ensure that the comments are received, documented, and considered by NMFS. Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered. All comments received are a part of the public record and will generally be posted for public viewing on *http://www.regulations.gov* without change. All personal identifying information (e.g., name, address) submitted voluntarily by the sender will be publicly accessible. Do not submit confidential business information, or otherwise sensitive or protected information. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word or Excel, WordPerfect, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Obren Davis, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the GOA exclusive economic zone according to the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

NMFS closed directed fishing for pollock in Statistical Area 630 of the GOA under § 679.20(d)(1)(iii) on January 23, 2012 (77 FR 3638, January 25, 2012).

As of February 10, 2012, NMFS has determined that approximately 5,298 metric tons of pollock remain in the directed fishing allowance for pollock in Statistical Area 630 of the GOA. Therefore, in accordance with § 679.25(a)(1)(i), (a)(2)(i)(C), and (a)(2)(iii)(D), and to fully utilize the A season allowance of the 2012 TAC of pollock in Statistical Area 630 of the GOA, NMFS is terminating the previous closure and is reopening directed fishing pollock in Statistical Area 630 of the GOA. The Administrator, Alaska Region (Regional Administrator) considered the following factors in reaching this decision: (1) the current catch of pollock in Statistical Area 630 of the GOA and, (2) the harvest capacity and stated intent on future harvesting patterns of vessels in participating in this fishery.

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the opening of the pollock fishery

in Statistical Area 630 of the GOA. Immediate notification is necessary to allow for the orderly conduct and efficient operation of this fishery, to allow the industry to plan for the fishing season, and to avoid potential disruption to the fishing fleet and processors. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of February 10, 2012.

The AA also finds good cause to waive the 30-day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

Without this inseason adjustment, NMFS could not allow pollock fishery in Statistical Area 630 of the GOA to be harvested in an expedient manner and in accordance with the regulatory schedule. Under § 679.25(c)(2), interested persons are invited to submit written comments on this action to the above address until February 29, 2012.

This action is required by § 679.25 and is exempt from review under Executive Order 12866.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: February 14, 2012.

Carrie Selberg,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2012–3794 Filed 2–14–12; 4:15 pm]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 101126522–0640–2]

RIN 0648–XB014

Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Cod by Catcher/Processors Using Trawl Gear in the Western Regulatory Area of the Gulf of Alaska

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; closure.

SUMMARY: NMFS is prohibiting directed fishing for Pacific cod by catcher/processors (C/Ps) using trawl gear in the Western Regulatory Area of the Gulf of Alaska (GOA). This action is necessary to prevent exceeding the A season allowance of the 2012 Pacific cod total allowable catch apportioned to C/Ps using trawl gear in the Western Regulatory Area of the GOA.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), February 14, 2012, through 1200 hrs, A.l.t., September 1, 2012.

FOR FURTHER INFORMATION CONTACT: Obren Davis, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the GOA exclusive economic zone according to the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679. Regulations governing sideboard protections for GOA groundfish fisheries appear at subpart B of 50 CFR part 680.

The A season allowance of the 2012 Pacific cod total allowable catch (TAC) apportioned to C/Ps using trawl gear in the Western Regulatory Area of the GOA is 186 metric tons (mt), as established by the final 2011 and 2012 harvest specifications for groundfish of the GOA (76 FR 11111, March 1, 2011), revision to the final 2012 harvest specifications for Pacific cod (76 FR 81860, December 29, 2011), and inseason adjustment to the final 2012 harvest specifications for Pacific cod (77 FR 438, January 5, 2012).

In accordance with § 679.20(d)(1)(i), the Administrator, Alaska Region, NMFS (Regional Administrator) has determined that the A season allowance of the 2012 Pacific cod TAC apportioned to C/Ps using trawl gear in the Western Regulatory Area of the GOA will soon be reached. Therefore, the Regional Administrator is establishing a directed fishing allowance of 136 mt, and is setting aside the remaining 50 mt as bycatch to support other anticipated groundfish fisheries. In accordance with § 679.20(d)(1)(iii), the Regional Administrator finds that this directed fishing allowance has been reached. Consequently, NMFS is prohibiting directed fishing for Pacific cod by C/Ps using trawl gear in the Western Regulatory Area of the GOA. After the effective date of this closure the maximum retainable amounts at § 679.20(e) and (f) apply at any time during a trip.

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the directed fishing closure of Pacific cod for C/Ps using trawl gear in the Western Regulatory Area of the GOA. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of February 13, 2012.

The AA also finds good cause to waive the 30-day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

This action is required by § 679.20 and is exempt from review under Executive Order 12866.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: February 14, 2012.

Carrie Selberg,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2012–3797 Filed 2–14–12; 4:15 pm]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 77, No. 33
Friday, February 17, 2012

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

DEPARTMENT OF JUSTICE

8 CFR Part 1292

[EOIR Docket No. 176]

RIN 1125–AA72

Recognition and Accreditation

AGENCY: Executive Office for Immigration Review, Department of Justice.

ACTION: Notice of meeting.

SUMMARY: The Executive Office for Immigration Review (EOIR) is reviewing and considering amendments to the regulations governing the recognition of organizations and accreditation of representatives who appear before EOIR. EOIR seeks public comment on issues affecting these regulations and will host two open public meetings to discuss these regulations. The first meeting will be limited to a discussion of the recognition of organizations and the second will address accreditation of representatives.

DATES: *Dates and Times:* The first meeting will be held on Wednesday, March 14, 2012 at 1 p.m. The second meeting will be held on Wednesday, March 21, 2012 at 1 p.m.

ADDRESSES: The meetings will be held at 5107 Leesburg Pike, Suite 1800, Falls Church, VA 22041.

FOR FURTHER INFORMATION CONTACT: To RSVP for the meeting: Lauren Alder Reid, Counsel for Legislative and Public Affairs, 703–305–0289, *PAO.EOIR@usdoj.gov*. For each meeting, attendance will be limited to the first forty (40) individuals to RSVP. EOIR will also offer a conference call option for those who cannot physically attend the meeting. To attend the meeting via conference call, please RSVP with the name(s) of the attendee(s), the attendee's organization, and an email address where instructions may be sent for accessing the conference call.

SUPPLEMENTARY INFORMATION:

Background

EOIR is reviewing and considering amendments to the regulations at 8 CFR 1292.2 governing the recognition of organizations and accreditation of representatives who appear before EOIR. EOIR will be hosting two open public meetings to discuss these regulations. The purpose of these meetings is to solicit the views of non-governmental organizations and other interested members of the public regarding potential amendments to these regulations.

Agenda for March 14, 2012, Meeting

The first meeting, which will be held on March 14, 2012, will focus on issues addressing the recognition of organizations. An agenda for the first meeting is listed below.

1. *Introductions.*

2. *Discussion of required documentation to establish eligibility for recognition.* What documentation must an organization be required to provide in order to establish that it meets the eligibility requirements for recognition? For example, should EOIR require the organization to submit incorporation or tax documents to prove non-profit status?

3. *Discussion of fraud prevention.* EOIR is committed to preventing fraud and is mindful that the recognition and accreditation program may be susceptible to abuse. How can EOIR both prevent abuse of the system by organizations that may seek to exploit or misuse their recognized status, and encourage the participation of legitimate organizations in the program?

4. *Discussion of nominal fees.* Currently, recognized organizations are allowed to charge only a ''nominal fee'' for their services in order to ensure that they are serving a non-profit, religious, charitable, or social service purpose. *See* 8 CFR 1292.1(a)(1). Should recognized organizations be able to charge more than a nominal fee for their services? If so, under what circumstances? Would a system, in which an organization's eligibility for recognition is determined based on the percentage of its revenue from client fees, be an effective measure to ensure that the recognized organization is serving a non-profit religious, charitable, or social service purpose?

5. *Discussion of withdrawal of recognition.* Are the current procedures for withdrawal of recognition for an organization effective? *See* 8 CFR 1292.2(c). If not, how can the process be improved?

6. *Discussion of definition of ''low-income.''* EOIR is considering defining ''low-income'' by using percentages of the Federal Poverty Guidelines amounts. For example, the Legal Services Corporation provides that the income of service recipients may not exceed 125% of the current official Federal Poverty Guidelines amounts. *See* 45 CFR part 1611. How should ''low-income'' be defined?

7. *Adjourn.*

Agenda for March 21, 2012 Meeting

The second meeting, which will be held on March 21, 2012, will focus on issues addressing the accreditation of representatives. An agenda for the second meeting is listed below.

1. *Introductions.*

2. *Discussion of required training for accredited representatives.* In order to ensure that accredited representatives maintain sufficient knowledge in immigration law and procedure to represent individuals adequately before the Department of Homeland Security and EOIR, should EOIR require that accredited representatives fulfill an annual immigration training requirement similar to a Continuing Legal Education (CLE) requirement for attorneys? What would be the appropriate amount and type of annual training for accredited representatives (e.g., requiring fifteen hours of CLE annually as many state bar associations require for licensed attorneys)?

3. *Discussion of fraud prevention.* EOIR is committed to preventing fraud and mindful that the recognition and accreditation program may be susceptible to abuse. How can EOIR both prevent abuse of the system by individuals who may seek to exploit or misuse their accredited status, and encourage the participation of legitimate individuals in the program?

4. *Discussion of adequate supervision.* Generally, accredited representatives are non-attorneys who provide advice and representation to individuals. What is the best way to ensure that accredited representatives receive adequate supervision in order to provide effective assistance and representation?

5. *Adjourn.*

Public Participation

EOIR welcomes responses to these questions in the form of written submissions, as well as in-person discussion at each respective meeting. To facilitate EOIR's ability to respond to comments at the meetings, the agency believes it will be most helpful to receive written answers to the questions before the meetings. Therefore, EOIR encourages parties to submit written answers no later than 5 p.m. on Tuesday, March 6, 2012, by email to *PAO.EOIR@usdoj.gov*. However, EOIR will also accept comments and written responses after the meetings. Final written submissions are due no later than 5 p.m. on Friday, March 30, 2012, by email to *PAO.EOIR@usdoj.gov*.

The meetings are open to the public, but advance notice of attendance is required to ensure adequate seating. Persons planning to attend should notify Lauren Alder Reid, Counsel for Legislative and Public Affairs, 703–305–0289, *PAO.EOIR@usdoj.gov*. For each meeting, participation will be limited to the first forty (40) individuals to RSVP, with an additional conference call option available.

Dated: February 7, 2012.

Lauren Alder-Reid,

Counsel for Legislative and Public Affairs.

[FR Doc. 2012–3725 Filed 2–16–12; 8:45 am]

BILLING CODE 4410–30–P

NUCLEAR REGULATORY COMMISSION

10 CFR Part 72

RIN 3150–AJ05

[NRC–2011–0221]

List of Approved Spent Fuel Storage Casks: HI–STORM 100, Revision 8

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed rule.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC or the Commission) is proposing to amend its spent fuel storage cask regulations by revising the Holtec International HI–STORM 100 dry cask storage system listing within the ''List of Approved Spent Fuel Storage Casks'' to include Amendment No. 8 to Certificate of Compliance (CoC) No. 1014. Amendment No. 8 adds a new multipurpose canister (MPC)—68M to the approved models currently included in CoC No. 1014 with two new boiling water reactor fuel assembly/array classes, and a new pressurized water reactor fuel assembly/class to CoC No. 1014 for loading into the MPC–32. In addition, the amendment makes several other changes as described under the ''Background'' heading in the **SUPPLEMENTARY INFORMATION** section of this document.

DATES: Submit comments by March 19, 2012. 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–2011–0221 in the subject line of your comments. For instructions on submitting comments and 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 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–2011–0221. Address questions about NRC dockets to Carol Gallagher, telephone: 301–492–3668, email: *Carol.Gallagher@nrc.gov*.
- *Mail comments to:* Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Rulemakings and Adjudications Staff.
- *Email comments to: Rulemaking.Comments@nrc.gov*. If you do not receive a reply email confirming that we have received your comments, contact us directly at 301–415–1677.
- *Hand-deliver comments to:* 11555 Rockville Pike, Rockville, Maryland 20852, between 7:30 a.m. and 4:15 p.m. EST Federal workdays (telephone: 301–415–1677).
- *Fax comments to:* Secretary, U.S. Nuclear Regulatory Commission at 301–415–1101.

FOR FURTHER INFORMATION CONTACT: Gregory Trussell, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: 301–415–6445, email: *Gregory.Trussell@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 O–1F21, 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 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 proposed rule can be found at *http://www.regulations.gov* by searching on Docket ID NRC–2011–0221. For additional information, see the direct final rule published in the Rules and Regulations section of this issue of the **Federal Register**.

Procedural Background

This rule is limited to the changes contained in Amendment No. 8 to CoC No. 1014 and does not include other aspects of the HI–STORM 100 dry storage cask system. Because the NRC considers this action noncontroversial and routine, the NRC is publishing this proposed rule concurrently as a direct final rule in the Rules and Regulations section of this issue of the **Federal Register**. Adequate protection of public health and safety continues to be ensured. The direct final rule will become effective on May 2, 2012. However, if the NRC receives significant adverse comments on the direct final rule by March 19, 2012, then the NRC will publish a document that withdraws the direct final rule. If the direct final rule is withdrawn, the NRC will address the comments received in response to

the proposed revisions in a subsequent final rule. Absent significant modifications to the proposed revisions requiring republication, the NRC will not initiate a second comment period on this action in the event the direct final rule is withdrawn.

A significant adverse comment is a comment where the commenter explains why the rule would be inappropriate, including challenges to the rule's underlying premise or approach, or would be ineffective or unacceptable without a change. A comment is adverse and significant if:

(1) The comment opposes the rule and provides a reason sufficient to require a substantive response in a notice-and-comment process. For example, a substantive response is required when:

(a) The comment causes the NRC staff to reevaluate (or reconsider) its position or conduct additional analysis;

(b) The comment raises an issue serious enough to warrant a substantive response to clarify or complete the record; or

(c) The comment raises a relevant issue that was not previously addressed or considered by the NRC staff.

(2) The comment proposes a change or an addition to the rule, and it is apparent that the rule would be ineffective or unacceptable without incorporation of the change or addition.

(3) The comment causes the NRC staff to make a change (other than editorial) to the rule, CoC, or Technical Specifications (TSs).

For additional procedural information and the regulatory analysis, see the direct final rule published in the Rules and Regulations section of this **Federal Register**.

Background

On November 28, 2009, and as supplemented on November 4 and December 14, 2010, and February 25 and July 8, 2011, Holtec International, the holder of CoC No. 1014, submitted a certificate amendment request to the NRC requesting an amendment to CoC No. 1014. Specifically, Holtec International requested changes to add a new multipurpose canister (MPC)–68M to the approved models currently included in CoC No. 1014 with two new boiling water reactor fuel assembly/array classes, and a new pressurized water reactor fuel assembly/class to CoC No. 1014 for loading into the MPC–32. In addition, the amendment would change (1) Condition 5 of CoC No. 1014 to add ''if applicable'' after the reference to Section 3.5 of Appendix B, ''Cask Transfer Facility (CTF)'' to clarify that the CTF is an optional facility; (2) Appendix A, TS 1.1, to modify the CTF definition to clarify that it could be used in lieu of Title 10 of the Code of Federal Regulations (10 CFR) part 50 controlled structures for cask transfer evolutions; and (3) Table 3–1, MPC Cavity Drying Limits, to include the previously approved, but omitted table to eliminate inconsistencies between Table 3–1 and TS 3.1.1, Limiting Condition for Operation.

List of Subjects in 10 CFR Part 72

Administrative practice and procedure, Criminal penalties, Manpower training programs, Nuclear materials, Occupational safety and health, Penalties, Radiation protection, Reporting and recordkeeping requirements, Security measures, Spent fuel, Whistleblowing.

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; the Nuclear Waste Policy Act of 1982, as amended, and 5 U.S.C. 553; the NRC is proposing to adopt the following amendments to 10 CFR part 72.

PART 72—LICENSING REQUIREMENTS FOR THE INDEPENDENT STORAGE OF SPENT NUCLEAR FUEL, HIGH-LEVEL RADIOACTIVE WASTE, AND REACTOR-RELATED GREATER THAN CLASS C WASTE

1. The authority citation for part 72 continues to read as follows:

Authority: Secs. 51, 53, 57, 62, 63, 65, 69, 81, 161, 182, 183, 184, 186, 187, 189, 68 Stat. 929, 930, 932, 933, 934, 935, 948, 953, 954, 955, as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2071, 2073, 2077, 2092, 2093, 2095, 2099, 2111, 2201, 2232, 2233, 2234, 2236, 2237, 2238, 2282); sec. 274, Pub. L. 86–373, 73 Stat. 688, as amended (42 U.S.C. 2021); sec. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846); Pub. L. 95–601, sec. 10, 92 Stat. 2951 as amended by Pub. L. 102–486, sec. 7902, 106 Stat. 3123 (42 U.S.C. 5851); sec. 102, Pub. L. 91–190, 83 Stat. 853 (42 U.S.C. 4332); secs. 131, 132, 133, 135, 137, 141, Pub. L. 97–425, 96 Stat. 2229, 2230, 2232, 2241, sec. 148, Pub. L. 100–203, 101 Stat. 1330–235 (42 U.S.C. 10151, 10152, 10153, 10155, 10157, 10161, 10168); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note); Energy Policy Act of 2005, Pub. L. 109–58, 119 Stat. 549 (2005).

Section 72.44(g) also issued under secs. 142(b) and 148(c), (d), Pub. L. 100–203, 101 Stat. 1330–232, 1330–236 (42 U.S.C. 10162(b), 10168(c), (d)). Section 72.46 also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239); sec. 134, Pub. L. 97–425, 96 Stat. 2230 (42 U.S.C. 10154). Section 72.96(d) also issued under sec. 145(g), Pub. L. 100–203, 101 Stat. 1330–235 (42 U.S.C. 10165(g)). Subpart J also issued under secs. 2(2), 2(15), 2(19), 117(a), 141(h), Pub. L. 97–425, 96 Stat. 2202, 2203, 2204, 2222, 2244 (42 U.S.C. 10101, 10137(a), 10161(h)). Subparts K and L are also issued under sec. 133, 98 Stat. 2230 (42 U.S.C. 10153) and sec. 218(a), 96 Stat. 2252 (42 U.S.C. 10198).

2. In § 72.214, Certificate of Compliance 1014 is revised to read as follows:

§ 72.214 List of approved spent fuel storage casks.

* * * * *

Certificate No.: 1014.
Initial Certificate Effective Date: May 31, 2000.
Amendment Number 1 Effective Date: July 15, 2002.
Amendment Number 2 Effective Date: June 7, 2005.
Amendment Number 3 Effective Date: May 29, 2007.
Amendment Number 4 Effective Date: January 8, 2008.
Amendment Number 5 Effective Date: July 14, 2008.
Amendment Number 6 Effective Date: August 17, 2009.
Amendment Number 7 Effective Date: December 28, 2009.
Amendment Number 8 Effective Date: May 2, 2012.
SAR Submitted by: Holtec International.
SAR Title: Final Safety Analysis Report for the HI–STORM 100 Cask System.
Docket Number: 72–1014.
Certificate Expiration Date: May 31, 2020.
Model Number: HI–STORM 100.

* * * * *

Dated at Rockville, Maryland, this 25th day of January 2012.

For the Nuclear Regulatory Commission.

R.W. Borchardt,

Executive Director for Operations.

[FR Doc. 2012–3682 Filed 2–16–12; 8:45 am]

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BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1090

[Docket No. CFPB–2012–0005]

RIN 3170–AA00

Defining Larger Participants in Certain Consumer Financial Product and Service Markets

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Proposed rule; request for public comment.

SUMMARY: The Bureau of Consumer Financial Protection (Bureau) is proposing a new regulation pursuant to

section 1024 of the Consumer Financial Protection Act of 2010. That provision grants the Bureau authority to supervise certain nonbank covered persons for compliance with Federal consumer financial laws and for other purposes. The Bureau has the authority to supervise nonbank covered persons of all sizes in the residential mortgage, private education lending, and payday lending markets. In addition, the Bureau has the authority to supervise nonbank ''larger participant[s]'' in markets for other consumer financial products or services. The Bureau must define such ''larger participants'' by rule, and such an initial rule must be issued by July 21, 2012.

In this proposal, the Bureau proposes to define larger participants in the markets for consumer debt collection and consumer reporting. The Bureau intends that this proposal and subsequent initial rule will be followed by a series of rulemakings covering additional markets for consumer financial products and services. The Bureau also proposes to include provisions in this proposal that will facilitate the supervision of nonbank covered persons.

DATES: Comments must be received on or before April 17, 2012.

ADDRESSES: Interested parties are invited to submit written comments electronically or in paper form. Because paper mail in the Washington, DC area and at the Bureau is subject to delay, commenters are encouraged to submit comments electronically. You may submit comments, identified by *Docket No. CFPB–2012–0005* or RIN 3170–AA00 by any of the following methods:

- *Electronic: http://www.regulations.gov.* Follow the instructions for submitting comments. In general, all comments received will be posted without change to their content.
- *Mail:* Monica Jackson, Office of the Executive Secretary, Bureau of Consumer Financial Protection, 1700 G Street NW., Washington DC 20006.
- *Hand Delivery/Courier:* Monica Jackson, Office of the Executive Secretary, Bureau of Consumer Financial Protection, 1700 G Street NW., Washington DC 20006.

In addition, comments will be available for public inspection and copying at 1700 G Street NW., Washington, DC 20006 on official business days between the hours of 10 a.m. and 5 p.m. Eastern Time. You can make an appointment to inspect the documents by telephoning (202) 435–7275.

All comments, including attachments and other supporting materials, will become part of the public record and will be subject to public disclosure. Submit only information that you wish to make available publicly. Do not include sensitive personal information, such as account numbers or Social Security numbers. Comments will not be edited to remove any identifying or contact information, such as name and address information, email addresses, or telephone numbers.

FOR FURTHER INFORMATION CONTACT: Christopher Young, Senior Counsel, (202) 435–7408, or Nicholas Krafft, Consumer Financial Protection Analyst, (202) 435–7252, Office of Nonbank Supervision, Bureau of Consumer Financial Protection, 1700 G Street NW., Washington, DC 20006.

SUPPLEMENTARY INFORMATION:

I. Background

The Consumer Financial Protection Act of 2010 (Act) [1] established the Bureau of Consumer Financial Protection (Bureau) on July 21, 2010. One of the Bureau's key responsibilities under the Act is the supervision of very large banks, thrifts, and credit unions, and their affiliates,[2] and certain nonbank covered persons.[3]

This proposal (Proposed Rule or proposal) would establish, in part, the scope of coverage of the Bureau's supervision authority for nonbank covered persons pursuant to section 1024 of the Act.[4] That authority varies by consumer financial product or service market. Specifically, section 1024 grants the Bureau authority to supervise, regardless of size, nonbank covered persons that offer or provide to consumers: (1) Origination, brokerage, or servicing of residential mortgage loans secured by real estate, and related mortgage loan modification or foreclosure relief services; (2) private education loans; and (3) payday loans.[5] In addition, the Bureau has the authority to supervise any ''larger participant of a market for other consumer financial products or services,'' as defined by rule by the Bureau.[6] The Act requires the initial larger participant rule to be issued by July 21, 2012. This Proposed Rule would establish the initial larger participant rule for two markets: consumer debt collection and consumer reporting. The Bureau anticipates subsequent rulemakings to define larger participants in additional markets.

The Bureau is authorized to supervise nonbank entities subject to section 1024 of the Act by requiring the submission of reports and conducting examinations to: (1) Assess compliance with Federal consumer financial law; (2) obtain information about such persons' activities and compliance systems or procedures; and (3) detect and assess risks to consumers and to the consumer financial markets.[7]

The Proposed Rule only pertains to defining larger participants in certain markets for purposes of the Bureau's nonbank supervision authority and would not impose new substantive consumer protection requirements on any nonbank entity. Moreover, nonbank entities are subject to the Bureau's regulatory and enforcement authority and any applicable Federal consumer financial law, regardless of whether they are subject to the Bureau's supervisory authority.

II. Overview of Comments Received

The Bureau solicited public comment on developing an initial proposed larger participant rule by publishing in the **Federal Register** a Notice and Request

[1] The Act is Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Public Law 111–203 (12 U.S.C. 5301).

[2] *See* Act section 1025(a). The Bureau also has certain authorities relating to the supervision of other banks, thrifts, and credit unions. *See* Act section 1026 (c)(1), (e).

[3] Section 1024 of the Act applies to nondepository (nonbank) covered persons and expressly excludes from coverage persons described in sections 1025(a) or 1026(a) of the Act. Under section 1002(6) of the Act, a ''covered person'' means ''(A) any person that engages in offering or providing a consumer financial product or service; and (B) any affiliate of a person described [in (A)] if such affiliate acts as a service provider to such person.'' Act section 1002(6); *see also* Act section 1002(5) (defining ''consumer financial product or service.'') Section 1024(d) of the Act provides that, subject to certain exceptions, ''to the extent that Federal law authorizes the Bureau and another Federal agency to * * * conduct examinations, or require reports from a [nonbank covered person] under such law for purposes of assuring compliance with Federal consumer financial law and any regulations thereunder, the Bureau shall have exclusive authority to * * * conduct examinations [and] require reports * * * with regard to a [nonbank covered person], subject to those provisions of law.''

[4] The Bureau's supervision authority also extends to service providers of these entities. *See* Act section 1024(e) (establishing the Bureau's supervisory authority relating to service providers); *see also,* Act section 1002(26) (defining ''service provider''). Service providers to consumer debt collectors and consumer reporting agencies may include firms such as data aggregators, law firms, data and record suppliers, account maintenance services, call centers, software providers, and developers of credit scoring algorithms.

[5] Act section 1024(a)(1)(A), (D), and (E).

[6] Act section 1024(a)(1)(B), (a)(2). The Bureau also has the authority to supervise any nonbank covered person that it ''has reasonable cause to determine, by order, after notice and a reasonable opportunity * * * to respond'' that such covered person ''is engaging, or has engaged, in conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services.'' Act section 1024(a)(1)(C).

[7] Act section 1024(b)(1).

for Comment (Notice) on June 29, 2011,[8] and holding a series of roundtable discussions with industry, consumer and civil rights groups, and state regulatory agencies and associations.[9] The comment period for the Notice ended on August 15, 2011. The Bureau received more than 10,400 comments from individual consumers, consumer advocacy groups, industry trade groups, individual companies, state and Federal regulators, regulatory associations, and elected officials.[10] Issues addressed in the comments included which markets should be covered in the initial proposed rule, the particular criteria and thresholds the initial rule should use to measure the size of nonbank covered persons, available data sources, and measurement dates and supervision timeframes.

Commenters suggested a variety of approaches to choosing markets for inclusion in the initial larger participant rule. Some suggested the inclusion of certain specified markets, such as consumer reporting. Other commenters, both industry and consumer, recommended that the Bureau take a broad and flexible approach to covering markets and defining larger participants, in order to bring a large number of markets and market participants under the Bureau's supervision program. Still other commenters suggested consideration of specific factors in choosing markets for inclusion, such as risk to consumers, costs and benefits, or duplication of existing supervision. With respect to establishing a test to define who is a larger participant in a market, comments submitted by both consumer groups and industry associations recommended that any test adopted by the Bureau enable it to adapt to evolving markets and be crafted such that nonbank covered persons do not ''slip through the cracks.'' Several commenters suggested that a ''one-size-fits-all'' approach to establishing a test to define who is a larger participant would not work. These commenters noted that the differences between markets call for tests tailored to each individual market. In addition, some industry and consumer group commenters supported using multiple tests within a given market to make it harder for nonbank covered persons to evade supervision under the rule. Other industry group commenters, however, favored the use of a single test to minimize burden on both nonbank covered persons and the Bureau.

The Bureau received comments both in favor and opposed to including small businesses within the coverage of the rulemaking. Trade groups with members that are small businesses cautioned about unnecessary burden and recommended an exemption of small businesses from coverage by the larger participant rule. Some consumer groups, on the other hand, advocated coverage of relevant firms even if they are small, arguing that in highly fragmented industries, almost all participants may be small businesses, and further, in the context of regional markets, small businesses may be large, regional players.

Finally, some commenters responded to the Bureau's request for suitable data sources to develop and apply definitions of larger participants. However, none of the comments identified available, comprehensive data sources that could be used for this purpose.

Comments are discussed below as relevant in the section-by-section description of the proposal.

III. Summary of the Proposal

This proposal is the first in what the Bureau intends to be a series of rules to define ''larger participants'' in specific markets for purposes of establishing, in part, the scope of coverage of the Bureau's nonbank supervision program. In developing the proposal, the Bureau considered the comments it received in response to the Notice and in the roundtables conducted last year. The Proposed Rule covers two markets for consumer financial products and services: consumer debt collection and consumer reporting.

The Proposed Rule sets forth definitions for the consumer financial products or services comprising the markets that it covers, in addition to defining other terms. The proposal establishes a test for each market to determine whether a nonbank entity is a larger participant of that market. For the debt collection and consumer reporting markets, the Bureau is proposing a test that measures the criterion of ''annual receipts.'' This measurement will use a definition of ''annual receipts'' adapted from the definition of the term used by the Small Business Administration (SBA) for purposes of defining small business concerns. The proposed threshold for the consumer debt collection market is more than $10 million in annual receipts and, for the consumer reporting market, is more than $7 million in annual receipts. Under the tests set forth in the Proposed Rule, these receipts must result from activities related to the market in question. Covered persons meeting the proposed tests would qualify as larger participants and be subject to the Bureau's supervision authority under section 1024 of the Act. Although annual receipts are proposed as the criterion of measurement for both markets covered by the Proposed Rule, the Bureau has not determined that this criterion would be appropriate for any other market that may be the subject of a future rulemaking. Rather, the Bureau will tailor each test to the market to which it will be applied.

The Proposed Rule provides that once a nonbank covered person qualifies as a larger participant, the person will be deemed a larger participant for a period not less than two years from the first day of the tax year in which the person last met the applicable test. The proposal also includes a procedure for a person to dispute that it qualifies as a larger participant. To facilitate the Bureau's supervision of nonbank covered persons, to enable the Bureau to carry out the purposes and objectives of the Act relating to supervision, and to prevent evasion, the Proposed Rule provides that the Bureau may require submission of certain records, documents, and other information for purposes of determining whether a person is a larger participant of a covered market.

IV. Legal Authority and Procedural Matters

A. Rulemaking Authority

The Bureau is issuing this Proposed Rule pursuant to its authority under: (1) Sections 1024(a)(1)(B) and (a)(2) of the Act which require the Bureau to issue an initial rule to define who is a larger participant in certain markets for consumer financial products or services by July 21, 2012, one year after the designated transfer date; (2) section 1024(b)(7) which authorizes the Bureau to prescribe rules to facilitate the supervision of covered persons under section 1024 of the Act; (3) section 1022(c)(5), which provides the Bureau the authority to assess whether a nonbank entity is a covered person under the Act by requiring such person to submit to the Bureau, under oath or otherwise, annual reports or answers in

[8] 76 FR 38059.

[9] In July 2011, the Bureau held four roundtable discussions on the larger participant Notice. More than 70 stakeholders participated, representing a diverse mix of nonbank and bank trade associations and consumer advocacy and civil rights groups. The roundtables focused on key issues regarding criteria (what to measure), thresholds (where to set), data (available sources), and markets (which to cover and how to define). Also in July 2011, the Bureau held a multistate regulator and regulatory association conference call that had more than 40 participants.

[10] More than 10,300 of these comments were nearly identical form letters from individuals asking the Bureau to include credit bureaus and credit scoring companies in its supervision program.

writing to specific questions; and (4) section 1022(b)(1), which grants the Bureau the authority to prescribe rules as may be necessary and appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions of these laws.

B. Proposed Effective Date of Final Rule

The Administrative Procedure Act generally requires that rules be published not less than 30 days before their effective dates.[11] The Bureau proposes that, once issued, the final rule for this proposal would be effective 30 days after publication. The Bureau seeks comment on whether the proposed effective date is appropriate, or whether the Bureau should adopt an alternative effective date.

V. Section-by-Section Description of the Proposed Rule

Section 1090.100—Scope and Purpose

Proposed § 1090.100 sets forth the scope and purpose of the Proposed Rule. It states that the part defines those nonbank covered persons that qualify as larger participants of certain markets for consumer financial products or services pursuant to sections 1024(a)(1)(B) and (a)(2) of the Act. Proposed § 1090.100 further explains that a larger participant of a market covered by the part will be subject to the supervisory authority of the Bureau under section 1024 of the Act. Finally, proposed § 1090.100 provides that the part establishes rules to facilitate the Bureau's supervisory authority over larger participants pursuant to section 1024(b)(7) of the Act.

Section 1090.101—Definitions

Proposed § 1090.101 defines terms used in the Proposed Rule. If a term is defined in the Act, the proposal generally incorporates that definition, with clarifications and modifications where necessary. The Bureau seeks comment on each of the definitions set forth in the Proposed Rule and any suggested clarifications, modifications, or alternatives. The Bureau notes that certain key terms defined by the Act and adopted by the proposal, such as ''consumer,'' are defined differently by some consumer protection regulations such as Regulation Z [12] or Regulation E.[13] The Bureau solicits comment on whether the Bureau should conform any of these definitions to other regulations for consistency and, if so, to which definitions it should conform.

Act. Proposed § 1090.101(a) states that the term ''Act'' means the Consumer Financial Protection Act of 2010.

Affiliated company. Section 1024(a)(3)(B) of the Act provides that for purposes of determining activity levels for, among other things, defining who is a larger participant of certain markets, the activities of affiliated companies (other than insured depository institutions or insured credit unions) shall be aggregated. The term ''affiliated company'' is not defined in the Act. For purposes of implementing section 1024(a)(3)(B)'s aggregation requirement, proposed § 1090.101(b) defines the term ''affiliated company'' in a manner guided by the definition of ''affiliate'' set forth in the Act,[14] with modifications to track the requirements of 1024(a)(3)(B). Thus, proposed § 1090.101(b) states that the term ''affiliated company'' means any company (other than an insured depository institution or insured credit union) that controls, is controlled by, or is under common control with, a person.

For purposes of the definition of ''affiliated company,'' proposed § 1090.101(b) provides that the term ''company'' means any corporation, limited liability company, business trust, general or limited partnership, proprietorship, cooperative, association, or similar organization.[15]

Also for purposes of the definition of ''affiliated company,'' proposed § 1090.101(b) explains when a person shall be considered to have control over another person, guided by the definitions of the term control provided in section 2 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) (12 U.S.C. 5301),[16] section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813), section 2 of the Bank Holding Company Act (12 U.S.C. 1841), and the rules of other Federal financial regulators.[17] Proposed § 1090.101(b) thus provides that a person has control over another person if: (i) The person directly or indirectly or acting through one or more other persons owns, controls, or has power to vote 25 percent or more of any class of voting securities or similar ownership interest of the other person; (ii) the person controls in any manner the election of a majority of the directors, trustees, members, or general partners of the other person; or (iii) the person directly or indirectly exercises a controlling influence over the management or policies of the other person, as determined by the Bureau.

The Bureau seeks comment on whether the definition of ''affiliated company'' is appropriate to implement the aggregation requirement under section 1024(a)(3)(B) of the Act, and on possible alternatives to the proposed definition.

Annual receipts. Proposed § 1090.101(c) is informed by the method of calculating ''annual receipts'' used by the SBA [18] in determining whether a business is a ''small business concern.'' Under proposed § 1090.101(c), for purposes of calculating ''annual receipts,'' the term ''receipts'' means ''total income'' (or in the case of a sole proprietorship, ''gross income'') plus ''cost of goods sold'' as these terms are defined and reported on Internal Revenue Service (IRS) tax return forms. The term does not include net capital gains or losses. Annual receipts are measured as the average of a person's most recently completed three fiscal years, or the average receipts for the entire period the person has been in business if it has less than three completed fiscal years.[19] The calculation of annual receipts also implements the aggregation requirement in section 1024(a)(3)(B) of the Act by providing that the annual receipts of a person shall be added to the annual receipts of each of its affiliated companies. Such aggregation includes the receipts of both the acquired and acquiring companies in the case of an acquisition occurring during any relevant measurement period.

The Bureau considered defining ''annual receipts'' as the term is used in the U.S. Economic Census, but this term includes revenue from all business activities, whether or not payment was

[11] 5 U.S.C. 553(d).

[12] 12 CFR 1026.1 *et seq.*

[13] 12 CFR 1005.1 *et seq.*

[14] Act section 1002(1).

[15] This definition of ''company'' is guided by the definition of that term in Regulation P, 12 CFR 1016.1 *et seq.* (Privacy of Consumer Financial Information), and Regulation V, 12 CFR 1022.1 *et seq.* (Fair Credit Reporting).

[16] Public Law 111–203, 124 Stat. 1390, section 2(18)(A) (2010).

[17] *See, e.g.,* 12 CFR 41.3(i) (OCC rule defining ''common ownership or common corporate control'' in connection with fair credit reporting); 12 CFR 336.3(b) (FDIC rule defining ''control'' in connection with minimum standards of fitness for employment with the FDIC); 12 CFR 1805.104(q) (Department of the Treasury rule defining ''control'' in connection with the Community Development Financial Institutions Program).

[18] 13 CFR 121.104.

[19] A ''completed fiscal year'' means a ''tax year'' including any ''short tax year.'' A ''fiscal year'' is 12 consecutive months ending on the last day of any month except December 31st. A ''tax year'' is an annual accounting period for keeping records and reporting income and expenses. An annual accounting period does not include a ''short tax year.'' A ''short tax year'' is a ''tax year'' of less than 12 months. IRS Publication 538, *available at http://www.irs.gov/publications/p538/ar02.html#d0e237.*

received in the census year, including net investment income, interest, and dividends.[20] The Bureau believes that the SBA's definition of ''annual receipts'' is more appropriate as a guide for this proposal because, by excluding net capital gains and losses, it does not capture this investment income, which is not generated from market activities in a given year.

Assistant Director. Proposed § 1090.101(d) states that the term ''Assistant Director'' means the Bureau's Assistant Director for Nonbank Supervision or her or his designee. Under proposed § 1090.101(d), the Director of the Bureau may perform the functions of the Assistant Director as set forth in the Proposed Rule. Proposed § 1090.101(d) further provides that, in the event there is no Assistant Director, the Director of the Bureau may designate an alternative Bureau employee to perform the functions of the Assistant Director.

Bureau. Proposed § 1090.101(e) states that the term ''Bureau'' means the Bureau of Consumer Financial Protection.

Consumer. Proposed § 1090.101(f) incorporates the definition of ''consumer'' set forth in section 1002(4) of the Act. Thus, proposed § 1090.101(f) states that the term ''consumer'' means an individual or an agent, trustee, or representative acting on behalf of an individual.

Consumer debt collection. Under section 1002(15)(A)(x) of the Act, the term ''financial product or service'' includes ''collecting debt related to any consumer financial product or service.'' Section 1002(5)(B) of the Act, in turn, provides that this activity is a ''consumer financial product or service'' when ''delivered, offered, or provided in connection with a consumer financial product or service.''

Proposed § 1090.101(g) defines the consumer financial product or service of ''consumer debt collection'' to ensure that it captures a range of consumer debt collection activities, including consumer debt collection activities undertaken by third-party collectors, law firms, attorneys, and debt buyers. The proposed definition describes consumer debt collection as collecting or attempting to collect, directly or indirectly, any debt owed or due or asserted to be owed or due to another and related to any consumer financial product or service.[21] It also indicates the debt may either be collected on behalf of another person or on the person's own behalf if the debt was obtained while in default, to ensure consumer debt collection activities of debt buyers are covered. The Bureau invites comments on all aspects of the definition of the term ''consumer debt collection,'' including possible alternatives to the proposed definition.

Consumer financial product or service. Proposed § 1090.101(h) incorporates the definition of the term ''consumer financial product or service'' set forth in section 1002(5) of the Act. Proposed § 1090.101(h) provides that the term ''consumer financial product or service'' means any financial product or service as defined in section 1002(15) of the Act that is described in one or more categories under: (a) section 1002(15) of the Act and is offered or provided for use by consumers primarily for personal, family, or household purposes; or (b) clause (i), (iii), (ix), or (x) of section 1002(15)(A) of the Act[22] and is delivered, offered, or provided in connection with a consumer financial product or service referred to in the immediately preceding subparagraph (a).

Consumer reporting. Under section 1002(15)(A)(ix) of the Act, the term ''financial product or service'' includes, subject to certain exceptions, ''collecting, analyzing, maintaining, or providing consumer report information or other account information, including information relating to the credit history of consumers, used or expected to be used in connection with any decision regarding the offering or provision of a consumer financial product or service.'' Section 1002(5)(B) of the Act, in turn, provides that this activity is a ''consumer financial product or service'' when ''delivered, offered, or provided in connection with a consumer financial product or service.''

The definition of the consumer financial product or service of ''consumer reporting'' proposed in § 1090.101(i) is guided by the activity described in sections 1002(5)(B) and (15)(A)(ix) of the Act. The Bureau is proposing to modify this definition for the purposes of this Proposed Rule generally to exclude the activities of persons that furnish information about their own experiences or transactions with consumers and persons that use consumer report or other account information for their own purposes. While these activities do not typically result in annual receipts, the Bureau believes expressly excluding these activities will provide greater certainty for nonbank entities that do engage in these activities. Moreover, many large furnishers of information to consumer reporting entities are already subject to the Bureau's supervisory authority under the Act.[23]

Proposed § 1090.101(i) states that the term ''consumer reporting'' means collecting, analyzing, maintaining, or providing consumer report information or other account information, used or expected to be used in any decision by another person regarding the offering or provision of any consumer financial product or service. The language ''by another person'' revises the language of the Act to prevent the possibility of a person's own use of consumer report information being included in the definition. The definition also provides exceptions for the activities of a person providing information related to their (or their affiliate's) transactions and experiences with a consumer to an affiliate or to a consumer reporting entity, as well as the exception detailed in the Act for information used solely in a decision regarding employment, government licensing, and residential leasing. This definition covers different types of consumer reporting agencies such as credit bureaus, consumer report resellers, and specialty consumer reporting agencies such as those specializing in consumer check verification and payday lending transactions.[24] The Bureau invites

[20] *See http://factfinder2.census.gov/faces/help/jsf/pages/metadata.xhtml?lang=en&type=category&id=category.en./ECN/ECN/2007_US/56SSSZ4.MEASURE.RCPTOT#main_content.*

[21] Similarly, section 1692a(6) of the Fair Debt Collection Practices Act (15 U.S.C.1692 et seq.), defines debt collection to include, among other things, collecting or attempting to collect, directly or indirectly, any debt owed or due or asserted to be owed or due to another.

[22] Under these clauses, the term ''financial product or service'' is generally defined to include, subject to certain exclusions: (1) Extending credit and servicing loans, Act section 1002(15)(A)(i); (2) providing real estate settlement services or performing appraisals of real estate or personal property, Act section 1002(15)(A)(iii); (3) collecting, analyzing, maintaining, or providing consumer report information or other account information used or expected to be used in connection with any decision regarding the offering or provision of a consumer financial product or service, Act section 1002(15)(A)(ix); and (4) collecting debt related to any consumer financial product or service, Act section 1002(15)(A)(x).

[23] As noted above, section 1024 of the Act grants the Bureau authority to supervise, regardless of size, nonbank covered persons that offer or provide to consumers: (1) Origination, brokerage, or servicing of residential mortgage loans secured by real estate, and related mortgage loan modification or foreclosure relief services; (2) private education loans; and (3) payday loans. Section 1025 of the Act grants the Bureau authority to supervise very large banks, thrifts, and credit unions, and their affiliates.

[24] This definition may also include entities such as credit scoring companies. Whether such an entity is covered under this definition would depend upon its particular activities. To the extent that a credit scoring company is engaged in collecting, analyzing, maintaining, or providing consumer report or other account information for the purposes described above, it would be covered by the definition.

comments on all aspects of the definition of the term ''consumer reporting,'' including possible alternatives to the proposed definition.

Larger participant. Proposed § 1090.101(j) defines the term ''larger participant'' to mean a nonbank covered person that meets a test under § 1090.102, and which remains a larger participant for the period provided in § 1090.103 of this part.

Nonbank covered person. Section 1024 of the Act relates to ''covered persons'' as defined in section 1002(6) of the Act that are not insured depository institutions or credit unions, or, in the case of such entities with assets of more than $10 billion, their affiliates, as set forth in sections 1025(a) and 1026(a) of the Act. Proposed § 1090.101(k) therefore excludes from the definition of ''nonbank covered persons'' persons described in sections 1025(a) and 1026(a) of the Act and provides that the term ''nonbank covered person'' means, except for persons described in sections 1025(a) and 1026(a) of the Act: (a) Any person that engages in offering or providing a consumer financial product or service; and (b) any affiliate of a person described in subparagraph (a) of this paragraph if such affiliate acts as a service provider to such person.

Person. Proposed § 1090.101(l) incorporates the definition of ''person'' set forth in section 1002(19) of the Act. Proposed § 1090.101(l) states that the term ''person'' means an individual, partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity.

Supervision or supervisory activity. Proposed § 1090.101(m) defines the terms ''supervision'' or ''supervisory activity'' to mean the Bureau's exercise, or intended exercise, of supervisory authority by initiating or undertaking an examination, or requiring a report, of a person pursuant to section 1024 of the Act.

Section 1090.102—Covered Markets and Tests for Determining Larger Participants of Those Markets

Section 1090.102(a)—Consumer Debt Collection

Market Overview

Proposed § 1090.102(a) relates to the market for consumer debt collection. As explained in the section-by-section description of proposed § 1090.101(g), this market encompasses the collection, or attempted collection, of debt related to the consumer financial products or services described in sections 1002(5) and (15)(A) of the Act. Such activity includes the collection of debt related to consumer credit, certain consumer leases, and a variety of other consumer financial products or services, but generally not other debt incurred by individuals, such as medical debt.

Participants in the debt collection market generally include third-party debt collectors, debt buyers, and collection attorneys and law firms. Third-party collectors primarily collect debt on behalf of a debt owner, the person that originated the debt or purchased it. Third-party collectors typically are compensated through contingency fees calculated as a percentage of the debt they collect.[25] Creditors' practices vary in how they use outside collection agencies; in some cases creditors use collection agencies in the early stages of delinquency prior to charge off (charge off usually occurs 120 or 180 days after delinquency, depending on the type of debt).[26] In other cases, creditors use third-party debt collectors after a debt has been written off by the creditor.

Debt buying is another important component of the consumer debt collection market. As the name indicates, debt buyers purchase debt, either from the original creditor or from another debt buyer, usually for a fraction of the balance owed.[27] They profit when their recoveries exceed the combined costs of debt acquisition and of collecting from debtors, including overhead (or direct and indirect costs of collection). Debt buyers sometimes use third-party collection agencies or collection law firms to collect their debt, but many also undertake their own collection efforts. Finally, debt buyers also may decide to sell purchased debt to another debt buyer.

Collection attorneys and law firms also play a key role in the consumer debt collection market.[28] They sometimes are the primary (or only) debt collector with which a consumer will interact. Collection attorneys and law firms may collect through litigation (i.e., filing suit against consumers to collect debt). They also may collect in the same manner as other debt collectors, such as by sending dunning letters and making phone calls. By one estimate, approximately one in 20 delinquent accounts gets referred to a law firm that specializes in debt collection.[29]

Consumer debt collection is a market for ''consumer financial products or services'' under section 1024(a)(1)(B) of the Act and is thus appropriate for inclusion in a larger participant rulemaking. Moreover, consumer debt collection is critical to the functioning of the consumer credit market and has a significant impact on consumers. By collecting delinquent debt, collectors reduce creditors' losses from non-repayment and thereby help to keep consumer credit available and potentially more affordable to consumers. Available and affordable credit is vital to millions of consumers because it makes it possible for them to purchase goods and services that they could not afford if they had to pay the entire cost at the time of purchase. Further, debt collection is a large, multi-billion dollar industry that directly affects a large number of consumers. In 2011, approximately 30 million individuals, or 14 percent of American adults had debt that was subject to the collections process (averaging approximately $1,400).[30] Although these figures include not only consumer debt covered by the Act and the Proposed Rule, but also other types of debt such as medical debt, they indicate the importance and central role of

[25] ACA International, *2010 Agency Benchmarking Survey*, at 19 (2010). According to the ACA International's 2010 Benchmarking Survey, collection agency commission rates averaged 27% in 2009, with a median of 25.6%.

[26] For example, the Federal Financial Institutions Examination Council, in its Uniform Retail Credit Classification and Account Management Policy, establishes a charge-off policy for open-end credit at 180 days delinquency and closed-end credit at 120 days delinquency. *See* 65 FR 36903, June 12, 2000.

[27] Federal Trade Commission, *Collecting Consumer Debts: The Challenges of Change,* at 4 (Feb. 2009), *available athttp://www.ftc.gov/bcp/workshops/debtcollection/dcwr.pdf*) (citing, Kaulkin Ginsberg, The Kaulkin Report: The Future of Receivables Management at 50 (7th ed. 2007)).

[28] Although attorneys are generally excluded from the Act's coverage, *see* Act section 1027(e)(1), this exclusion does not preclude the exercise of the Bureau's supervisory authority over collection attorneys. Section 1027(e)(2) of the Act provides that the general exclusion for attorneys does not limit the Bureau's supervisory, enforcement, or other authority with respect to an attorney who offers or provides a consumer financial product or service with respect to any consumer who is not receiving legal advice or services from the attorney in connection with that product or service. Further, section 1027(e)(3) of the Act provides that the Bureau shall have authority over attorneys who are otherwise subject to any ''enumerated consumer law'' within the meaning of the Act. Collection attorneys are subject to the Fair Debt Collection Practices Act, which is included among the enumerated consumer laws listed in section 1002(23) of the Act. *See Heintz* v. *Jenkins,* 514 U.S. 291 (1995).

[29] National Consumer Law Center, *The Debt Machine: How the Collection Industry Hounds Consumers and Overwhelms Courts* at 11 (July 2010).

[30] Federal Reserve Bank of New York, *Quarterly Report on Household Debt and Credit* (November 2011), *available athttp://www.newyorkfed.org/research/national_economy/householdcredit/DistrictReport_Q32011.pdf.*

consumer debt collection as a market for consumer financial products or services.

The Bureau received comments from consumer groups recommending that the Bureau define each of the various debt collection activities described above as separate markets. Although the collection of consumer debt encompasses these different business models and it may be reasonable to define them as separate markets, it is difficult based on current market practices to draw a bright line separating them. Some third party-collectors also buy debt, and debt buyers may utilize in-house or third-party collectors. Similarly, collection attorneys and law firms may, in addition to representing debt owners, buy debt and collect on their own behalf.[31] The Bureau is also not aware of any currently available data that would be useable to devise separate tests for these nonbank covered persons. Thus, the Proposed Rule provides for a single-market approach to consumer debt collection.

Test to define larger participants in the debt collection market.

Criteria. The Bureau has broad discretion in choosing criteria for determining whether a nonbank covered person is a larger participant of a covered market. For any specific market there could be several criteria, used alone or in combination, that could be viewed as reasonable alternatives. For the consumer debt collection market, the Bureau considered a variety of criteria, including criteria used by other agencies in different contexts. Among other possible criteria, the Bureau considered annual receipts; annual recoveries; number of employees; and new business (debt purchased by or placed with a collector).

The Bureau proposes in § 1090.102(a) to use annual receipts as the criterion for defining larger participants in the market for consumer debt collection. As noted above, the Proposed Rule is guided by and adapts the SBA's definition of ''annual receipts.'' The Bureau believes that annual receipts are a reasonable criterion because, among other things, they are a meaningful measure of the level of participation of an entity in a market and the entity's impact on consumers. For example, third-party collectors, debt buyers, and collection law firms earn income from recovering delinquent consumer debt. Those recoveries are the result of market participation, either through traditional collection means or litigation. Thus, the level of a person's market participation is reflected by the amount of that person's annual receipts. Moreover, by adapting the SBA's definition of ''annual receipts,'' which has been used by the SBA for purposes of measuring small business concerns since soon after the inception of its program,[32] the Proposed Rule uses a criterion that should be familiar to nonbank covered persons, thereby reducing regulatory burden. Further, the calculation for annual receipts is based on IRS tax forms and, as a result, generally can be determined by using business records created in the ordinary course of business.

In addition, the U.S. Census Bureau's 2007 Economic Census (Economic Census)[33] provides an available data source for determining the general contours of the market for consumer debt collection based on the criterion of annual receipts and thereby for defining the larger participants of that market. The Economic Census undertakes a direct survey of domestic business establishments and releases comprehensive statistics about key features and activity levels of these businesses, including total annual receipts.[34] To conduct an Economic Census, the Census Bureau mails out data collection forms for all establishments of multi-unit companies, large single-unit employers, and a sample of small employers (generally defined as three or fewer employees).[35]

There are limitations to the use of the Economic Census data on annual receipts in the debt collection market for purposes of the Proposed Rule. Most importantly, the Economic Census data are not limited to the collection of consumer financial debt, but rather include both business and non-financial consumer debt, such as medical debt.[36] They may also be under-inclusive because entities that fall within the NAICS code may not correctly identify themselves or may otherwise fail to respond to the Census; moreover, the NAICS code may not include all persons engaged in activities that meet the definition of consumer debt collection under this proposal. However, although over-inclusive and possibly under-inclusive, the Economic Census data are nevertheless useful in showing the general contours of the consumer debt collection market, the relative size of participants within it on an aggregated basis, and how the participants are clustered by size. This information is thus helpful for purposes of developing a test to determine which participants in the market for consumer debt collection are larger participants based on the criterion of annual receipts.

By contrast, neither annual recoveries nor new business were considered by the Bureau as viable criteria at this time, in large part, because there are not sufficient data to allow the Bureau to ascertain the general contours of the market based on these criteria. Further, the Bureau believes that the number of employees is not a suitable alternative criterion for this market because it may be difficult for a multi-line company to apportion employee time between relevant market-related and other activities. In addition, the number of employees may be an inaccurate measure if a company with wide market reach performs much of its work through contractors.

The Bureau anticipates considering alternative or additional criteria for measuring larger participants of the market for consumer debt collection in the future if additional data for the debt collection market become available to

[31] Federal Trade Commission, *Collecting Consumer Debts: The Challenges of Change,* at 3 (Feb. 2009), *available athttp://www.ftc.gov/bcp/workshops/debtcollection/dcwr.pdf* (citing, Kaulkin Ginsberg, The Kaulkin Report: The Future of Receivables Management at 74 (7th ed. 2007)).

[32] *See* ''SBA Size Standards Methodology'' at 4, *available athttp://www.sba.gov/sites/default/files/size_standards_methodology.pdf.*

[33] U.S. Census Bureau 2007 Economic Census, *available at http://www.census.gov/econ/census07/.*

[34] As noted in the section-by-section discussion of the definition of ''annual receipts'' (proposed § 1090.101(c)), the SBA and the Economic Census use the term ''annual receipts'' somewhat differently. As used by the Economic Census, the term includes receipts from all business activities, including net investment income, interest, and dividends, whether or not payment was received in the census year. The SBA, by contrast, defines the term to exclude net capital gains and losses and thus does not capture investment income. Notwithstanding this difference in the meaning of the term, the Economic Census data regarding annual receipts remain useful for purposes of developing a general understanding of the market for consumer debt collection and establishing a test for defining larger participants in that market.

[35] Response is required by law. No firm-level data is released; rather, the data are aggregated by sector according to North American Industry Classification System (NAICS) codes. For annual receipts, the Economic Census categorizes a business's annual receipts into one of 11 tiers to indicate different sizes, beginning at the highest level with firms having annual receipts in excess of $100 million, with each lower tier approximately half the size of the one above it (e.g., $50 million, $25 million, $10 million). When categorizing the data by sector, both the SBA and the Economic Census use the NAICS codes. This furthers the purpose of having a standard set of classification codes used across the Federal government. This joint use of NAICS codes enables the Bureau to make direct comparisons between the two data sets for purposes of market classification.

[36] Entities whose activities fall within this NAICS code are described as: ''establishments primarily engaged in collecting payments for claims and remitting payments collected to their clients'' and include, among others, collection agencies, debt collection services, and account collection services. NAICS code 56144 (collection agencies) through 2007, *available at http://www.naicscode.com/search/MoreNAICSDetail.asp?N=561440.*

the Bureau, whether through registration of nonbank covered persons by the Bureau or otherwise.[37] In that event, the Bureau may also consider potential amendments to the annual receipts criterion used in the Proposed Rule. The Bureau seeks comment on the proposed criterion and any additional or alternative criteria that might be used for measuring larger participants in the consumer debt collection market, as well as on any data sources available for such criteria.

Threshold. Under the Proposed Rule, a nonbank covered person is a larger participant in the market for consumer debt collection if its annual receipts meet a specified threshold. As with regard to the selection of the criterion itself, the Bureau has broad discretion in setting the threshold above which an entity would qualify as a larger participant. The Bureau proposes more than $10 million in annual receipts as the threshold to define larger participants in the consumer debt collection market. Using this threshold, proposed § 1090.102(a) states that if a nonbank covered person offers or provides consumer debt collection, and has annual receipts of more than $10 million resulting from that activity, it will be a larger participant of the consumer debt collection market.

The Bureau believes that this threshold is a reasonable means of defining larger participants in this market.[38] Based on the Economic Census, the proposed threshold would likely bring within the Bureau's scope of supervision approximately 175 entities [39] out of approximately 4,500 firms engaged in debt collection under NAICS code 56144. Thus, approximately 4 percent of all collection firms would be covered by the proposed threshold.[40] For comparison, based on the Economic Census data, the median for annual receipts among collection firms is roughly $500,000, significantly below the proposed threshold.[41]

The Bureau believes that the proposed definition would result in sufficient coverage of the debt collection market to enable the Bureau effectively to identify and assess risks to consumers in that market and assess nonbank covered persons' compliance with Federal consumer financial laws. The firms that would be covered by the proposed threshold generate approximately 63 percent of collections receipts.[42] Thus, although covering only a small percentage of firms in the market, under the proposed threshold, the Bureau's supervision program would cover nonbank entities interacting with a significant portion of consumers with debt under collection.

Two trade associations for the debt collection industry each suggested that the Bureau set a threshold that would cover third-party collection firms and debt buyers with annual revenues of more than $250 million. Based on available data, however, the Bureau estimates that $250 million in annual receipts would cover, at most, approximately seven or fewer firms comprising only approximately 20 percent of overall collection industry receipts.[43] The Bureau does not believe that this recommended threshold would result in sufficient market coverage to allow it effectively to assess compliance with Federal consumer financial laws and detect and assess risks to consumers. Further, by covering only a handful of actors in a market of approximately 4,500 firms, the recommended threshold would omit many firms that would fairly be described as larger market participants. Indeed, the Act provides that the Bureau's supervision authority extends to the ''larger,'' not merely the ''largest,'' participants in a market.[44] The threshold set forth in the Proposed Rule would provide the Bureau with the ability to supervise a broader range of market participants than only the very largest and identify and evaluate risks to consumers in different segments of the market.

The Bureau notes that one of the largest debt buyers commented that the Bureau should not limit its supervisory authority to the very largest market participants. This commenter indicated that some of the most significant risks to consumers come from smaller debt collection companies that do not file disclosures and financial statements with the Securities and Exchange Commission and may not be properly licensed. Another industry commenter noted that smaller debt collection firms own or service tens of millions of consumer collection accounts, but often lack the sophisticated quality control mechanisms, training programs, and technological safeguards of the largest debt collectors.

Finally, the threshold set forth in the Proposed Rule is substantially above the SBA's size standard for defining small business concerns. Under the SBA's rules, a debt collection firm with annual receipts of $7 million or less is a small business concern.[45] Consequently, the Bureau believes that small business concerns under the SBA's rules generally should not meet the Proposed Rule's threshold for the consumer debt collection market.

The proposed threshold is tailored for consumer debt collection, and the Bureau recognizes that it may not be suitable for other markets. The Bureau anticipates that other thresholds may be appropriate for purposes of defining larger participants in other markets. Moreover, just as with its choice of criteria, the Bureau anticipates considering alternative thresholds to define larger participants of the market for consumer debt collection in the future if additional data for the consumer debt collection market become available to the Bureau.

The Bureau seeks comment, including any possible alternatives on the threshold it proposes for defining larger participants in the consumer debt collection market.

Apportionment. The Bureau recognizes that there are multi-line companies that derive only a portion of their annual receipts from activities related to the consumer debt collection market. The Bureau further recognizes that in determining whether a person qualifies as a larger participant, the

[37] The Bureau is contemplating a future rulemaking to establish a nonbank registration program, which could be used to gather data to support subsequent larger participant rulemakings and their implementation. The Bureau has authority to issue such a registration rule under sections 1022(c)(7) and 1024(b)(7) of the Act.

[38] The Bureau believes that a lower threshold might bring under the Proposed Rule entities that could reasonably be described as larger participants. The Bureau therefore seeks comment on whether in this proposal or in a future rulemaking the Bureau should set a lower threshold. For example, a threshold of $5 million in annual receipts would cover approximately 361 firms out of 4,500, and would comprise approximately 73% of the industry's annual receipts.

[39] Because firms collecting commercial and other debt that would not fall under the definition of consumer debt collection would not qualify as larger participants, the number of nonbank covered persons that would be larger participants under the Proposed Rule may be less than 175.

[40] Estimated from 2007 U.S. Economic Census—*available at http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_56SSSZ4&prodType=table,* scroll to NAICS code 56144.

[41] Estimated from 2007 U.S. Economic Census—*available at http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml ?pid=ECN_2007_US_56SSSZ4&prodType=table,* scroll to NAICS code 56144.

[42] Estimated from 2007 U.S. Economic Census—*available athttp://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_56SSSZ4&prod Type=table,* scroll to NAICS code 56144.

[43] Estimated from 2007 U.S. Economic Census—*available athttp://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml ?pid=ECN_2007_US_56SSSZ6&prodType=table,* scroll to NAICS code 56144.

[44] Act section 1024(a)(1)(B).

[45] U.S. Small Business Administration Table of Small Business Size Standards Matched to NAICS Codes, *http://www.sba.gov/sites/default/files/Size_Standards_Table.pdf* at 32.

annual receipts that are relevant are those that derive from a market covered by the Proposed Rule. Thus, the proposal provides that the only annual receipts to be considered are those ''resulting from'' activities related to the covered market. For example, a single entity might engage in both consumer debt collection and the collection of commercial debt. Similarly, in certain cases, the consumer debt it collects may be debt unrelated to consumer financial products or services, such as medical debt. In these circumstances, only the annual receipts resulting from the entity's collection of debt related to consumer financial products or services would be considered for purposes of determining whether the person is a larger participant of the consumer debt collection market.

The Bureau recognizes that this apportionment adds an additional step in determining whether an entity is a larger participant for multi-line nonbank covered persons, and of nonbank covered persons that are part of a corporate family that files its tax returns on a consolidated basis. The Bureau also understands that the burden of determining annual receipts, and performing this additional calculation where necessary, will vary among businesses. The Bureau seeks comment on the way apportionment is treated in the Proposed Rule and any suggested alternative method for determining whether multi-line entities qualify as larger participants in a given market.

Section 1090.102(b)—Consumer Reporting

Market Overview

Proposed § 1090.102(b) relates to the market for consumer reporting. As explained in the section-by-section description of proposed § 1090.101(i) above, the consumer reporting market includes the largest consumer reporting agencies selling comprehensive consumer reports, consumer report resellers, and specialty consumer reporting agencies. The largest consumer reporting agencies collect, among other information, credit account information, items sent for collection, and public records such as judgments and bankruptcies. Resellers purchase consumer information from one or more of the largest agencies, typically provide further input to the consumer report (including by merging files from multiple agencies or adding information from other data sources), and then resell the report to lenders and other users. Specialty consumer reporting agencies primarily collect and provide specific types of information that may be used to make eligibility decisions for particular consumer financial products or services, such as payday loans or checking accounts, or for other determinations, such as eligibility for employment or rental housing. However, certain types of specialty consumer reporting agencies, depending on their activities, may not be engaged in offering consumer financial products or services within the meaning of the Act, and for that reason would not be ''covered persons'' subject to the Bureau's supervisory authority.[46] These effective exclusions are implemented in the definition of consumer reporting in proposed § 1090.101(i).

The consumer reporting market is appropriate for inclusion in the Proposed Rule because it is a market for a consumer financial product or service under section 1024(a)(1)(B) of the Act. Additionally, consumer reporting is of fundamental importance to the broader market for consumer financial products and services. Consumer reports (commonly referred to as ''credit reports''), which contain information about consumers' credit histories and other transactions, and the credit scores derived from these reports, affect many aspects of consumers' lives. Consumer reports are important tools that lenders use to assess borrower risk when evaluating applications for credit cards, home mortgage loans, automobile loans, and other types of credit. Consumer reports may also be used to determine eligibility and pricing for other types of products and services and other relationships, such as checking accounts. The consumer reporting market affects hundreds of millions of consumers. The Consumer Data Industry Association estimates that each year there are more than 36 billion updates made to consumer files at consumer reporting agencies,[47] and three billion reports issued.[48] It also estimates that each of the three largest consumer reporting agencies maintains credit files on more than 200 million consumers.[49]

In response to the Notice, the Bureau received more than 10,400 comments, approximately 10,300 of which were nearly identical letters sent from individuals asking the Bureau to exercise supervisory authority over different types of consumer reporting agencies and over credit scoring companies. On the other hand, one industry trade association commented that the Bureau should give careful consideration to the costs and burdens of including the consumer reporting market within the larger participant rule.

In addition, a number of commenters recommended that the Bureau divide the consumer reporting market into separate markets for the largest consumer reporting agencies, specialized consumer reporting agencies, and credit scoring companies to ensure that consumer reporting agencies other than the three largest are deemed larger participants. The Bureau recognizes the importance of covering different types of consumer reporting agencies in its supervision program and believes that it may be reasonable to identify separate markets. At this time, however, despite its request for public comment on the best data sources, the Bureau is not currently aware of adequate data to devise separate tests for distinct markets in the consumer reporting industry. Although the Bureau is treating the consumer reporting market as a single market, as discussed in further detail below, it has chosen a test that would bring within the scope of the Bureau's supervision program certain consumer reporting agencies other than the very largest, including some larger specialty consumer reporting agencies.

Test to define larger participant in the consumer reporting market.

[46] Such an agency does not provide a ''consumer financial product or service'' if it provides only information ''that is used or expected to be used solely in any decision regarding the offering or provision of a product or service that is not a consumer financial product or service, including a decision for employment, government licensing, or a residential lease or tenancy involving a consumer.'' Act section 1002(15)(A)(ix)(I)(cc). The Bureau received a number of comments from consumer groups suggesting that the larger participant rule include within its scope of coverage firms that engage in providing background screening for employment purposes. However, as noted above, such activities do not constitute a ''consumer financial product or service'' within the meaning of the Act.

[47] Stuart Pratt, President, Consumer Data Industry Association (CDIA), Statement before House Committee on Financial Institutions and Consumer Credit, ''Keeping Score on Credit Scores: An Overview of Credit Scores, Credit Reports, and Their Impact on Consumers,'' at 7 (March 24, 2010), *available athttp://www.house.gov/apps/list/hearing/financialsvcs_dem/pratt_testimony.pdf*). *See also* Federal Trade Commission, Report to Congress Under Sections 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003 at 8–9 (2004).

[48] *See* Stuart Pratt, President, Consumer Data Industry Association (CDIA), Statement before House Committee on Financial Services, ''Credit Reports: Consumers' Ability to Dispute and Change Inaccurate Information,'' at 23 (June 19, 2007), *available athttp://archives.financialservices.house.gov/hearing110/ospratt061907.pdf.*

[49] Stuart Pratt, Comments of CDIA to National Telecommunications and Information Administration, ''Information Privacy and Innovation in the Internet Economy,'' at 2 (June 13, 2010), *available athttp://ntia.doc.gov/files/ntia/comments/100402174-0175-01/attachments/Consumer%20Data%20Industry%20Association%20Comments.pdf.*

Criteria. As noted in the section-by-section description of the consumer debt collection market above (proposed § 1090.102(a)), the Bureau has broad discretion in choosing criteria for measuring whether a nonbank entity is a larger participant of a covered market. The Bureau considered several criteria to measure participants in the consumer reporting market. These include, among others, annual receipts; number of unique consumer reports sold or otherwise provided to a third party annually; number of individual consumers a nonbank covered person collects, analyzes, and maintains data about, or provides consumer reports on, annually; and number of employees.

The Bureau proposes in § 1090.102(b) to use annual receipts as the criterion for defining larger participants in the consumer reporting market. As in the consumer debt collection market, the Bureau proposes to use as a guide the SBA's definition of ''annual receipts.'' The Bureau believes that annual receipts resulting from consumer reporting activities provide a reasonable indication of the level of market participation by a person and its impact on consumers. Consumer reporting agencies earn income from selling consumer reports and other market-related activities that directly affect consumers. As a result, the greater the annual receipts of a consumer reporting agency, the greater its market participation and the greater its impact on consumers. In addition, as with the consumer debt collection market, by adapting the SBA's definition of ''annual receipts,'' which has been used by the SBA since soon after the inception of its program, the proposed test is intended to be sufficiently straightforward so as not to put undue burden on nonbank covered persons in determining or disputing whether they are subject to the Bureau's nonbank supervision program.

There are limited data available to develop a test for defining larger participants in the consumer reporting market. Although several of the largest participants in this market are public companies, the majority of firms are private and do not publicly disclose data. However, as with the consumer debt collection market, for the criterion of annual receipts, the 2007 Economic Census data provides an available data source.[50]

The Bureau analyzed the Economic Census data for annual receipts for NAICS code 561450 (credit bureaus). Encompassed within this code are both ''consumer reporting agencies'' and ''mercantile (business-to-business) reporting agencies.'' Consequently, as with the consumer debt collection market, a limitation of the Economic Census data is that they are over-inclusive.[51] They are also under-inclusive because entities that fall within the NAICS code may not correctly identify themselves or may otherwise fail to respond to the Census; moreover, the NAICS code may not include all persons engaged in activities that meet the definition of consumer reporting under this proposal. An additional limitation of the Economic Census data for this particular NAICS code is that for certain census tiers, the aggregated annual receipts data are kept confidential.[52] The data are nonetheless useful in showing the general distribution of the size of participants in the consumer reporting market.

By contrast, the Bureau does not believe that other potential criteria, such as the total number of unique consumer reports sold or the number of individual consumers an entity provides consumer reports on, are appropriate alternatives because the available data do not permit the Bureau meaningfully to measure the general contours of the market based on these criteria and thus to devise a test for defining larger participants in the market on the basis of them. Further, the Bureau believes that the number of employees is not a suitable alternative criterion because it could be very difficult for a multi-line company to apportion employee time between market-related and other activities, and many positions could be filled by contractors rather than employees.

As additional data for the consumer reporting market become available to the Bureau, through future registration of nonbank covered persons or by other means, the Bureau may consider other criteria and potential revisions to the annual receipts criterion used in the Proposed Rule. The Bureau seeks comment on the proposed criterion and any additional or alternative criteria that might be used for measuring larger participants in the consumer reporting market, as well as on any data sources available for such criteria.

Threshold. As noted above with regard to the consumer debt collection market, the Bureau has broad discretion in setting the threshold above which a nonbank covered person will qualify as a larger participant in the consumer reporting market.

The Bureau proposes adopting more than $7 million in annual receipts as the threshold to define larger participants in the consumer reporting market. Applying this threshold, proposed § 1090.102(b) states that if a nonbank covered person offers or provides consumer reporting and has annual receipts of more than $7 million resulting from this activity, it will be a larger participant of the consumer reporting market.

The Bureau believes that this threshold is reasonable, in part, because available data indicate that it would enable the Bureau to cover in its nonbank supervision program the largest consumer reporting agencies as well as a number of larger specialty consumer reporting agencies.[53] The Bureau believes that this threshold would cover a sufficient number of market participants to enable the Bureau effectively to assess compliance and identify and assess risks to consumers, but at the same time cover only the ''larger'' participants of the market.

While there are hundreds of consumer reporting agencies, according to the 2007 Economic Census, a threshold of more than $7 million in annual receipts would cover no more than 39 credit bureaus, or 7 percent of credit reporting agencies (including both mercantile credit reporting agencies and consumer reporting agencies).[54] Because the Economic Census indicates that 75 percent of these credit bureaus are consumer reporting agencies,[55] this

[50] A description of the Economic Census and its methodologies may be found in the debt collection market section (proposed § 1090.102(a)) above.

[51] *http://factfinder2.census.gov/faces/help/jsf/pages/metadata.xhtml?lang=en&type=category&id=category.en./ECN/ECN/2007_US/56SSSZ4.MEASURE.RCPTOT#main_content.*

[52] *Available at http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_56SSSZ4&prodType=table*, scroll to NAICS code 56145. Many Census tiers have flags in the receipts category, which read ''withheld'' to avoid disclosing data for individual companies; data are included in higher level totals. Other aggregated revenue data are available in a table showing the concentration of revenues among the largest firms, which extend through the top 50. *See also http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_56SSSZ6&prodType=table*, scroll to NAICS code 56145.

[53] The Bureau believes that a lower threshold might bring under the Proposed Rule entities that could reasonably be described as larger participants. The Bureau therefore seeks comment on whether in this proposal or in a future rulemaking the Bureau should set a lower threshold. For example, a threshold of $5 million in annual receipts would cover approximately 36 firms out of 401, and would comprise approximately 95% of the industry's annual receipts.

[54] This calculation assumes that firms in the Census-defined tier between $5 million and $10 million are evenly distributed throughout the tier.

[55] The Bureau extrapolated the number of entities from the proportion of establishments that are part of consumer reporting agencies rather than part of mercantile reporting agencies. According to the

Continued

threshold would likely cover approximately 30 out of approximately 401 consumer reporting agencies. However, some of those consumer reporting agencies may be specialty consumer reporting agencies providing, for example, consumer reports only for employment background screening or rental decisions. As noted above, such agencies do not offer consumer financial products or services within the meaning of the Act, and are effectively excluded from the Bureau's supervisory jurisdiction.[56] As a result, the Bureau believes that this threshold will cover fewer than 30 consumer reporting agencies. Again for comparison, the Bureau estimates that the median for annual receipts in this industry is less than $500,000, significantly below the proposed threshold.[57]

The threshold of more than $7 million in annual receipts is consistent with the objective of supervising market participants that have a significant impact on consumers, in terms of the number of consumers affected by their operations. In the consumer reporting industry, prices range from two to three cents for prescreening products, from seven cents to sixty two cents for credit scores, and from one to two dollars for consumer reports, while some specialty reports may cost several dollars.[58] Thus, a company with more than $7 million in annual receipts would likely impact several million consumers. Further, the entities meeting the proposed threshold generate approximately 94 percent of industry receipts.[59] Although this market share coverage is higher than that resulting from the threshold proposed for the consumer debt collection market, the Bureau believes that this difference is appropriate in light of the different structures of the two markets, particularly the highly concentrated nature of the consumer reporting market and the different types of firms encompassed in the market.

Pending better and more complete data sources, the Bureau tentatively concludes that setting the threshold higher than that proposed amount likely would not result in sufficient coverage of consumer reporting agencies effectively to identify and assess risks to consumers in the consumer reporting market and to assess compliance with the Federal consumer financial laws. It is particularly important to reach larger participants of the consumer reporting market that may not be the largest firms, as some consumers may not have files at the largest consumer reporting agencies. Many consumers may not utilize a credit card or checking account, or otherwise participate in mainstream financial activities. As a result, the largest consumer reporting agencies may receive little, if any, data with which to maintain files on these consumers. However, these consumers may utilize alternative financial products such as payday loans or check cashing services, which in some instances may be reported to specialty consumer reporting agencies. Setting the threshold too high would fail to capture the larger specialty consumer reporting agencies that compile information about consumers in alternative financial markets.

Finally, the proposed threshold is consistent with the SBA's size standard for defining small business concerns. Under the SBA's rules, a consumer reporting firm with annual receipts of $7 million or less is a small business concern.[60] Thus, the Bureau believes that small business concerns under the SBA's rules generally should not meet the Proposed Rule's threshold for the consumer reporting market.

In tailoring the thresholds for this market, the Bureau considered several comments from both industry and consumer groups that suggested the Bureau use tests involving multiple criteria and thresholds for each market segment. Although the Bureau recognizes the advantages of this approach, in light of the limited data for the consumer reporting market, the Bureau tentatively concludes that in the case of consumer reporting a test using a single criterion and threshold would be most effective for the nonbank supervision program at this time.

The Bureau seeks comment, including any possible alternatives, on the proposed threshold for defining larger participants in the consumer reporting market.

Apportionment. As with the consumer debt collection market, the Bureau recognizes that in developing a test for determining whether a person qualifies as a larger participant, the annual receipts that are relevant are those that derive from a market covered by the Proposed Rule. Thus, the proposal provides that the only annual receipts to be considered are those ''resulting from'' activities related to the covered market. As with the consumer debt collection market, the need to apportion revenues would add an additional step in determining whether an entity is a larger participant both for multi-line nonbank covered persons and for nonbank covered persons that are part of a corporate family that files its tax returns on a consolidated basis. The Bureau seeks comment on the way apportionment is treated in the Proposed Rule and any suggested alternative method for determining whether multi-line entities qualify as larger participants in a given market.

Section 1090.103—Status as Larger Participant Subject to Supervision

The Bureau believes that it is important that the Bureau have sufficient time to undertake and complete supervisory activities relating to a larger participant. Thus, proposed § 1090.103 states that a person qualifying as a larger participant under § 1090.102 shall not cease to be a larger participant under this part until two years from the first day of the tax year in which the person last met the applicable test under § 1090.102.[61]

Economic Census, consumer reporting agencies account for almost 75 percent of all credit bureau entities (401 out of 535 in total). The Economic Census also indicates that the consumer reporting industry is highly concentrated. The 50 largest firms generate 96 percent of industry revenues. Conversely, the smallest 50 percent of firms generate approximately 1 percent of revenues.

[56] *See* Act section 1002(15)(A)(ix)(I)(cc). This provision defines the term ''financial product or service'' to exclude the provision of information ''that is used or expected to be used solely in any decision regarding the offering or provision of a product or service that is not a consumer financial product or service, including a decision for employment, government licensing, or a residential lease or tenancy involving a consumer.''

[57] The median is estimated from data *available at http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_56SSSZ4&prodType=table*, scroll to NAICS code 56145.

[58] Based on an analysis of General Services Administration schedules and other publicly available price quotes for several consumer reporting firms.

[59] Estimated from 2007 Economic Census—*available at http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_56SSSZ4&prodType=table*, scroll to NAICS code 56145. *See also http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_56SSSZ6&prodType=table*, scroll to NAICS code 56145.

[60] U.S. Small Business Administration Table of Small Business Size Standards Matched to NAICS Codes, *http://www.sba.gov/sites/default/files/Size_Standards_Table.pdf* at 32.

[61] For example, assume a nonbank consumer reporting agency's tax year were to run from July 1 to June 30. Assume the entity had $8 million in receipts in each of the tax years of 2010, 2011, and 2012 (July 1, 2010 to June 30, 2011; July 1, 2011 to June 30, 2012; and July 1, 2012 to June 30, 2013, respectively). That entity would have $8 million in annual receipts for the 2012 tax year (July 1, 2012 to June 30, 2013), as annual receipts are generally calculated as a three-year average. If the entity then had only $2 million in receipts for the 2013 tax year (July 1, 2013 to June 30, 2014), its annual receipts for the 2013 tax year would be $6 million. With the two-year supervision period, it would nevertheless remain a larger participant through June 30, 2014 because of its annual receipts in the 2012 tax year. On the other hand, assume the same facts but that the entity's tax year were to run from April 1 to March 31. In that case, the entity would remain a

For the above reasons, the Bureau believes that establishing this minimum two-year supervision period is appropriate for the administration of the Bureau's supervisory authority and will avoid the inefficiency of more frequent determinations of an entity's status. The Bureau seeks comment on all aspects of proposed § 1090.103, and in particular on whether a longer or shorter supervision period might be appropriate.

Section 1090.104—Determination of Status as a Larger Participant

Prior to its implementation of a registration program, the Bureau expects to use various data sources, including publicly available data, to identify which nonbank covered persons appear to qualify as larger participants. If the Bureau determines that an entity qualifies as a larger participant and, after assessing applicable criteria as set forth in the Act, including risk to consumers,[62] decides to undertake supervisory action in connection with that entity, the Bureau will send the entity a letter apprising it that it plans to undertake supervisory action on the basis of the entity's status as a larger participant. The Bureau recognizes that there may be instances when a person will dispute that it is a larger participant after receiving such a letter. Proposed § 1090.104 sets forth a procedure for such a person to dispute its classification as a larger participant by providing to the Assistant Director for Nonbank Supervision of the Bureau an affidavit setting forth an explanation of the basis for the person's assertion that it does not meet the definition of larger participant. Proposed § 1090.104 further permits a person to include with the response copies of any records, documents, or other information on which the person relied to make the assertion. Proposed § 1090.104 further provides that a person waives the right, at any time that it may dispute that it qualifies as a larger participant, to rely on any argument, records, documents, or other information that it fails to submit to the Assistant Director under this section. Moreover, proposed § 1090.104 states that a person who fails to respond to the Bureau's written communication within 30 days will be deemed to have acknowledged that it is a larger participant. Under proposed § 1090.104, after reviewing the affidavit and any other information submitted by the person disputing its status as a larger participant or deemed relevant by the Assistant Director, the Assistant Director must send the person a statement setting forth the Bureau's conclusion as to whether the person meets the definition of a larger participant. Additionally, the Proposed Rule provides that the Assistant Director may require that a person provide to the Bureau such records, documents, and information as the Assistant Director may deem appropriate to determine whether a person is a larger participant.[63]

These provisions are proposed pursuant to the Bureau's authority under section 1024(b)(7) of the Act to facilitate the Bureau's supervision of larger participants of the markets covered by this Proposed Rule by permitting the Bureau to determine whether a person meets the test for being a larger participant.[64] The Bureau also proposes § 1090.104 pursuant to section 1022(b)(1) of the Act, which grants the Director the authority to prescribe such rules as may be necessary and appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, such as its supervision of larger participants, and to prevent evasions of these laws. Providing a process whereby entities must come forward with information if they wish to dispute their status as larger participants, and providing the Bureau the ability to require such information, is necessary and appropriate for the Bureau to implement and efficiently exercise its supervision authority and to prevent evasion of section 1024 of the Act.[65]

The Bureau seeks comment on this proposed process for allowing a person to submit to the Bureau documents and information supporting its assertion that it is not a larger participant. The Bureau also seeks comment on all other aspects of these proposed provisions.

VI. Request for Comments

The Bureau invites comment on all aspects of this notice of proposed rulemaking and on the specific issues on which comment is solicited elsewhere herein, including on any appropriate modifications or exceptions to the Proposed Rule. The Bureau also seeks comment on which other markets for consumer financial products or services should be covered by future proposed rules to define larger participants.

VII. Section 1022(b)(2)(A) of the Act

A. Overview

Section 1022(b)(2)(A) of the Act calls for the Bureau to consider the potential benefits, costs, and impacts of its regulations.[66] The proposal, if adopted, would authorize the Bureau to exercise its supervisory authority with respect to certain nonbank covered persons defined as larger participants of the consumer debt collection and consumer reporting markets. Nonbank covered persons in the consumer debt collection market with more than $10 million in annual receipts and nonbank covered persons in the consumer reporting market with more than $7 million in annual receipts, as calculated in the manner set forth in the proposal, would qualify as larger participants and thus be subject to the Bureau's supervision authority. As noted, the Bureau estimates that these thresholds would encompass approximately 175

larger participant through March 31, 2014. If the entity were to continue to have $7 million or less in annual receipts for the 2014 tax year (April 1, 2014 to March 31, 2015), it would not be a larger participant for that year. However, if it were to have more than $7 million in annual receipts for the 2014 tax year, it would again qualify as a larger participant for that year and would remain a larger participant through March 31, 2016, even if its annual receipts again fell below $7 million for the 2015 tax year (April 1, 2015 to March 31, 2016).

[62] Act section 1024(b)(2). The factors to be considered in making this assessment include asset size, volume of transactions involving consumer financial products or services, risks to consumers, the extent to which institutions are subject to state oversight, and any other factor that the Bureau determines to be relevant.

[63] The Bureau believes that while it would have this authority under section 1024 of the Act even absent a regulation, a regulation is useful to provide clarity on the issue.

[64] Section 1024(b)(7) of the Act provides that in developing requirements or systems under that provision, where appropriate the Bureau shall consult with State agencies regarding requirements or systems (including coordinated or combined systems for registration). Given the focus of these provisions of the Proposed Rule on obtaining information to determine larger participant status, the Bureau does not believe that such consultation is appropriate in connection with this proposal. The Bureau, however, requests comments from relevant State agencies on this proposal.

[65] The Bureau also proposes § 1090.104 in part pursuant to section 1022(c)(5) of the Act, which permits the Bureau to require that a nonbank person file with the Bureau, under oath or otherwise, annual or special reports or written answers to specific questions, to determine whether such person is a covered person.

[66] Specifically, the Bureau is to consider the potential benefits and costs of a regulation to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services; the impact on depository institutions and credit unions with $10 billion or less in total assets as described in section 1026 of the Act; and the impact on consumers in rural areas. The manner and extent to which the provisions of section 1022(b)(2) apply to a rulemaking of this kind that does not establish standards of conduct is unclear. Nevertheless, to inform this rulemaking more fully, the Bureau performed the described analyses.

consumer debt collectors and 30 consumer reporting agencies.

That the Bureau is authorized to undertake supervisory activities with respect to a nonbank covered person that qualifies as a larger participant does not necessarily mean that the Bureau would in fact undertake such activities. Rather, the Bureau would decide whether to use its limited resources to examine or otherwise exercise its supervisory authority over a larger participant based on criteria set by Congress, which focus on risks to consumers.[67] Conversely, nonbank covered persons in the consumer debt collection market with $10 million or less in annual receipts and nonbank covered persons in the consumer reporting market with $7 million or less in annual receipts, as calculated in the manner set forth in the proposal, generally would not be subject to the Bureau's supervision authority as larger participants of a covered market. They would, however, be subject to the Bureau's rulemaking and enforcement authority and subject to potential Bureau supervision pursuant to section 1024(a)(1)(C) of the Act.

The Bureau notes at the outset that there is little publicly available data with which to effectively measure or quantify the benefits, costs, and impacts of supervision for compliance with Federal consumer financial law generally; as applied to the consumer debt collection or consumer reporting markets, more specifically; or, even more particularly, to covered persons in these markets with annual receipts above the thresholds set by the Proposed Rule. The Bureau has sought information from State regulators and regulatory associations to help quantify the costs incurred by nonbank covered persons from supervision, but, to date, the Bureau has been unable to locate useful information. As a result, the analysis that follows qualitatively examines the benefits, costs, and impacts of the key provisions of the proposal.[68] The Bureau seeks comment on additional sources of data to evaluate the proposal. The Bureau will further consider the benefits, costs, and impacts of the Proposed Rule and any modifications the Bureau might make to the Proposed Rule prior to adopting a final rule.

B. Potential Benefits and Costs to Consumers and Covered Persons

The analysis considers the benefits, costs, and impacts of the key provisions of the proposal against a pre-statutory baseline, *i.e.,* the benefits, costs, and impacts of the statute[69] and the regulation combined. Together, the Act and the Proposed Rule initiate a Federal supervision program for certain nonbank entities in the markets for consumer debt collection and consumer reporting. The benefits, costs, and impacts therefore are considered relative to a baseline where such a Federal supervisory regime does not exist for nonbank institutions in these markets.[70] In the following discussion, references to the proposal or the supervision program should be read to include the relevant provisions of the Act and the Proposed Rule regarding larger participants.

The potential benefit to consumers from the proposal is the increased consumer protection that should result from larger participants' likely increased compliance with Federal consumer financial law.[71] The potential costs derive from the resources that larger participants will use to respond to any supervisory activity by the Bureau and to improve their compliance where necessary.

The Bureau expects that the initiation of the supervision program in these markets will likely increase larger participants' compliance with Federal consumer financial law, and that such additional compliance will yield certain benefits for consumers that are affected by consumer debt collectors or consumer reporting agencies. For example, supervisory activity by the Bureau may lead to increased compliance with various statutes and regulations governing consumer debt collection and consumer reporting activities, such as the Fair Debt Collection Practices Act[72] and the Fair Credit Reporting Act,[73] respectively.[74]

Increased compliance with existing laws may lead the affected entities to incur additional costs. Expenditures on systems and personnel may be required to revise existing products or processes to the extent they do not comply with Federal consumer financial law. At present, the Bureau does not have specific information on the magnitude of such changes, but expects that such costs will be larger at firms where major changes are necessary.

Additional costs of the Proposed Rule are related to instances in which the Bureau decides to undertake supervisory activity, including an examination, with respect to a larger participant. The nature and extent of the supervisory activity will depend on the circumstances, and the costs incurred by an entity may derive from the gathering and reporting of information; the staff time, space and resources necessary to support on site exams; or other costs of interacting with the supervisor. Importantly, the proposal, if adopted, would not in itself impose any supervision-related costs. The rule would only authorize the Bureau to undertake certain supervisory activities. In deciding whether to undertake a supervisory activity with respect to any particular larger participant, the Bureau would have to take account of its limited supervisory resources, and apply the statutory criteria, which focus on risks to consumers. Therefore, these potential costs related to responding to supervisory activity, and any potential costs or benefits derived from increased compliance that would result from such supervisory activity, are probabilistic in nature.

Consumer debt collectors and consumer reporting agencies may also incur some minor costs in determining if they qualify as larger participants under the rule, specifically if they believe their annual receipts are near

[67] Act section 1024(b)(2). The Bureau is required to exercise its authority under its nonbank supervision program in a manner that is ''based on the assessment by the Bureau of the risks posed to consumers in the relevant product markets and geographic markets, and taking into consideration, as applicable—(A) the asset size of the covered person; (B) the volume of transactions involving consumer financial products or services in which the covered person engages; (C) the risks to consumers created by the provision of such consumer financial products or services; (D) the extent to which such institutions are subject to oversight by State authorities for consumer protection; and (E) any other factors that the Bureau determines to be relevant to a class of covered persons.''

[68] Where benefits or costs are not readily quantifiable or where data is not reasonably available, the Bureau will conduct qualitative analyses relying on information from available sources.

[69] Sections 1024(a)(1)(B) and 1024(b) of the Act.

[70] The Bureau has discretion in any rulemaking to choose an appropriate scope of analysis with respect to potential benefits and costs and an appropriate baseline. For the current proposal, another approach would be focus almost entirely on the supervision-related costs for larger participants and would omit a broader consideration of the benefits and costs of increased compliance. The Bureau, as a matter of discretion, has chosen to describe a broader range of potential effects to more fully inform the rulemaking.

[71] The Bureau also views the increased detection and assessment of risks to consumers and to the consumer financial markets as a critical mission of the supervision program. The extent to which the Bureau is better informed and that further policy actions yield tangible benefits to consumers, covered persons, and the markets in general could also be viewed as a longer term benefit.

[72] 15 U.S.C. 1692 *et seq.*

[73] 15 U.S.C. 1681 *et seq.*

[74] For those larger participants as to which the Bureau does not initiate supervisory activity, it is expected that the prospect of potential supervisory activity may create an incentive to increase compliance where it is lacking.

the applicable thresholds and they wish to dispute the Bureau's decision to commence a supervisory activity based on their status as larger participants. The Bureau's choice to use annual receipts, a well-defined criterion that is likely available to these entities, should help to minimize the costs of this calculation relative to other possible criteria. This is true even though apportionment may be necessary for certain firms that engage in activities not covered by this rule.

As noted earlier, the Bureau may decide to undertake supervisory activity with regard to a larger participant only after considering the applicable statutory criteria including factors such as the size of the entity and risks to consumers. For larger firms or firms where there is evidence of risk to consumers, the benefits of the proposal should be highest. The largest firms are expected to impact the most customers; therefore, any lapses in compliance by such firms may have the largest negative impacts.[75] Any increase in compliance would therefore benefit a large number of customers or transactions. At the same time, these firms should be best able to bear any fixed supervisory costs given their size and their potential ability to spread these costs over the large number of consumers and transactions. Where there is evidence of risks to consumers, the benefits of supervisory activity are also expected to be high. As a result, the statutory criteria regarding supervision should ensure that those larger participants that are supervised and that incur the costs of that supervision are the same firms where the benefits are likely to be highest.

The proposal, if adopted, may have impacts on consumers' access to consumer financial products or services. Predicting the nature and extent of any potential impacts is difficult, particularly given that consumers are not generally the end customers in these two markets. For most consumers, consumer credit reports and the information contained therein, are primarily an input into ultimate credit decisions by mortgage lenders, credit card issuers, and other financial services providers. Similarly, terms in the consumer debt collection market are set between debt collectors and the creditors for whom they collect or from whom they purchase debts, in part, based on the debt collectors' ability to recover from consumers.

Under the proposal, larger participants, and in particular those with respect to whom the Bureau chooses to conduct supervisory activity, are expected to incur the majority of the resource costs of increased compliance and increases in the quality of the services provided (*e.g.* credit reports may become more accurate, or consumers in collection may be treated more fairly).[76] However, providers may pass on those costs to their customers (as noted, consumers do not generally purchase these types of services) who then may pass them on to consumers, in part through changes in prices for credit. The extent to which these costs are eventually reflected, on average, in higher prices for consumers or lower profits for the affected firms depends on the competitive conditions in the relevant markets. Some consumers could see higher costs of credit and less access, while for others the opposite could be true.[77]

In developing the proposal the Bureau considered selecting different thresholds for each market. One alternative would be to set the thresholds substantially higher and cover only the very largest firms in each market. For example, a threshold of $100 million in annual receipts in the market for consumer reporting would cover only about 10 firms. Under such an alternative, the benefits of supervision to both consumers and covered persons would likely be substantially reduced, since firms impacting a large number of consumers and/or consumers in important market segments would be omitted. On the other hand, the potential costs to covered persons would of course be reduced if fewer firms were defined as larger participants and thus fewer were subject to the Bureau's supervision authority on that basis.[78]

C. Impact on Depository Institutions and Credit Unions With Total Assets of $10 Billion or Less as Described in Section 1026 of the Act, and the Impact on Consumers in Rural Areas

The proposal does not apply to depository institutions or credit unions of any size.[79] In addition, there is no additional or unique impact from the proposal on rural consumers.

VIII. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, requires each agency to consider the potential impact of its regulations on small entities, including small businesses, small governmental units, and small not-for-profit organizations.[80] The RFA defines a ''small business'' as a business that meets the size standard developed by the Small Business Administration pursuant to the Small Business Act.[81]

The RFA generally requires an agency to conduct an initial regulatory flexibility analysis (IRFA) and a final regulatory flexibility analysis (FRFA) of any rule subject to notice-and-comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The Bureau also is subject to certain additional procedures under the RFA involving the convening of a panel to consult with small business representatives prior to proposing a rule for which an IRFA is required.[82]

An initial regulatory flexibility analysis is not required for this proposal because the proposal, if adopted, would not have a significant economic impact on a substantial number of small entities. If adopted, the rule would define a class of firms as larger participants and thereby authorize the

[75] Larger firms may have more comprehensive or complex systems to monitor internal compliance limiting potential failures to comply with relevant regulations. However, the increased difficulty in coordination and communication in larger firms, and the fact that any compliance failures that do occur may impact a greater number of consumers, suggests that the benefits of supervision are still substantial.

[76] Debt collectors and consumer reporting agencies below the larger participant thresholds may change their behavior in response to the actions of larger participants. Specific reactions will depend on various factors, including the extent to which larger participants change their services or pricing, and are therefore difficult to predict.

[77] For example, increased accuracy of credit reports may yield a higher credit score for some borrowers and lower score for others. This former group could see the cost of credit decrease and access increase. The opposite may happen for the latter. Overall, the increased accuracy of the information should improve the pricing and allocation of credit.

[78] Pursuant to section 1024(e) of the Act, the Bureau also has supervision authority over service providers to nonbank covered persons encompassed by section 1024(a)(1), which includes larger participants, and some of these service providers may qualify as covered persons. The service providers to consumer debt collection and consumer reporting larger participants may include data aggregators, law firms, account maintenance services, call centers, data and record suppliers, and software providers. The Bureau does not have data on the number and characteristics of these service providers. The Bureau's discussion of potential costs, benefits, and impacts that may result from this proposal generally applies to service providers to larger participants.

[79] As noted above, as potential users of some of the services covered by the proposal, depository institutions and credit unions might see changes in the quality and prices of such services.

[80] 5 U.S.C. 601 *et seq.* The Bureau is not aware of any governmental units or not-for-profit organizations to which the proposal would apply.

[81] 5 U.S.C. 601(3). The Bureau may establish an alternative definition after consultation with the Small Business Administration and an opportunity for public comment.

[82] 5 U.S.C. 609.

Bureau to undertake supervisory activities with respect to those firms. The rule would not itself impose any obligations or standards of conduct on larger participants for purposes of RFA analysis. Moreover, even if the rule were considered to impose regulatory obligations for purposes of RFA analysis, the rule would impose such obligations only on nonbank covered persons in the consumer debt collection market with more than $10 million in annual receipts and nonbank covered persons in the consumer reporting market with more than $7 million in annual receipts, as calculated as set forth in the rule. As a result, a nonbank entity that would qualify as a larger participant would generally not meet the SBA standard for a small business, which in these markets has annual receipts at or below $7 million.[83]

Additionally, the Bureau believes that the Proposed Rule would not result in a ''significant impact'' on any small entities that may be affected. As noted, the proposal, if adopted, would authorize the Bureau to undertake supervisory activities with respect to larger participants. Whether the Bureau would in fact engage in supervisory activity, such as an examination, with respect to a larger participant (and, if so, the frequency and extent of such activity) would depend on a number of considerations, including the availability of Bureau resources and the application of the applicable statutory factors set forth in section 1024(b)(2). Given the Bureau's finite supervisory resources, and the range of industries over which it has supervisory responsibility for consumer financial protection, whether and when an entity in the consumer debt collection and consumer reporting markets would be supervised is probabilistic. Moreover, in cases where supervisory activity were to occur, the costs that would result from such activity are expected to be minimal in relation to the overall activities of the firm.

Finally, section 1024(e) of the Act authorizes the Bureau to supervise service providers to nonbank covered persons encompassed by section 1024(a)(1), which includes larger participants. Because the Proposed Rule does not address service providers, effects on service providers need not be addressed for purposes of this RFA analysis. Even were such effects relevant, the Bureau believes that it is very unlikely that any supervisory activities with respect to the service providers to the approximately 200 larger participants covered by this proposal would result in a significant economic impact on a substantial number of small entities.[84]

Accordingly, the undersigned certifies that this Proposed Rule, if adopted, would not have a significant economic impact on a substantial number of small entities.

IX. Paperwork Reduction Act

The Bureau has determined that this Proposed Rule does not impose any new recordkeeping or reporting requirements on covered entities or members of the public that would be collections of information requiring approval under 44 U.S.C. 3501, *et seq.*

X. Consultation With Federal Agencies

In developing the Proposed Rule, the Bureau consulted or offered to consult with the Federal Trade Commission, as well as with the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, and the National Credit Union Administration, including regarding consistency with any prudential, market, or systemic objectives administered by such agencies.[85]

List of Subjects in 12 CFR Part 1090

Consumer protection and credit.

Authority and Issuance

For the reasons set forth above, the Bureau of Consumer Financial Protection proposes to add part 1090 to Chapter X in Title 12 of the Code of Federal Regulations to read as follows:

PART 1090—DEFINING LARGER PARTICIPANTS IN CERTAIN CONSUMER FINANCIAL PRODUCT AND SERVICE MARKETS

Sec.

1090.100 Scope and purpose.
1090.101 Definitions.
1090.102 Covered markets and tests for determining larger participants of those markets.
1090.103 Status as larger participant subject to supervision.
1090.104 Determination of status as a larger participant.

Authority: 12 U.S.C. 5514(a)(1)(B); 12 U.S.C. 5514(b)(7)(A); 12 U.S.C. 5512(b)(1); and 12 U.S.C. 5512(c)(5).

§ 1090.100 Scope and purpose.

This part defines those nonbank covered persons that qualify as larger participants of certain markets for consumer financial products or services pursuant to sections 1024(a)(1)(B) and (a)(2) of the Act. A larger participant of a market covered by this part is subject to the supervisory authority of the Bureau under section 1024 of the Act. This part also establishes rules to facilitate the Bureau's supervisory

[83] The Proposed Rule, if adopted, might authorize the Bureau to supervise a small business as a larger participant in two rare instances. First, a nonbank covered person that was not a small business when it met the larger participant definition might become a small business during the second year of the supervision period. The Bureau expects that this would be rare given that relatively few nonbank covered persons appear to have annual receipts near the relevant threshold. Moreover, the Bureau's choice to average the nonbank covered person's receipts over the previous three years (absent special circumstances) reduces the probability that a firm would fall below the $7 million threshold because this average is less sensitive to fluctuations from a single year. Second, the Proposed Rule defines the term ''control'' somewhat more expansively than the Small Business Administration for purposes of aggregating the activities of a nonbank covered person's affiliated companies for purposes of classification as a larger participant. A nonbank covered person that was not considered affiliated under the Small Business Administration standards but was classified as affiliated under the Proposed Rule might therefore be classified as a small entity under the RFA and a larger participant under the Proposed Rule. The Bureau anticipates that very few such cases would exist in either of the markets covered by the Proposed Rule.

[84] The Bureau reaches this judgment in light of the number of relevant small firms in the relevant NAICS codes. For example, based on the examples in footnote 4, many of these service providers would be considered to be in industry 522390, ''Other activities related to credit intermediation,'' or 518210, ''Data Processing, Hosting, and Related Services.'' According to the 2007 Economics Census, there are more than 5000 small firms in the first industry group and nearly 8,000 in the second. Moreover, the limited number of expected cases in which an examination of a larger participant may indicate the need to examine a small service provider further limits any impact on these entities. And, were the Bureau to choose to undertake some supervisory activity with respect to a service provider, the burden imposed would likely be small compared to the overall activities of the firm. For example, using a conservative estimate of an exam that lasts ten business days (the Bureau expects any exam of a small service provider to be considerably shorter), the Bureau conservatively estimates that the supervised small entity would require a maximum of four person-weeks of time to support that exam (one full-time person for the two weeks prior to the exam and for the duration of the exam). For the two industries described above, such an exam at the median-sized firm below the SBA size threshold (approximately three or eight employees, respectively) is estimated to cost a fraction of a percent of annual receipts. Because the Bureau finds it very unlikely that it would supervise such entities except in rare circumstances, a substantial number of entities could not be involved. For larger small entities, the potential costs as a fraction of revenue are even smaller. For these reasons, the Bureau believes that any supervision of service providers would not result in a substantial economic impact on a significant number of small entities.

[85] Section 1022(b)(2)(B) of the Act requires the Bureau to consult with appropriate prudential regulators or other Federal agencies regarding consistency with any prudential, market, or systemic objectives administered by such agencies prior to proposing a rule and during the comment process. Additionally, section 1024(a)(2) specifically requires the Bureau to consult with the Federal Trade Commission prior to issuing a rule defining larger participants under section 1024(a)(1)(B) of the Act.

authority over such larger participants pursuant to section 1024(b)(7) of the Act.

§ 1090.101 Definitions.

For the purposes of this part, the following definitions apply:

(a) *Act* means the Consumer Financial Protection Act of 2010.

(b) *Affiliated company* means any company (other than an insured depository institution or insured credit union) that controls, is controlled by, or is under common control with, a person. For purposes of this definition:

(1) *Company* means any corporation, limited liability company, business trust, general or limited partnership, proprietorship, cooperative, association, or similar organization.

(2) A person has control over another person if:

(i) The person directly or indirectly or acting through one or more other persons owns, controls, or has power to vote 25 percent or more of any class of voting securities or similar ownership interest of the other person;

(ii) The person controls in any manner the election of a majority of the directors, trustees, members, or general partners of the other person; or

(iii) The person directly or indirectly exercises a controlling influence over the management or policies of the other person, as determined by the Bureau.

(c) *Annual receipts* means receipts calculated as follows:

(1) *Receipts* means ''total income'' (or in the case of a sole proprietorship, ''gross income'') plus ''cost of goods sold'' as these terms are defined and reported on Internal Revenue Service (IRS) tax return forms (such as Form 1120 for corporations; Form 1120S and Schedule K for S corporations; Form 1120, Form 1065 or Form 1040 for LLCs; Form 1065 and Schedule K for partnerships; Form 1040, Schedule C for other sole proprietorships). Receipts do not include net capital gains or losses; taxes collected for and remitted to a taxing authority if included in gross or total income, such as sales or other taxes collected from customers and excluding taxes levied on the entity or its employees; and amounts collected for another (but fees earned in connection with such collections are receipts). Items such as subcontractor costs, reimbursements for purchases a contractor makes at a customer's request, and employee-based costs such as payroll taxes, are included in receipts.

(2) *Completed fiscal year* means a tax year including any short tax year. ''Fiscal year,'' ''tax year,'' and ''short tax year'' have the meanings attributed to them by the IRS as set forth in IRS Publication 538, which provides that:

(i) A ''fiscal year'' is 12 consecutive months ending on the last day of any month except December 31st.

(ii) A ''tax year'' is an annual accounting period for keeping records and reporting income and expenses. An annual accounting period does not include a short tax year.

(iii) A ''short tax year'' is a tax year of less than 12 months.

(3) *Period of measurement.* (i) Annual receipts of a person that has been in business for three or more complete fiscal years means the total receipts of the person over its most recently completed three fiscal years divided by three.

(ii) Annual receipts of a person that has been in business for less than three complete fiscal years means the total receipts of the person for the period the person has been in business divided by the number of weeks in business, multiplied by 52.

(iii) Where a person has been in business for three or more complete fiscal years, but one of the years within its period of measurement is a short tax year, annual receipts means the total receipts for the short year and the two full fiscal years divided by the total number of weeks in the short year and the two full fiscal years, multiplied by 52.

(4) *Annual receipts of affiliated companies.* (i) The annual receipts of a person are calculated by adding the annual receipts of the person with the annual receipts of each of its affiliated companies.

(ii) If a person has acquired an affiliated company or been acquired by an affiliated company during the applicable period of measurement, the annual receipts used in determining size status include the receipts of such affiliated company for the entire period of measurement (not just the period after the affiliation arose).

(iii) Receipts are calculated separately for the person and each of its affiliated companies in accordance with paragraph (c)(3) of this section even though this may result in using a different period of measurement to calculate an affiliated company's annual receipts. Thus, for example, if an affiliated company has been in business for a period of less than three years, the affiliated company's receipts are to be annualized in accordance with paragraph (c)(3)(ii) of this section even if the person has been in business for three or more complete fiscal years.

(iv) The annual receipts of a former affiliated company are not included if affiliation ceased before the applicable period of measurement as set forth in paragraph (c)(3) of this section. This exclusion of annual receipts of former affiliated companies applies during the entire period of measurement, rather than only for the period after which affiliation ceased.

(d) *Assistant Director* means the Bureau's Assistant Director for Nonbank Supervision or her or his designee. The Director of the Bureau may perform the functions of the Assistant Director under this proposal. In the event there is no such Assistant Director, the Director of the Bureau may designate an alternative Bureau employee to fulfill the duties of the Assistant Director under this part.

(e) *Bureau* means the Bureau of Consumer Financial Protection.

(f) *Consumer* means an individual or an agent, trustee, or representative acting on behalf of an individual.

(g) *Consumer debt collection* means collecting or attempting to collect, directly or indirectly, any debt owed or due or asserted to be owed or due to another and related to any consumer financial product or service. A person offers or provides consumer debt collection where the relevant debt is either:

(1) Collected on behalf of another person; or

(2) Collected on the person's own behalf, if the person purchased or otherwise obtained the debt while the debt was in default under the terms of the contract or other instrument governing the debt.

(h) *Consumer financial product or service* means any financial product or service, as defined in section 1002(15) of the Act that is described in one or more categories under:

(1) Section 1002(15) of the Act and is offered or provided for use by consumers primarily for personal, family, or household purposes; or

(2) Clauses (i), (iii), (ix), or (x) of section 1002(15)(A) of the Act and is delivered, offered, or provided in connection with a consumer financial product or service referred to in paragraph (h)(1) of this section.

(i) *Consumer reporting* means:

(1) *In general.* Consumer reporting means collecting, analyzing, maintaining, or providing consumer report information or other account information used or expected to be used in any decision by another person regarding the offering or provision of any consumer financial product or service.

(2) *Exception for furnishing to an affiliated person.* Consumer reporting does not include the activities of a person to the extent that a person—

(i) Collects, analyzes, or maintains information that solely relates to transactions or experiences between the person and a consumer; and

(ii) Provides the information described in paragraph (i)(2)(i) of this section to an affiliate.

(3) *Exception for furnishing information to a consumer reporting entity.* Consumer reporting does not include the activities of a person to the extent that a person provides information that solely relates to transactions or experiences between a consumer and the person, or the affiliate of such person, to another person that is engaged in consumer reporting.

(4) *Exception for providing information to be used solely in a decision regarding employment, government licensing, or residential leasing or tenancy.* Consumer reporting does not include the activities of a person to the extent that a person provides consumer report or other account information that is used or expected to be used solely in any decision regarding the offering or provision of a product or service that is not a consumer financial product or service, including a decision for employment, government licensing, or a residential lease or tenancy involving a consumer.

(j) *Larger participant* means a nonbank covered person that meets a test under § 1090.102, and for the period provided in § 1090.103 of this part.

(k) *Nonbank covered person* means, except for persons described in sections 1025(a) and 1026(a) of the Act:

(1) Any person that engages in offering or providing a consumer financial product or service; and

(2) Any affiliate of a person described in paragraph (k)(1) of this section if such affiliate acts as a service provider to such person.

(l) *Person* means an individual, partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity.

(m) *Supervision or supervisory activity* means the Bureau's exercise, or intended exercise, of supervisory authority by initiating or undertaking an examination, or requiring a report of a person pursuant to section 1024 of the Act.

§ 1090.102 Covered markets and tests for determining larger participants of those markets.

(a) *Consumer debt collection.* A nonbank covered person that offers or provides consumer debt collection is a larger participant of the consumer debt collection market if the person's annual receipts resulting from consumer debt collection are more than $10 million.

(b) *Consumer reporting.* A nonbank covered person that offers or provides consumer reporting is a larger participant of the consumer reporting market if the person's annual receipts resulting from consumer reporting are more than $7 million.

§ 1090.103 Status as larger participant subject to supervision.

A person qualifying as a larger participant under § 1090.102 shall not cease to be a larger participant under this part until two years from the first day of the tax year in which the person last met the applicable test under § 1090.102.

§ 1090.104 Determination of status as a larger participant.

(a) If a nonbank covered person receives a written communication from the Bureau initiating a supervisory activity, such person may respond by asserting that the person does not meet the definition of a larger participant of a market covered by this part within 30 days of the date of the communication. Such response must be sent to the Assistant Director by electronic transmission at the address included in the communication and must include an affidavit setting forth an explanation of the basis for the person's assertion that it does not meet the definition of larger participant of a market covered by this part and therefore is not subject to the Bureau's supervisory authority under section 1024 of the Act. In addition, a person may include with the response copies of any records, documents, or other information on which the person relied to make the assertion.

(b) A person shall be deemed to have waived the right, at any time that it may dispute that it qualifies as a larger participant, to rely on any argument, records, documents, or other information that it fails to submit to the Assistant Director under paragraph (a) of this section. A person who fails to respond to the Bureau's written communication within 30 days will be deemed to have acknowledged that it is a larger participant.

(c) The Assistant Director shall review the affidavit, any attached records, documents, or other information submitted pursuant to paragraph (a) of this section, and any other information the Assistant Director deems relevant, and thereafter send by electronic transmission to the person a statement setting forth the Bureau's conclusion as to whether the person meets the definition of a larger participant of a market covered by this part.

(d) At any time, including prior to issuing the written communication referred to in paragraph (a) of this section, the Assistant Director may require that a person provide to the Bureau such records, documents, and information as the Assistant Director may deem appropriate to determine whether a person qualifies as a larger participant. Persons must provide the requisite records, documents, and other information to the Bureau within the time period specified in the request.

(e) The Assistant Director, in her or his discretion, may modify any timeframe prescribed by this section on his or her own initiative or for good cause shown.

Dated: February 8, 2012.

Richard Cordray,

Director, Consumer Financial Protection Bureau.

[FR Doc. 2012–3775 Filed 2–16–12; 8:45 am]

BILLING CODE 4810–AM–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 177

[Docket No. FDA–2012–F–0031]

American Chemistry Council; Filing of Food Additive Petition

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of petition.

SUMMARY: The Food and Drug Administration (FDA) is announcing that the American Chemistry Council (ACC) has filed a petition proposing that the food additive regulations be amended to no longer provide for the use of polycarbonate (PC) resins in infant feeding bottles and spill-proof cups designed to help train babies to drink from cups because these uses have been abandoned. PC resins are formed by the condensation of 4,4′-isopropylenediphenol (i.e., Bisphenol A (BPA)), and carbonyl chloride or diphenyl carbonate.

DATES: Submit either electronic or written comments by April 17, 2012.

ADDRESSES: You may submit comments, identified by Docket No. FDA–2012–F–0031 by any of the following methods:

Electronic Submissions

Submit electronic comments in the following way:

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

Written Submissions

Submit written submissions in the following ways:

• *Fax:* 301–827–6870.

• *Mail/Hand delivery/Courier (for paper or CD–ROM submissions):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

Instructions: All submissions received must include the Agency name and Docket No. FDA–2012–F–0031. All comments received may be posted without change to *http://www.regulations.gov,* including any personal information provided. For additional information on submitting comments, see the ''Comments'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* and insert the docket number(s), found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Vanee Komolprasert, Center for Food Safety and Applied Nutrition (HFS–275), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740–3835, 240–402–1217.

SUPPLEMENTARY INFORMATION:

I. Background

Under section 409(b)(5) of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 348(b)(5)), notice is given that a food additive petition (FAP 1B4783) has been filed by the American Chemistry Council (ACC), 700 Second St. NE., Washington, DC 20002. The petition proposes to amend the food additive regulations in 21 CFR 177.1580 to no longer permit the use of PC resins in infant feeding bottles (''baby bottles'') and spill-proof cups designed to help train babies to drink from cups (''sippy cups'') because these uses have been abandoned. Polycarbonate resins are formed by the condensation of 4,4′-isopropylenediphenol (i.e., BPA), and carbonyl chloride or diphenyl carbonate.

II. Abandonment

Under section 409(i) of the FD&C Act, FDA ''shall by regulation prescribe the procedure by which regulations under the foregoing provisions of this section may be amended or repealed, and such procedure shall conform to the procedure provided in this section for the promulgation of such regulations.'' FDA's regulations specific to administrative actions for food additives provide as follows: ''The Commissioner, on his own initiative or on the petition of any interested person, pursuant to part 10 of this chapter, may propose the issuance of a regulation amending or repealing a regulation pertaining to a food additive or granting or repealing an exception for such additive.'' (21 CFR 171.130(a)). These regulations further provide: ''Any such petition shall include an assertion of facts, supported by data, showing that new information exists with respect to the food additive or that new uses have been developed or old uses abandoned, that new data are available as to toxicity of the chemical, or that experience with the existing regulation or exemption may justify its amendment or appeal. New data shall be furnished in the form specified in 21 CFR 171.1 and 171.100 for submitting petitions.'' (21 CFR 171.130(b)). Under these regulations, a petitioner may propose that FDA amend a food additive regulation if the petitioner can demonstrate that there are ''old uses abandoned'' for the relevant food additive. Such abandonment must be complete for any intended uses in the U.S. market. While section 409 of the FD&C Act and § 171.130 also provide for amending or revoking a food additive regulation based on safety, an amendment or revocation based on abandonment is not based on safety, but is based on the fact that regulatory authorization is no longer necessary for the use of that food additive.

Abandonment may be based on the abandonment of certain authorized food additive uses for a substance (e.g., if a substance is no longer used in certain product categories), or on the abandonment of all authorized food additive uses of a substance (e.g., if a substance is no longer being manufactured). If a petition seeks an amendment to a food additive regulation based on the abandonment of certain uses of the food additive, such uses must be adequately defined so that both the scope of the abandonment and any amendment to the food additive regulation are clear.

The ACC petition contains public information and information collected from companies that produce PC resins to support the claim that baby bottles and sippy cups containing PC resins are no longer being introduced into the U.S. market and that manufacturers of baby bottles and sippy cups have abandoned the use of PC resins in making these products. The petition contains the results of an industry poll showing that the PC resin manufacturers, which represent over 97 percent of worldwide, global PC resin production capacity, are no longer, to their knowledge, selling PC resins to be used in the manufacture of baby bottles and sippy cups intended for import into the United States or sale in the U.S. market.

FDA expressly requests comments on ACC's proposal that FDA amend the food additive regulations to no longer permit the use of PC resins in baby bottles and sippy cups. For the purposes of this petition, FDA considers ''sippy cups'' to mean spill-resistant training cups, including their closures and lids, intended for use by babies or toddlers. As noted, the basis for the proposed amendment is that the use of PC resins in the manufacture of baby bottles and sippy cups has been abandoned. Accordingly, FDA requests comments that address whether these uses of PC resins have been abandoned, such as information on whether baby bottles or sippy cups containing PC resins are currently being introduced or delivered for introduction into the U.S. market. Further, FDA requests comments on whether the uses that are the subject of ACC's petition (baby bottles and sippy cups) have been adequately defined. FDA is not currently aware of information that would suggest continued use of PC resins in the manufacture of baby bottles and sippy cups. FDA is providing the public 60 days to submit comments.

The Agency is not requesting comments on the safety of these uses of PC resins because, as discussed previously in this document, such information is not relevant to abandonment, which is the basis of the proposed action. Any comments addressing the safety of PC resins or containing safety information on these resins will not be considered in FDA's evaluation of this petition. Separate from FDA's consideration of this petition, FDA is actively assessing the safety of BPA (see 75 FR 17145, April 5, 2010). Interested persons with safety information that has not previously been submitted to FDA on the use of PC resins may provide that information to Docket No. FDA–2010–N–0100. Although this docket is no longer accepting electronic comments, written comments will be accepted by FDA's Division of Dockets Management (see **ADDRESSES**).

The Agency has determined under 21 CFR 25.32(m) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore,

neither an environmental assessment nor an environmental impact statement is required.

III. 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. 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.

Dated: February 13, 2012.

Dennis M. Keefe,

Director, Office of Food Additive Safety, Center for Food Safety and Applied Nutrition.

[FR Doc. 2012–3744 Filed 2–16–12; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 876

[Docket No. FDA–2012–M–0076]

Gastroenterology-Urology Devices; Reclassification of Sorbent Hemoperfusion Devices for the Treatment of Poisoning and Drug Overdose; Effective Date of Requirement for Premarket Approval for Sorbent Hemoperfusion Devices To Treat Hepatic Coma and Metabolic Disturbances

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is proposing to reclassify the sorbent hemoperfusion system, a preamendments class III device, into class II (special controls) for the treatment of poisoning and drug overdose, and to require the filing of a premarket approval application (PMA) or a notice of completion of a product development protocol (PDP) for the treatment of hepatic coma and metabolic disturbances. FDA is identifying the proposed special controls that the Agency believes will reasonably ensure the safety and effectiveness of the device for the treatment of poisoning and drug overdose. The Agency is also summarizing its proposed findings regarding the degree of risk of illness or injury designed to be eliminated or reduced by requiring the devices to meet the statute's approval requirements and the benefits to the public from the use of the devices. In addition, FDA is announcing the opportunity for interested persons to request that the Agency change the classification of any of the devices mentioned in this document based on new information. This action implements certain statutory requirements.

DATES: Submit either electronic or written comments by May 17, 2012. Submit requests for a change in classification by March 5, 2012. See section XVIII of this document for the proposed effective date of a final rule based on this proposed rule.

ADDRESSES: You may submit comments, identified by Docket No. FDA–2012–M–0076, by any of the following methods:

Electronic Submissions

Submit electronic comments in the following way:

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

Written Submissions

Submit written submissions in the following ways:

- Fax: 301–827–6870.
- Mail/Hand delivery/Courier (for paper or CD–ROM submissions): Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

Instructions: All submissions received must include the Agency name and Docket No. FDA–2012–M–0076 for this rulemaking. All comments received may be posted without change to *http://www.regulations.gov*, including any personal information provided. For additional information on submitting comments, see the ''Comments'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Melissa Burns, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, rm. 1646, Silver Spring, MD 20993, 301–796–5616, *melissa.burns@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background—Regulatory Authorities

A. Requirement for Premarket Approval Application

The Federal Food, Drug, and Cosmetic Act (FD&C Act), as amended by the Medical Device Amendments (the 1976 amendments) (Pub. L. 94–295), the Safe Medical Devices Act of 1990 (SMDA) (Pub. L. 101–629), Food and Drug Administration Modernization Act of 1997 (FDAMA) (Pub. L. 105–115), the Medical Device User Fee and Modernization Act of 2002 (MDUFMA) (Pub. L. 107–250), the Medical Devices Technical Corrections Act (Pub. L. 108–214), and the Food and Drug Administration Amendments Act of 2007 (Pub. L. 110–85) establish a comprehensive system for the regulation of medical devices intended for human use. Section 513 of the FD&C Act (21 U.S.C. 360c) established three categories (classes) of devices, reflecting the regulatory controls needed to provide reasonable assurance of their safety and effectiveness. The three categories of devices are class I (general controls), class II (special controls), and class III (premarket approval).

Under section 513 of the FD&C Act, devices that were in commercial distribution before the enactment of the 1976 amendments, May 28, 1976 (generally referred to as preamendments devices), are classified after FDA has: (1) Received a recommendation from a device classification panel (an FDA advisory committee); (2) published the panel's recommendation for comment, along with a proposed regulation classifying the device; and (3) published a final regulation classifying the device. FDA has classified most preamendments devices under these procedures.

Devices that were not in commercial distribution prior to May 28, 1976 (generally referred to as postamendments devices) are automatically classified by section 513(f) of the FD&C Act into class III without any FDA rulemaking process. Those devices remain in class III and require premarket approval unless, and until, the device is reclassified into class I or II or FDA issues an order finding the device to be substantially equivalent, in accordance with section 513(i) of the FD&C Act, to a predicate device that does not require premarket approval. The Agency determines whether new devices are substantially equivalent to predicate devices by means of premarket notification procedures in section 510(k) of the FD&C Act (21 U.S.C. 360(k)) and 21 CFR part 807.

A preamendments device that has been classified into class III may be

marketed by means of premarket notification procedures (510(k) process) without submission of a PMA until FDA issues a final regulation under section 515(b) of the FD&C Act (21 U.S.C. 360e(b)) requiring premarket approval. Section 515(b)(1) of the FD&C Act establishes the requirement that a preamendments device that FDA has classified into class III is subject to premarket approval. A preamendments class III device may be commercially distributed without an approved PMA or a notice of completion of a PDP until 90 days after FDA issues a final rule requiring premarket approval for the device, or 30 months after final classification of the device under section 513 of the FD&C Act, whichever is later. Also, a preamendments device subject to the rulemaking procedure under section 515(b) of the FD&C Act is not required to have an approved investigational device exemption (IDE) (see part 812 (21 CFR part 812)) contemporaneous with its interstate distribution until the date identified by FDA in the final rule requiring the submission of a PMA for the device. At that time, an IDE is required only if a PMA has not been submitted or a PDP completed.

Section 515(b)(2)(A) of the FD&C Act provides that a proceeding to issue a final rule to require premarket approval shall be initiated by publication of a notice of proposed rulemaking containing: (1) The regulation; (2) proposed findings with respect to the degree of risk of illness or injury designed to be eliminated or reduced by requiring the device to have an approved PMA or a declared completed PDP and the benefit to the public from the use of the device; (3) an opportunity for the submission of comments on the proposed rule and the proposed findings; and (4) an opportunity to request a change in the classification of the device based on new information relevant to the classification of the device.

Section 515(b)(2)(B) of the FD&C Act provides that if FDA receives a request for a change in the classification of the device within 15 days of the publication of the notice, FDA shall, within 60 days of the publication of the notice, consult with the appropriate FDA advisory committee and publish a notice denying the request for change in reclassification or announcing its intent to initiate a proceeding to reclassify the device under section 513(e) of the FD&C Act. Section 515(b)(3) of the FD&C Act provides that FDA shall, after the close of the comment period on the proposed rule and consideration of any comments received, issue a final rule to require premarket approval or publish a document terminating the proceeding together with the reasons for such termination. If FDA terminates the proceeding, FDA is required to initiate reclassification of the device under section 513(e) of the FD&C Act, unless the reason for termination is that the device is a banned device under section 516 of the FD&C Act (21 U.S.C. 360f).

If a proposed rule to require premarket approval for a preamendments device is finalized, section 501(f)(2)(B) of the FD&C Act (21 U.S.C. 351(f)(2)(B)) requires that a PMA or notice of completion of a PDP for any such device be filed within 90 days of the date of issuance of the final rule or 30 months after the final classification of the device under section 513 of the FD&C Act, whichever is later. If a PMA or notice of completion of a PDP is not filed by the later of the two dates, commercial distribution of the device is required to cease since the device would be deemed adulterated under section 501(f) of the FD&C Act.

The device may, however, be distributed for investigational use if the manufacturer, importer, or other sponsor of the device complies with the IDE regulations. If a PMA or notice of completion of a PDP is not filed by the later of the two dates, and the device does not comply with IDE regulations, the device is deemed to be adulterated within the meaning of section 501(f)(1)(A) of the FD&C Act, and subject to seizure and condemnation under section 304 of the FD&C Act (21 U.S.C. 334) if its distribution continues. Shipment of devices in interstate commerce will be subject to injunction under section 302 of the FD&C Act (21 U.S.C. 332), and the individuals responsible for such shipment will be subject to prosecution under section 303 of the FD&C Act (21 U.S.C. 333). In the past, FDA has requested that manufacturers take action to prevent the further use of devices for which no PMA or PDP has been filed and may determine that such a request is appropriate for the class III devices that are the subjects of this regulation.

The FD&C Act does not permit an extension of the 90-day period after issuance of a final rule within which an application or a notice is required to be filed. The House Report on the 1976 amendments states that ''[t]he thirty month grace period afforded after classification of a device into class III * * * is sufficient time for manufacturers and importers to develop the data and conduct the investigations necessary to support an application for premarket approval (H. Rept. 94–853, 94th Cong., 2d sess. 42 (1976)).''

The SMDA added section 515(i) to the FD&C Act requiring FDA to review the classification of preamendments class III devices for which no final rule requiring the submission of PMAs has been issued and to determine whether or not each device should be reclassified into class I or class II or remain in class III. For devices remaining in class III, the SMDA directed FDA to develop a schedule for issuing regulations to require premarket approval. The SMDA does not, however, prevent FDA from proceeding immediately to rulemaking under section 515(b) of the FD&C Act on specific devices, in the interest of public health, independent of the procedures of section 515(i). Proceeding directly to rulemaking under section 515(b) of the FD&C Act is consistent with Congress' objective in enacting section 515(i), i.e., that preamendments class III devices for which PMAs have not been previously required either be reclassified to class I or class II or be subject to the requirements of premarket approval. Moreover, in this proposed rule, interested persons are being offered the opportunity to request reclassification of any of the devices.

B. Reclassification

Section 513(e) of the FD&C Act governs reclassification of classified preamendments devices. This section provides that FDA may, by rulemaking, reclassify a device (in a proceeding that parallels the initial classification proceeding) based upon ''new information.'' FDA can initiate a reclassification under section 513(e) or an interested person may petition FDA to reclassify a preamendments device. The term ''new information,'' as used in section 513(e) of the FD&C Act, includes information developed as a result of a reevaluation of the data before the Agency when the device was originally classified, as well as information not presented, not available, or not developed at that time. (See, e.g., *Holland Rantos* v. *United States Department of Health, Education, and Welfare,* 587 F.2d 1173, 1174 n.1 (D.C. Cir. 1978); *Upjohn* v. *Finch,* 422 F.2d 944 (6th Cir. 1970); *Bell* v. *Goddard,* 366 F.2d 177 (7th Cir. 1966).)

Reevaluation of the data previously before the Agency is an appropriate basis for subsequent regulatory action where the reevaluation is made in light of newly available regulatory authority (see *Bell* v. *Goddard,* supra, 366 F.2d at 181; *Ethicon, Inc.* v. *FDA,* 762 F. Supp. 382, 388–389 (D.D.C. 1991)) or in light of changes in ''medical science.'' (See *Upjohn* v. *Finch,* supra, 422 F.2d at 951.). Whether data before the Agency are past or new data, the ''new

information'' to support reclassification under section 513(e) must be ''valid scientific evidence,'' as defined in section 513(a)(3) of the FD&C Act and § 860.7(c)(2) (21 CFR 860.7(c)(2)). (See, e.g., *General Medical Co.* v. *FDA,* 770 F.2d 214 (D.C. Cir. 1985); *Contact Lens Assoc.* v. *FDA,* 766 F.2d 592 (D.C. Cir.), cert. denied, 474 U.S. 1062 (1985).)

FDA relies upon ''valid scientific evidence'' in the classification process to determine the level of regulation for devices. To be considered in the reclassification process, the valid scientific evidence upon which the Agency relies must be publicly available. Publicly available information excludes trade secrets and/or confidential commercial information, e.g., the contents of a pending PMA. (See section 520(c) of the FD&C Act (21 U.S.C. 360j(c)).) Section 520(h)(4) of the FD&C Act, added by FDAMA, provides that FDA may use, for reclassification of a device, certain information in a PMA 6 years after the application has been approved. This includes information from clinical and preclinical tests or studies that demonstrate the safety or effectiveness of the device but does not include descriptions of methods of manufacture or product composition and other trade secrets.

FDAMA added a new section 510(m) to the FD&C Act. New section 510(m) of the FD&C Act provides that a class II device may be exempted from the premarket notification requirements under section 510(k) of the FD&C Act, if the Agency determines that premarket notification is not necessary to assure the safety and effectiveness of the device.

II. Regulatory History of the Device

In the preamble to the proposed rule (46 FR 7562, January 23, 1981, and 46 FR 7630, January 23, 1981), the Gastroenterology-Urology Device Classification Panel (the Panel) recommended that sorbent hemoperfusion systems be classified into class III because the device is life sustaining and life supporting and because there was a lack of data on the absorption characteristics of this device regarding the possibility that it may, while removing toxic substances, also remove essential substances from the blood or cause loss or platelets and white cells. The Panel indicated that general controls alone would not be sufficient and that there was not enough information to establish a performance standard. Consequently, the Panel believed that premarket approval was necessary to assure the safety and effectiveness of the device. In 1983, FDA classified sorbent hemoperfusion systems into class III after receiving no comments on the proposed rule (48 FR 53012, November 23, 1983). In 1987, FDA published a clarification by inserting language in the codified language stating that no effective date had been established for the requirement for premarket approval for sorbent hemoperfusion system devices (52 FR 17732 at 17738, May 11, 1987).

In 2009, FDA published an order for the submission of information on sorbent hemoperfusion systems by August 7, 2009 (74 FR 16214, April 9, 2009). In response to that order, FDA received one reclassification petition from a device manufacturer recommending that sorbent hemoperfusion systems be reclassified to class II. The manufacturers stated that safety and effectiveness of these devices may be assured by device design, performance testing, and labeling (special controls).

III. Device Description

A sorbent hemoperfusion system is a device that consists of an extracorporeal blood system and a container filled with adsorbent material that removes a wide range of substances, both toxic and normal, from blood flowing through it. The adsorbent materials are usually activated-carbon or resins, which may be coated or immobilized to prevent fine particles entering the patient's blood. The generic type of device may include lines and filters specifically designed to connect the device to the extracorporeal blood system. Sorbent hemoperfusion systems may also include the machine or instrument used to drive and manage blood and fluid flow within the extracorporeal circuit, as well as any accompanying controllers, monitors, or sensors.

IV. Proposed Reclassification

FDA is proposing that sorbent hemoperfusion systems intended for the treatment of poisoning and drug overdose be reclassified from class III to class II. FDA believes that the identified special controls would provide reasonable assurance of safety and effectiveness. Therefore, in accordance with sections 513(e) and 515(i) of the FD&C Act and § 860.130 (21 CFR 860.130), based on new information with respect to the devices, FDA, on its own initiative, is proposing to reclassify this preamendments class III device intended for the treatment of poisoning and drug overdose into class II. The Agency has identified special controls that would provide reasonable assurance of their safety and effectiveness. The Agency does not intend to exempt this proposed class II device from premarket notification (510(k)) submission as provided for under section 510(m) of the FD&C Act.

V. Risks to Health

After considering the information from the reports and recommendations of the advisory committees (panels) for the classification of these devices along with information submitted in response to the 515(i) order and any additional information that FDA has encountered, FDA has evaluated the risks to health associated with the use of sorbent hemoperfusion systems and determined that the following risks to health are associated with its use:

- *Extracorporeal leaks (blood loss)*—Rupture of the extracorporeal circuit, cartridge, filters, and/or tubing, as well as disconnections, may lead to blood leaks and blood loss.
- *Platelet loss and thrombocytopenia*—The adsorption characteristics of the device may cause large losses of platelets during hemoperfusion.
- *Leukopenia*—The materials used, or the design of the device, may cause absorption of leukocytes, leading to the transient loss of leukocytes in a patient.
- *Hemolysis*—The materials used, or the design of the blood pathways in the device, may cause the lysis of red blood cells.
- *Leak of adsorbent agent into fluid path (release of emboli)*—Fine particles leached from the sorbent column of the device may be deposited in the arterioles of the lungs and other organ as particulate emboli.
- *Lack of sterility*—Improper sterilization or compromise of the device packaging may lead to the introduction of microorganisms, which may be transmitted to a patient during use.
- *Toxic and/or pyrogenic reactions*—Toxic substances may be leached from the device, causing a patient to have a pyrogenic reaction (sudden fever with collapse and chills).
- *Infection*—Defects in the design or construction of the device preventing adequate cleaning and/or sterilization may allow pathogenic organisms to be introduced and may cause an infection in a patient.
- *Hypotension*—Sudden fluid shifts within the patient, due to pressures exerted by the device, or to fluid being removed by the device, may cause sudden decreases in a patient's blood pressure.
- *Lack of biocompatibility in materials or solutions contacting blood*—The patient-contacting materials of the device may cause an adverse

immunological or allergic reaction in a patient.

• *Clotting (blood loss)*—The materials used, or the design of the device, may cause a patient's blood to form clots, which may obstruct the device's extracorporeal circuit, interrupting or terminating treatments, and also leading to blood loss, because the blood entrapped in the clotted blood circuit often cannot be returned to the patient.

• *Removal or depletion of vital nutrients, hormones, vitamins, substances. and drugs (e.g., adsorption of glucose, unspecific removal characteristics, drop in patients' hematocrit), due to device's lack of specificity*—The adsorption characteristics of the device may cause removal or depletions of nutrients, hormones, and other necessary substances.

• *Metabolic disturbances*—The removal of normal metabolites along with undesirable substances may lead to metabolic disturbances.

• *Lack of effectiveness*—The adsorption characteristics of the device may lead to the failure to remove drugs in the treatment of poisoning or drug overdose, or to bring on clinical improvement in hepatic coma and metabolic disturbances.

• *Treatment interruptions or discontinuations*—Inadequate safeguards in the device may lead to treatment interruptions or discontinuations in the case of power failures.

• *Electrical shock due to lack of electrical safety*—Inadequate safeguards in the device may lead to electrical shocks in patients using them.

• *Electromagnetic interference, which may lead to adverse interactions with other patient systems*—Inadequate safeguards in the device may lead to its interference with other patient systems, causing adverse events in the patient, as well as adversely affecting the performance of the other patient systems.

VI. Summary of Reasons for Reclassification

FDA believes that sorbent hemoperfusion systems intended for the treatment of poisoning and drug overdose should be reclassified into class II because special controls, in addition to general controls, can be established to provide reasonable assurance of the safety and effectiveness of the device. In addition, there is now adequate effectiveness information sufficient to establish special controls to provide such assurance.

VII. Summary of Data Upon Which the Reclassification Is Based

Since the time of the original Panel recommendation, sufficient evidence has been developed to support a reclassification of sorbent hemoperfusion system to class II with special controls for the treatment of poisoning and hepatic coma. Evidence including reports of clinical evaluations and case studies of the use of these devices in the treatment of poisoning and drug overdose, and bench studies in which the devices' abilities to remove certain drugs have been well characterized.

VIII. Proposed Special Controls

FDA believes that the following special controls are sufficient to mitigate the risks to health described in section IV in this document for the treatment of poisoning and drug overdose:

• The device should be demonstrated to be biocompatible;

• Performance data to demonstrate the mechanical integrity of the device (e.g., tensile, flexural, and structural strength), including testing for the possibility of leaks, ruptures, release of particles and/or disconnections;

• Performance data to demonstrate device sterility and shelf life;

• Bench performance data to demonstrate device functionality in terms of substances, toxins, and drugs removed by the device, and the extent that these are removed when the device is used according to its labeling;

• Summary of clinical experience with the device that discusses and analyzes device safety and performance, including a list of adverse events observed during the testing;

• Labeling controls, including appropriate warnings, precautions, cautions, and contraindications statements to alert and inform users of proper device use and potential clinical adverse effects, including blood loss, platelet loss, leukopenia, hemolysis, hypotension, clotting, metabolic disturbances, and loss of vital nutrients and substances. Labeling recommendations must be consistent with the performance data obtained for the device, and must include a list of the drugs the device has been demonstrated to remove, and the extent of removal/depletion; and

• For those devices that incorporate electrical components, appropriate analysis and testing to validate electrical safety and electromagnetic compatibility.

IX. Dates New Requirements Apply

In accordance with section 515(b) of the FD&C Act, FDA is proposing to require that a PMA or a notice of completion of a PDP be filed with the Agency for class III devices within 90 days after issuance of any final rule based on this proposal. An applicant whose device was legally in commercial distribution before May 28, 1976, or whose device has been found to be substantially equivalent to such a device, will be permitted to continue marketing such class III devices during FDA's review of the PMA or notice of completion of the PDP. FDA intends to review any PMA for the device within 180 days and any notice of completion of a PDP for the device within 90 days of the date of filing. FDA cautions that under section 515(d)(1)(B)(i) of the FD&C Act, the Agency may not enter into an agreement to extend the review period for a PMA beyond 180 days unless the Agency finds that ''the continued availability of the device is necessary for the public health.''

FDA intends that under § 812.2(d), the preamble to any final rule based on this proposal will state that, as of the date on which the filing of a PMA or a notice of completion of a PDP is required to be filed, the exemptions from the requirements of the IDE regulations for preamendments class III devices in § 812.2(c)(1) and (c)(2) will cease to apply to any device that is: (1) Not legally on the market on or before that date or (2) legally on the market on or before that date but for which a PMA or notice of completion of a PDP is not filed by that date, or for which PMA approval has been denied or withdrawn.

If a PMA or notice of completion of a PDP for a class III device is not filed with FDA within 90 days after the date of issuance of any final rule requiring premarket approval for the device, commercial distribution of the device must cease. The device may be distributed for investigational use only if the requirements of the IDE regulations are met. The requirements for significant risk devices include submitting an IDE application to FDA for its review and approval. An approved IDE is required to be in effect before an investigation of the device may be initiated or continued under § 812.30. FDA, therefore, cautions that IDE applications should be submitted to FDA at least 30 days before the end of the 90-day period after the issuance of the final rule to avoid interrupting investigations.

X. Proposed Findings With Respect to Risks and Benefits

As required by section 515(b) of the FD&C Act, FDA is publishing its proposed findings regarding: (1) The degree of risk of illness or injury

designed to be eliminated or reduced by requiring that this device have an approved PMA or a declared completed PDP when indicated for the treatment of hepatic coma and metabolic disturbances and (2) the benefits to the public from the use of the sorbent hemoperfusion system for treatment of hepatic coma and metabolic disturbances.

These findings are based on the reports and recommendations of the advisory committees (panels) for the classification of these devices along with information submitted in response to the 515(i) Order, (74 FR 16214) and any additional information that FDA has encountered. Additional information regarding the risks as well as classification associated with this device type can be found in 46 FR 7630, 46 FR 7562, and 48 FR 53023.

For the treatment of hepatic coma and metabolic disturbances, FDA concludes that the safety and effectiveness of these devices have not been established by adequate scientific evidence, and the Agency continues to agree with the Panel's recommendation. The review of the published scientific literature revealed mostly observational studies performed with sorbent hemoperfusion devices. Only a few randomized, controlled trials were found, but sample sizes were small and not adequately powered, and etiologies and control group criteria were varied. Furthermore, based on FDA's experience reviewing these devices for use in the treatment of hepatic coma and metabolic disturbances, bench testing is not adequate in establishing the devices' safety and effectiveness, particularly since characterizing a sorbent hemoperfusion system's performance and adsorption capabilities has not correlated to patient outcomes, such as resolution of the patients' hepatic coma, or improvements in mortality. The scientific literature also revealed that there is no consensus on the clinical endpoints necessary to adequately evaluate sorbent hemoperfusion devices for the treatment of hepatic coma and metabolic disturbances or on the patient populations who will benefit the most from the use of these devices.

XI. PMA Requirements

A PMA for sorbent hemoperfusion system indicated for the treatment of hepatic coma and metabolic disturbances must include the information required by section 515(c)(1) of the FD&C Act. Such a PMA should also include a detailed discussion of the risks identified previously, as well as a discussion of the effectiveness of the device for which premarket approval is sought. In addition, a PMA must include all data and information on: (1) Any risks known, or that should be reasonably known, to the applicant that have not been identified in this document; (2) the effectiveness of the device that is the subject of the application; and (3) full reports of all preclinical and clinical information from investigations on the safety and effectiveness of the device for which premarket approval is sought.

A PMA must include valid scientific evidence to demonstrate reasonable assurance of the safety and effectiveness of the device for its intended use (see § 860.7(c)(2)). Valid scientific evidence is ''evidence from well-controlled investigations, partially controlled studies, studies and objective trials without matched controls, well-documented case histories conducted by qualified experts, and reports of significant human experience with a marketed device, from which it can fairly and responsibly be concluded by qualified experts that there is reasonable assurance of the safety and effectiveness of a device under its conditions of use. * * * Isolated case reports, random experience, reports lacking sufficient details to permit scientific evaluation, and unsubstantiated opinions are not regarded as valid scientific evidence to show safety or effectiveness. * * *'' (§ 860.7(c)(2)).

XII. PDP Requirements

A PDP for sorbent hemoperfusion system indicated for the treatment of hepatic coma and metabolic disturbances may be submitted in lieu of a PMA and must follow the procedures outlined in section 515(f) of the FD&C Act. A PDP must provide: (1) A description of the device, (2) preclinical trial information (if any), (3) clinical trial information (if any), (4) a description of the manufacturing and processing of the devices, (5) the labeling of the device, and (6) all other relevant information about the device. In addition, the PDP must include progress reports and records of the trials conducted under the protocol on the safety and effectiveness of the device for which the completed PDP is sought.

XIII. Opportunity To Request a Change in Classification

Before requiring the filing of a PMA or notice of completion of a PDP for a device, FDA is required by section 515(b)(2)(A)(i) through (b)(2)(A)(iv) of the FD&C Act and § 860.132 to provide an opportunity for interested persons to request a change in the classification of the device based on new information relevant to the classification. Any proceeding to reclassify the device will be under the authority of section 513(e) of the FD&C Act.

A request for a change in the classification of these devices is to be in the form of a reclassification petition containing the information required by § 860.123 (21 CFR 860.123), including new information relevant to the classification of the device.

The Agency advises that to ensure timely filing of any such petition, any request should be submitted to the Division of Dockets Management (see **ADDRESSES**) and not to the address provided in § 860.123(b)(1). If a timely request for a change in the classification of these devices is submitted, the Agency will, within 180 days after receipt of the petition, and after consultation with the appropriate FDA resources, publish an order in the **Federal Register** that either denies the request or gives notice of its intent to initiate a change in the classification of the device in accordance with section 513(e) of the FD&C Act and § 860.130 of the regulations.

XIV. Environmental Impact

The Agency has determined under 21 CFR 25.30(h) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

XV. Analysis of Impacts

FDA has examined the impacts of the proposed rule under Executive Order 12866, Executive Order 13563, the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). Executive Orders 12866 and 13563 direct Agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). The Agency believes that this proposed rule is not a significant regulatory action defined by Executive Order 12866.

The Regulatory Flexibility Act requires Agencies to analyze regulatory options that would minimize any significant impact of a rule on small entities. The Agency proposes to certify that the final rule will not have a significant economic impact on a substantial number of small entities.

Section 202(a) of the Unfunded Mandates Reform Act of 1995 requires

that Agencies prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing ''any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any one year.'' The current threshold after adjustment for inflation is $136 million, using the most current (2010) Implicit Price Deflator for the Gross Domestic Product. FDA does not expect this proposed rule to result in any 1-year expenditure that would meet or exceed this amount.

A. Objective of the Proposed Rule

The objective of this proposed rule is to classify sorbent hemoperfusion devices, which are preamendments class III devices. These devices are used in the treatment of drug overdose, poisoning, hepatic coma, and metabolic disturbances. The classification of these devices will be split into two parts based on the indication of use. Devices indicated for treatment of poisoning and drug overdose will be reclassified into class II with special controls. Devices indicated for treatment in hepatic coma and metabolic disturbances will be maintained in class III with PMA or PDP requirements. Sorbent hemoperfusion systems were originally classified as class III because they are life sustaining and life supporting, and there was lack of data to establish an adequate performance standard for these devices. Since that time, sufficient evidence has been accumulated to develop special controls for the treatment of poisoning and drug overdose, and the risks to health are now well characterized and understood. However, there is insufficient scientific evidence to develop special controls for these devices when used for the treatment of hepatic coma and metabolic disturbances. The call for PMAs or PDPs will allow for adequate evaluation of the device, particularly with respect to the clinical data necessary to support the safety and effectiveness of these devices when used in the treatment of these conditions.

B. Sorbent Hemoperfusion Systems for the Treatment of Poisoning and Drug Overdose

This rule proposes to reclassify sorbent hemoperfusion devices for the treatment of drug overdose and poisoning into class II devices with special controls. Currently, manufacturers of sorbent hemoperfusion devices are subject to premarket notification requirements similar to most class II devices, with manufacturers receiving clearance to market via a 510(k) premarket notification submission with no premarket approval (PMA) requirement. FDA has concluded that special controls are sufficient for ensuring the safety and effectiveness of these devices and that these devices may be reclassified to class II (special controls).

FDA's Premarket Notification 510(k) database identifies five manufacturers of six sorbent hemoperfusion devices. All six of these devices have been cleared for use in the treatment of drug overdose and poisoning. According to the 2005–2009 annual reports of the American Association of Poison Control Centers' National Poison Data Systems, hemoperfusion was used in an average of 27 cases per year, which suggests limited use of this device for these indications.

The proposed rule would require that manufacturers who wish to market new sorbent hemoperfusion devices or implement changes to existing marketed devices indicated for the treatment of poisoning and drug overdose submit 510(k)s that comply with the proposed special controls. As current practice, the Agency already recommends that manufacturers adopt the risk mitigations that are being proposed as special controls, so this rule would essentially formalize current practice as a regulation for these devices. Hence, this reclassification will not result in any significant changes in how 510(k)s for the affected devices are prepared or in how they are reviewed, and compliance with the special controls proposed for this device will not yield significant new costs for affected manufacturers. Because the formal reclassification of the affected devices from class III to class II with special controls is consistent with current FDA and industry practice, the Agency concludes that the proposed rule would impose no additional regulatory burdens on the manufacturing and marketing of sorbent hemoperfusion devices for the treatment of drug overdose and poisoning.

C. Sorbent Hemoperfusion Systems for the Indications of Hepatic Coma and Metabolic Disturbances

1. Benefits

The proposed requirement for PMAs or PDPs for sorbent hemoperfusion systems for treatment of hepatic coma and metabolic disturbances would generate social benefits equal to the value of information generated by the safety and effectiveness tests that producers of the device would be required to conduct under the proposed call for PMAs or PDPs. Provided first to FDA, this information would assist physicians, patients, and insurance providers to make more informed decisions regarding the safe and proper use of these devices, which would also be expected to improve some patient outcomes. There are currently no actively marketed products that are cleared for the indication of hepatic coma and metabolic disturbances. However, FDA projects that two firms are likely to enter the market in the near future.

Hepatic coma is characterized as the final state of hepatic encephalopathy, a complication of liver failure in which the brain function progressively deteriorates. Hepatic encephalopathy is a condition in which toxic substances that are normally cleared from the body by the liver accumulate in the blood, eventually traveling to the brain. Hepatic coma marks the final stage of encephalopathy, at which the disturbance of the brain function leads to loss of consciousness. Sorbent hemoperfusion systems can be used as a treatment device to compensate for liver failure by removing toxins from the blood.

Data from the Healthcare Cost and Utilization Project, a nationally representative sample of hospital discharges, suggest that hepatic coma related hospitalizations are associated with prolonged and costly hospital stays. In 2009, there were approximately 43,500 patients hospitalized in the United States for a primary diagnosis of hepatic coma. The number of discharges rises to over 115,000 when accounting for all-listed diagnoses, which include all diagnoses that coexist at the time of admission or that develop during hospitalization. For patients admitted with a primary diagnosis of hepatic coma, the mean length of stay was 5.8 days, with a mean cost of $10,000 per stay. In-hospital mortality was nearly 8 percent in 2009, while the survival rate after 3 years among patients with hepatic encephalopathy is estimated to be 25 percent (Ref. 1).

There is limited scientific evidence regarding the effectiveness of sorbent hemoperfusion systems for the indication of hepatic coma, which could partially be due to the fragile nature of the patient population (i.e., individuals who are acutely ill due to liver disease, and thus face poor clinical prognosis and high mortality). Because the risks and benefits of these devices for this indication are unknown and therefore cannot be adequately characterized, it is impossible to estimate the direct effect of the devices on patient outcomes. However, if they are approved, the

devices have the potential to greatly improve patient outcomes relative to the current baseline, since there are no alternative devices currently on the market. The PMA requirement will provide clinical testing to establish the safety and efficacy of the devices, to characterize their performance, and to determine the patient populations who will benefit most from the use of these devices. Clinical trials may also identify design issues that would have gone unnoticed in a premarket notification process, thereby reducing the potential of device failures. Furthermore, PMA requirements allow for continuing postmarketing evaluation and periodic reporting to FDA on the safety, effectiveness, and reliability of the device for its intended use.

2. Costs

The proposed rule would require producers of sorbent hemoperfusion for treatment of hepatic coma and metabolic disturbances to obtain a PMA or PDP prior to marketing new products. Currently, producers of sorbent hemoperfusion systems receive clearance to market these devices through the less costly 510(k) premarket notification process. The incremental cost of this rule for those who are developing devices to treat hepatic coma and metabolic disturbance would be the difference between the cost of preparing and submitting a premarket approval application and the cost of preparing and submitting a 510(k) application. The cost of preparing an average 510(k) application has been estimated to be $21 per page, or $37 after adjusting for inflation (Ref. 2). According to FDA industry experts, the number of pages in 510(k) submissions can range from an average of 400 for simple devices to 4,000 pages for more complicated systems. Assuming that the devices for this indication of treatment are complex in nature due to the intricate health conditions of the intended patient population, we use 4,000 pages as our primary estimate. At a cost per page of $37, this yields an average cost of preparing and submitting a 510(k) of $148,000. FDA has estimated an upper bound on the cost of preparing and submitting a PMA at approximately $1,000,000 (see, for example, 73 FR 7498 at 7502, February 8, 2008), which rises to $1,019,000 after inflation. This yields a difference of $871,000 between the costs of PMA and 510(k) preparation. Manufacturers must also pay FDA user fees. For fiscal year 2012, the user fee for a 510(k) submission is $4,049 for large firms and $2,024 for small firms (76 FR 45826 at 45828, August 1, 2011). The user fee for a premarket application (PMA or PDP) is currently set at $220,050 for large firms and $55,013 for small firms (76 FR 45828). This yields a cost difference of PMA and 510(k) submission costs of $216,001 for large companies and $52,989 for small businesses. The total incremental upfront rule-induced cost to industry of preparing and submitting a PMA or PDP is $1,083,950 for large firms and $908,901 for small firms. Manufacturers also incur postmarketing annual fees for periodic reporting to FDA, with the standard fee for annual reports currently set at $7,702 for large firms and $1,925 for small firms.

In addition to the cost to industry of preparing and submitting PMAs or PDPs, the proposed rule would impose review costs on FDA. It has been estimated that, for devices reviewed by FDA's Center for Devices and Radiological Health in 2003 and 2004, review costs were $563,000 per PMA and $13,400 per 510(k) (Ref. 3). Updated for inflation to 2010 dollars, these review costs become $653,000 per PMA and $15,500 per 510(k). This yields an incremental cost to FDA of $637,500. A portion of this total will be paid by industry in the form of user fees, with the remainder borne by general revenues.

The social costs per PMA would be the sum of the difference between a PMA and a 510(k) and the additional FDA costs of reviewing the PMA, or $1,508,500 (= $871,000 + $637,500). The annual cost of the proposed rule would be the number of submissions multiplied by the cost per submission. Because we project that few entities will introduce this device, the number of submissions in most years will be zero. FDA requests comments on the methods and results of our estimation.

D. Impact on Small Entities

The Regulatory Flexibility Act requires Agencies to prepare an initial regulatory analysis if a proposed rule would have a significant effect on a substantial number of small businesses, nonprofit organizations, local jurisdictions, or other entities. The proposed rule will yield no new costs for the five producers of sorbent hemoperfusion devices for the treatment of drug overdose and poisoning, as the rule is essentially a formalization of current industry practice. There are currently no companies actively participating in the market for the indications of hepatic coma and metabolic disturbance, which will require PMAs or PDPs as a result of the proposed rule. FDA projects that very few entities will enter this market in the near future. If a small entity were to enter the market, the reduced user fees would provide some relief. FDA requests comments on the overall effect of the proposed classification on the potential entry of small entities.

Because this proposed rule would impose no additional regulatory burdens for manufacturers of sorbent hemoperfusion devices currently in the market and there is limited participation in the market for devices that will require PMAs or PDPs, FDA concludes that this proposed rule would not have a significant economic impact on a substantial number of small entities.

XVI. Federalism

FDA has analyzed this proposed rule in accordance with the principles set forth in Executive Order 13132. FDA has determined that the proposed rule, if finalized, would not contain policies that would have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Accordingly, the Agency tentatively concludes that the proposed rule does not contain policies that have federalism implications as defined in the Executive order and, consequently, a federalism summary impact statement is not required.

XVII. Paperwork Reduction Act of 1995

This proposed rule refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in 21 CFR part 812 have been approved under OMB control number 0910–0078; the collections of information in 21 CFR part 807, subpart E, have been approved under OMB control number 0910–0120; the collections of information in 21 CFR part 814, subpart B, have been approved under OMB control number 0910–0231; and the collections of information under 21 CFR part 801 have been approved under OMB control number 0910–0485.

XVIII. Proposed Effective Date

FDA is proposing that any final rule based on this proposal become effective on the date of its publication in the **Federal Register** or at a later date if stated in the final rule.

XIX. 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 submit one set of comments. Identify comments with the docket number found in the 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.

XX. References

The following references have been placed on display in the Division of Dockets Management (see **ADDRESSES**) and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday. (FDA has verified the Web site address, but FDA is not responsible for any subsequent changes to the Web site after this document publishes in the **Federal Register**.)

1. Schiano, T.D., ''Clinical Management of Hepatic Encephalopathy,'' vol. 30, pp. 10S–15S, *Pharmacotherapy,* 2010.
2. Blozan, C.F. and S.A. Tucker, ''Premarket Notifications: The First 24,000,'' pp. 59–69, *Medical Device & Diagnostic Industry,* 1986.
3. Geiger, D.R., ''FY 2003 and FY 2004 Unit Costs for the Process of Medical Device Review,'' (*http://www.fda.gov/downloads/MedicalDevices/DeviceRegulationandGuidance/Overview/MedicalDeviceUserFeeandModernizationActMDUFMA/ucm109216.pdf*), September 2005.

List of Subjects in 21 CFR Part 876

Medical devices.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, it is proposed that 21 CFR part 876 be amended as follows:

PART 876—GASTROENTEROLOGY-UROLOGY DEVICES

1. The authority citation for 21 CFR part 876 continues to read as follows:

Authority: 21 U.S.C. 351, 360, 360c, 360e, 360j, 360l, 371.

2. Section 876.5870 is amended by revising paragraphs (b) and (c) to read as follows:

§ 876.5870 Sorbent hemoperfusion system.

* * * * *

(b) *Classification.* (1) Class II (special controls) when the device is intended for the treatment of poisoning and drug overdose. The special controls for this device are:

(i) The device should be demonstrated to be biocompatible;

(ii) Performance data to demonstrate the mechanical integrity of the device (e.g., tensile, flexural, and structural strength), including testing for the possibility of leaks, ruptures, release of particles, and/or disconnections;

(iii) Performance data to demonstrate device sterility and shelf life;

(iv) Bench performance data to demonstrate device functionality in terms of substances, toxins, and drugs removed by the device, and the extent that these are removed when the device is used according to its labeling;

(v) Summary of clinical experience with the device that discusses and analyzes device safety and performance, including a list of adverse events observed during the testing;

(vi) Labeling controls, including appropriate warnings, precautions, cautions, and contraindications statements to alert and inform users of proper device use and potential clinical adverse effects, including blood loss, platelet loss, leukopenia, hemolysis, hypotension, clotting, metabolic disturbances, and loss of vital nutrients and substances; Labeling recommendations must be consistent with the performance data obtained for the device, and must include a list of the drugs the device has been demonstrated to remove, and the extent for removal/depletion; and

(vii) For those devices that incorporate electrical components, appropriate analysis and testing to validate electrical safety and electromagnetic compatibility.

(2) Class III (premarket approval) when the device is intended for the treatment of hepatic coma and metabolic disturbances.

(c) *Date premarket approval application (PMA) or notice of completion of product development protocol (PDP) is required.* A PMA or notice of completion of a PDP is required to be filed with FDA on or before [date 90 days after date of publication of the final rule in the **Federal Register**], for any sorbent hemoperfusion system indicated for treatment of hepatic coma or metabolic disturbances that was in commercial distribution before May 28, 1976, or that has, on or before [date 90 days after date of publication of the final rule in the **Federal Register**], been found to be substantially equivalent to any sorbent hemoperfusion device indicated for treatment of hepatic coma or metabolic disturbances that was in commercial distribution before May 28, 1976. Any other sorbent hemoperfusion system device indicated for treatment of hepatic coma or metabolic disturbances shall have an approved PMA or declared completed PDP in effect before being placed in commercial distribution.

Dated: February 14, 2012.

Nancy K. Stade,

Deputy Director for Policy, Center for Devices and Radiological Health.

[FR Doc. 2012–3810 Filed 2–16–12; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 242

RIN 0750–AH52

Defense Federal Acquisition Regulation Supplement; DoD Voucher Processing (DFARS Case 2011–D054)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Proposed rule; clarification.

SUMMARY: DoD is clarifying the rule published on January 19, 2012, proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to update DoD's voucher processing procedures and better accommodate the use of Wide Area WorkFlow to process vouchers.

DATES: *Comments* on the proposed rule published January 19, 2012, at 77 FR 2682, continue to be accepted until March 19, 2012.

FOR FURTHER INFORMATION CONTACT: Mr. Mark Gomersall, Defense Acquisition Regulations System, OUSD (AT&L) DPAP (DARS), Room 3B855, 3060 Defense Pentagon, Washington, DC 20301–3060. Telephone 703–602–0302; facsimile 703–602–0350.

SUPPLEMENTARY INFORMATION: DoD is clarifying the proposed rule published on January 19, 2012 (77 FR 2682), which proposes to revise requirements for approving interim vouchers. Interim vouchers that are selected using risk-based sampling methodologies will be reviewed and approved by the contract auditors for provisional payment and sent to the disbursing office after the pre-payment review. Interim vouchers not selected for a pre-payment review will be considered acceptable for payment and will be sent directly to the disbursing office. All interim vouchers are subject to an audit of actual costs incurred after payment. The sampling process will be accomplished largely within the Wide Area WorkFlow system.

The rule proposes to revise the requirements for approving interim vouchers by replacing the direct submission process currently referenced

at DFARS 242.803(b)(i)(C) with a risk-based sampling process. The proposed risk-based sampling process is a more effective and efficient approach. It allows for the evaluation of selected interim vouchers on a pre-payment basis in lieu of the current direct submission authorization, which does not allow for the pre-payment evaluation of higher risk interim vouchers. It is anticipated that the revised process will provide a more comprehensive sample of all vouchers and an enhanced oversight of higher risk vouchers, while allowing a more efficient processing of the vouchers not selected for pre-payment review.

List of Subjects in 48 CFR Part 242

Government procurement.

Ynette R. Shelkin,

Editor, Defense Acquisition Regulations System.

[FR Doc. 2012–3659 Filed 2–16–12; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R8–ES–2012–0001; 4500030113]

Endangered and Threatened Wildlife and Plants; 90-Day Finding on a Petition To List the Thermophilic Ostracod as Endangered or Threatened

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of 90-day petition finding.

SUMMARY: We, the U.S. Fish and Wildlife Service, announce a 90-day finding on a petition to list the thermophilic ostracod (*Potamocypris hunteri*) as endangered or threatened under the Endangered Species Act of 1973, as amended (Act). Based on our review, we find that the petition does not present substantial information indicating that listing the thermophilic ostracod may be warranted. Therefore, we are not initiating a status review in response to this petition. We ask the public to submit to us any new information that becomes available concerning the status of, or threats to, the thermophilic ostracod or its habitat at any time.

DATES: The finding announced in this document was made on February 17, 2012.

ADDRESSES: This finding is available on the Internet at *http://www.regulations.gov* at Docket Number FWS–R8–ES–2012–0001. Supporting documentation we used in preparing this finding is available for public inspection, by appointment, during normal business hours at the U.S. Fish and Wildlife Service, Klamath Falls Fish and Wildlife Office, 1936 California Avenue, Klamath Falls, CA 97601. Please submit any new information, materials, comments, or questions concerning this finding to the above street address.

FOR FURTHER INFORMATION CONTACT: Laurie Sada, Field Supervisor, Klamath Falls Fish and Wildlife Office (see **ADDRESSES**), by telephone at 541–885–2507, or by facsimile to 541–885–7837. If you use a telecommunications device for the deaf (TDD), please call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Background

Section 4(b)(3)(A) of the Act (16 U.S.C. 1531 *et seq.*) requires that we make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information indicating that the petitioned action may be warranted. We are to base this finding on information provided in the petition, supporting information submitted with the petition, and information otherwise available in our files. To the maximum extent practicable, we are to make this finding within 90 days of our receipt of the petition, and publish our notice of the finding promptly in the **Federal Register**.

Our standard for substantial scientific or commercial information within the Code of Federal Regulations (CFR) with regard to a 90-day petition finding is ''that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted'' (50 CFR 424.14(b)). If we find that substantial scientific or commercial information was presented, we are required to promptly conduct a species status review, which we subsequently summarize in our 12-month finding.

Petition History

On March 8, 2011, we received a petition dated March 4, 2011, from Chris Zinda (Friends of Hunter's Hot Springs) and Drs. Brendan Bohannan and Richard Castenholz (University of Oregon) requesting that the thermophilic ostracod (*Potamocypris hunteri*) be listed as endangered or threatened under the Act. The petition clearly identified itself as such and included the requisite identification information for the petitioner, as required by 50 CFR 424.14(a). In a May 4, 2011, letter to the petitioner, we responded that we had reviewed the information presented in the petition and determined that issuing an emergency regulation temporarily listing the species under section 4(b)(7) of the Act was not warranted. We also stated that we were required to complete a significant number of listing and critical habitat actions in Fiscal Year 2011 pursuant to court orders, judicially approved settlement agreements, and other statutory deadlines, but that we had secured funding for Fiscal Year 2012 and anticipated publishing a finding in the **Federal Register** in 2012. This finding addresses the petition.

Evaluation of Listable Entity

Section 3(16) of the Act defines the term ''species'' to include ''any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.'' Entities that meet the Act's definition of a ''species'' can be considered for listing under the Act and are, therefore, referred to as ''listable entities.'' Listable entities can then be listed if they are determined to meet the definition of an endangered species or a threatened species. Prior to making a determination of whether the petition presents substantial information to indicate whether listing may be warranted, we must address the question of whether the petition presents substantial information to indicate whether the petitioned thermophilic ostracod may be a listable entity. We may consider the petitioned ostracod to be a listable entity if information submitted with the petition or in our files indicates that treatment of this ostracod as a listable entity may be warranted. Based on the information presented in the petition and information in our files, there is a considerable amount of uncertainty regarding the taxonomy of this entity. The following paragraphs present our evaluation of whether *Potamocypris hunteri* may be a listable entity.

Wickstrom and Castenholz (1973, p. 1063) reported finding what they considered to be a new undescribed species of *Potamocypris* at Hunter's Hot Springs (Hunter's) in southeastern Oregon. The Latin name *Potamocypris hunteri* was coined in a footnote in 1973, but not accompanied by a formal description (Wickstrom and Castenholz 1973, p. 1064). Wickstrom and

Castenholz (1973, p. 1064) stated that a formal description was forthcoming, and suggested that the animal might be the same as *P. perbrunnea,* which is discussed in Brues' (1932, p. 222) paper. However, Wickstrom and Castenholz (1973) did not provide any description, diagnosis, or references to specimens, and the animal was not formally described. Thus, *P. hunteri* is a nomen nudum (a species lacking a formal scientific name) with no standing. However, the Service will consider a taxon for listing that lacks a formal name if there is credible scientific evidence indicating that the taxon constitutes a listable entity as a species or subspecies under section 3(16) of the Act.

Additionally, the petition provides documentation of an ostracod named *Thermopsis thermophila,* which was validly published with a complete description and notes on the habitat (Külköylüoğlu *et al.* 2003, pp. 114–115). Külköylüoğlu *et al.* (2003, p. 114) established the species in a new genus, recognizing that the generic diagnosis is provisional. They provided a description and diagnosis for distinguishing *Thermopsis* from *Potamocypris* and several other related genera (Külköylüoğlu *et al.* 2003, pp. 114–115). The species description was based on collections from northern Nevada. Külköylüoğlu *et al.* (2003, p. 122), in referring to additional *Potamocypris* taxa that have been observed, stated: ''We strongly suspect *Potamocypris perbrunnea, P. varicolor, P. hunteri,* and above all Wickstrom and Castenholz' (1973, 1985) *Potamocypris* sp. to be identical to *Thermopsis thermophila.''* The authors made this conclusion due to the lack of taxonomic indications and verifications for the generic *Potamocypris* standing of these species (Külköylüoğlu *et al.* 2003, pp. 121–122). The authors clearly considered all of these undescribed taxa to be conspecific with (i.e., belonging to the same species as) their *T. thermophila,* although here the petition paraphrased this statement as ''* * * the similarity was suggested'' (Zinda *et al.* 2011, p. 5).

The petition does not provide generic descriptions, nor does it provide any other morphological, ecological, distributional, genetic, or other differences to distinguish the petitioned entity from thermophilic ostracods in other hot springs throughout the Great Basin, including *Thermopsis thermophila.* This information could indicate whether the petitioned *Potamocypris hunteri* is endemic or qualifies as a listable entity even if it lacks a validly published name, but no description data were provided, nor are any available within our files. The description provided by the petition, within references cited, or within our files for *P. hunteri* consists only of the location where the animal is found and reference to its ability to withstand 49 degrees Centigrade (°C) (120 degrees Fahrenheit (°F)) (Zinda *et al.* 2011, p. 5).

In summary, our review of the information supplied with the petition and in our files indicates there is a great deal of taxonomic uncertainty surrounding *Potamocypris hunteri* as evidenced by the 1932, 1973, and 2003 papers (Brues 1932, p. 222; Wickstrom and Castenholz 1973, p. 1064; Külköylüoğlu *et al.* 2003, pp. 114–115). Our general practice in recognizing a currently undescribed taxon as a possible listable entity is, at a minimum, to have the scientific community recognize the taxonomic validity of an entity, even if a formal taxonomic treatment has not been published. In this case, there is no information that would indicate that *Potamocypris hunteri* is a recognized taxon in the scientific community. Therefore, the information in the petition and in our files does not present substantial scientific or commercial information to indicate the petitioned *P. hunteri* may be a listable entity. Consequently, we will not proceed with an evaluation of the five factors described in section 4(a)(1) of the Act. Although we will not review the status of the petitioned entity at this time, if you wish to provide additional information regarding the thermophilic ostracod, you may submit your information or materials to the Field Supervisor, Klamath Falls Fish and Wildlife Office (see **ADDRESSES**), at any time.

References Cited

A complete list of references cited is available on the Internet at *http://www.regulations.gov* and upon request from the Klamath Falls Fish and Wildlife Office (see **ADDRESSES**).

Authors

The primary authors of this notice are the staff members of the Klamath Falls Fish and Wildlife Office (see **ADDRESSES**).

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: February 6, 2012.

Rowan W. Gould,

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

[FR Doc. 2012–3791 Filed 2–16–12; 8:45 am]

BILLING CODE 4310–55–P

Notices

Federal Register

Vol. 77, No. 33

Friday, February 17, 2012

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

February 13, 2012.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8958.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Animal and Plant Health Inspection Service

Title: Importation of Gypsy Moth Host Materials from Canada.

OMB Control Number: 0579–0142.

Summary of Collection: The United States Department of Agriculture (USDA) is responsible for preventing plant diseases or insect pests from entering the United States, preventing the spread of pests not widely distributed in the United States, and eradicating those imported pests when eradication is feasible. Under the Plant Protection Act (7 U.S.C. 7701 *et seq.*), the Secretary of Agriculture is authorized to regulate the importation of plants, plant products, other articles to prevent the introduction of injurious plant pests. The Plant Protection and Quarantine a program within USDA's Animal and Plant Health Inspection Service (APHIS) is responsible for ensuring that these regulations are enforced. APHIS will collect information using phytosanitary certificates, certificates of origin, written statement and a compliance agreement from individuals both within and outside the United States.

Need and Use of the Information: APHIS will collect information to ensure that importing foreign logs, trees, shrubs, and other articles do not harbor plant or insect pests such as the gypsy moth. Failing to collect this information would cripple APHIS' ability to ensure that trees, shrubs, logs, and a variety of other items imported from Canada do not harbor gypsy moths.

Description of Respondents: Business or other for-profit; Individuals or households; Federal Government.

Number of Respondents: 2,146.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 81.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2012–3713 Filed 2–16–12; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Public Availability of FY 2011 Service Contract Inventories

AGENCY: Office of Procurement and Property Management, Departmental Management, Department of Agriculture.

ACTION: Notice of public availability of FY 2011 Service Contract inventories.

SUMMARY: In accordance with Section 743 of Division C of the Consolidated Appropriations Act of 2010 (Pub. L. 111–117), Department of Agriculture is publishing this notice to advise the public of the availability of the FY 2011 Service Contract inventory. This inventory provides information on service contract actions over $25,000 that were made in FY 2011. The information is organized by function to show how contracted resources are distributed throughout the agency. The inventory has been developed in accordance with guidance issued on November 5, 2010 by the Office of Management and Budget's Office of Federal Procurement Policy (OFPP). OFPP's guidance is available at *http://www.whitehouse.gov/sites/default/files/omb/procurement/memo/servicecontract-inventories-guidance-11052010.pdf.* Department of Agriculture has posted its inventory and a summary of the inventory on the Office of Procurement and Property Management homepage at the following link: *http://www.dm.usda.gov/procurement/.*

FOR FURTHER INFORMATION CONTACT: Al Muñoz, Office of Procurement and Property Management, at (202) 720–1273 or by mail at OPPM, MAIL STOP 9304, U.S. Department of Agriculture, 1400 Independence Avenue SW., Washington, DC 20250–9303. Please cite ''2011 Service Contract Inventory'' in all correspondence.

Signed in Washington, DC, on February 10, 2012.

Lisa M. Wilusz,

Director, Office of Procurement and Property Management.

[FR Doc. 2012–3708 Filed 2–16–12; 8:45 am]

BILLING CODE 3410–98–P

DEPARTMENT OF AGRICULTURE

Forest Service

Nez Perce-Clearwater National Forests; Idaho; Clear Creek Integrated Restoration Project

AGENCY: Forest Service, USDA.

ACTION: Notice of intent to prepare an environmental impact statement.

SUMMARY: This is a corrected notice. This notice updates the contact information that was included in the original notice, and extends the comment due date to March 1, 2012. The original notice was published in the **Federal Register** on January 6, 2012, pages 775 and 776.

The Forest Service gives notice of its intent to prepare an Environmental Impact Statement for the Clear Creek Integrated Restoration Project. The Proposed action would use a combination of timber harvest, pre-commercial thinning, prescribed fire and reforestation to achieve the desired range of age classes, size classes, vegetative species distributions, habitat complexity (diversity) and landscape patterns across the forested portions of the project area. Road decommissioning, culvert replacements and road improvements are also proposed to improve watershed health. The EIS will analyze the effects of the proposed action and alternatives. The Nez Perce-Clearwater Forest invites comments and suggestions on the issues to be addressed. The agency gives notice of the National Environmental Policy Act (NEPA) analysis and decision making process on the proposal so interested and affected members of the public may participate and contribute to the final decision.

DATES: Comments concerning the scope of the analysis must be received by March 1, 2012. The draft environmental impact statement is expected in February 2013 and the final environmental impact statement is expected in November 2013.

ADDRESSES: Send written or electronic comments to Lois Hill, Interdisciplinary Team Leader; Kamiah Ranger Station; 903 3rd Street; Kamiah, ID 83536; FAX 208–935–4257; Email *comments-northern-nezperce-moose-creek@fs.fed.us.* Include your name, address, organization represented (if any), and the name of the project for which you are submitting comments. Electronic comments will be accepted in MS Word, Word Perfect, or Rich Text formats. Comments received in response to this solicitation, including names and addresses of those who comment, will be part of the public record for this proposed action. Comments submitted anonymously will be accepted and considered; however, anonymous comments will not provide the Agency with the ability to provide the respondent with subsequent environmental documents.

FOR FURTHER INFORMATION CONTACT: Lois Hill, Interdisciplinary Team Leader, (208) 935–4258.

SUPPLEMENTARY INFORMATION:

The objective of the Clear Creek Integrated Restoration Project is to manage forest vegetation to restore natural disturbance patterns; improve long term resistance and resilience at the landscape level; reduce fuels; improve watershed conditions; improve elk habitat effectiveness; improve habitat for early seral species; and maintain habitat structure, function, and diversity. Timber outputs from the proposed action would be used to offset treatment costs and support the economic structure of local communities and provide for regional and national needs.

Purpose and Need for the Proposal

Vegetation and Wildlife Habitat Improvement

Purpose: Trend vegetation species composition, structure, and distributions toward desired conditions described in the Forest Plan.

Need: There is a need to change tree species composition by retaining and planting early seral species, such as ponderosa pine, western larch and western white pine. The project area has a high proportion of grand fir/Douglas fir habitat. These habitats tend to be more susceptible to insects and diseases. Grand fir is unlikely to survive a wildfire. There is a need to trend the area toward a more diverse and resilient forest structure by creating a range of age classes, size classes, habitat complexity (diversity) and disturbance patterns that more closely emulate natural mixed severity disturbance. Increasing early seral species in managed areas would help trend the area toward, or maintain, desired habitat conditions and would make these habitats more resistant and resilient to change agents such as insects, diseases, and fire.

There is a need to increase diversity within previously harvested areas to begin restoring long-term habitat quality for sensitive and old growth associated species. Historic logging practices and fire suppression have created a landscape that is more highly fragmented than would be expected to result from natural disturbances. Ladder fuels have increased and there has been a shift to shade tolerant species. Habitat structure and patch sizes of young forests are simplified and smaller than would be expected to result from natural disturbances. Edges of patches are straight and even.

There is a need to increase young forest habitats on this landscape. Age classes are dominated by middle-aged and mature forest habitats. Forest management would increase high quality early seral wildlife habitats by retaining large trees and promoting establishment of tall shrubs and hardwood tree species by using variable retention regeneration harvest. In the short term, this would benefit wildlife species that use early seral habitats, such as neotropical migratory birds, resident birds, small mammals, and big game species. In the long term, large tree retention would help maintain habitat structure and complexity needed by old growth associated species.

Goods and Services

Purpose: To utilize timber outputs produced through restoration activities to support the economic structure of local communities and provide for regional and national needs (Forest Plan page II–1).

Need: There is a need to provide a sustained yield of resource outputs, as directed by the Forest Plan. Much of the area consists of grand fir dominated stands that have insect and disease infestations that are contributing to increased tree mortality, or are at risk from stand replacing events. Stands proposed for treatment are currently losing volume and value due to insects and diseases. Harvest of the timber would provide materials to local industries.

Fire Regime/Natural Disturbance Restoration and Fuel Reduction

Purpose: Reduce ladder fuels created by shade-tolerant species and create more natural patch sizes by emulating mixed severity fire. (Forest Plan page II–2)

Need: There is a need to increase patch sizes to shift age and size class distributions to increase high quality early seral wildlife habitats. Effective fire suppression in this area began in the 1930's. As a result, there has been a vegetative shift to less fire resistant species, and an increase in ladder fuels that can contribute to the risk of high intensity and potentially resource damaging wildfire. Some portions of the project area have been identified as being up to five times outside of their normal fire return intervals. Past harvest patterns do not emulate natural

disturbance patterns nor do they emulate natural habitat structure. Landscape burning and timber harvest that mimics natural fire would help increase forest resilience, help reduce risk of wildfires, and help create high quality habitats that would benefit neotropical migratory birds, resident birds, small mammals, and big game species. Fire dependent wildlife species would benefit from landscape burning.

Watershed Improvement

Purpose: Reduce potential sediment inputs into the aquatic ecosystem from roads.

Need: There is a need to drain roadside ditchline water away from streams by installing cross drain pipes near live stream crossings. The cross drain pipes collect ditchline water and direct it onto the forest floor. There is also a need to replace existing undersized, damaged, or rusting culverts on streams to minimize failure potential.

There are 283 miles of road within the project area, 200 of which are needed for current and future management. The remaining 83 miles of road have been cleared for decommissioning under the SF/WF Clear Creek Road Decommissioning EA (2011). The roads needed for management can contribute sediment to streams through road surface erosion and potential culvert failures. Surface erosion occurs during spring snowmelt and rain events. Dirt coming off roads is diverted into ditchlines which are often directed into streams. Preliminary surveys show most roads in the area are drained by ditches. Culvert failures can result from undersized, damaged or rusting culverts which can plug with debris and then fail as water saturates the surrounding fill. Failures can contribute large pulses of sediment into streams. Surveys indicate at least 60 miles of road with culverts that are in need of replacement or cleaning. There is a minimum of 40 high or moderate priority culverts in need of replacement, and 12 in need of cleaning. There are an additional 40 low priority culverts in need of replacement and 15 in need of cleaning. The surveyed roads pose the highest risk to streams in the project area.

The desired condition for roads is to have ditchlines that drain road surface water away from streams and onto forest the forest floor. All culverts at stream crossings are appropriately sized to allow for the passage of material within minimal risk of plugging.

The Proposed Action would:

Improve Forest Health, Provide Goods and Services, Reduce Fuels and Improve Wildlife Habitat

- Conduct ''variable retention'' regeneration harvest and post harvest burning activities on up to 2500 acres to create early sucessional plant communities and improve wildlife habitat while re-establishing long-lived early seral tree species. Variable retention harvest would include areas of full retention (clumps), irregular edges, and retention of snags and legacy trees to provide structure and a future source of woody debris. Openings will likely exceed 40 acres.
- Commercially thin approximately 7810 acres to reduce stand densities improve forest health and reduce the chance of crown fire.
- Apply improvement harvest to approximately 311 acres (thin from below) to remove encroachment and ladder fuels from ponderosa pine dominated stands.
- Construct a minimum temporary road system to carry out the proposed action. Roads would be decommissioned after use.
- Pre-commercially thin approximately 1865 acres to reduce stand densities improve forest health and reduce fuels.
- Restore approximately 42 acres of bunchgrass communities through prescribed burning and revegetation with native grasses to improve wildlife winter range through reestablishment of native grasses and forbs.
- Apply approximately 1400 acres of low and mixed severity prescribed fire within the Clear Creek Roadless area to restore natural fire regimes, reduce fuels, improve wildlife habitat and create mosaic forest conditions. Proposed activities are consistent with Idaho Roadless Rule. There is no timber cutting planned within the Clear Creek Roadless area.

Reduce Sediment Production and Address Transportation Needs

- Conduct maintenance on or improve 100–130 miles of system roads including culvert installation or replacement, ditch cleaning, and riprap placement for drainage improvement. It may also include gravel placement, road grading and dust abatement.
- Additional site specific maintenance or improvements would occur to improve watershed conditions on up to 20 miles of roads outside of proposed treatment areas.
- Decommission 2–5 miles of system roads no longer considered necessary for transportation needs.

Possible Alternatives the Forest Service will consider include a no-action alternative, which will serve as a baseline for comparison of alternatives. The proposed action will be considered along with additional alternatives that will be developed to meet the purpose and need for action, and to address significant issues identified during scoping.

The Responsible Official is Rick Brazell, Nez Perce-Clearwater Forest Supervisor, Clearwater National Forest Supervisor's Office, 12730 Highway 12, Orofino, ID 83544.

The Decision To Be Made is whether to adopt the proposed action, in whole or inpart, or another alternative; and what mitigation measures and management requirements will be implemented.

The Scoping Process for the EIS is being initiated with this notice. The scoping process will identify issues to be analyzed in detail and will lead to the developemnt of alternatives to the proposal. The Forest Service is seeking information and comments from other Federal, State, and local agencies; Tribal Governments; and organizations and individuals who may be interested in or affected by the proposed action. Comments received in response to this notice, including the names and addresses of those who comment, will be a part of the project record and available for public review.

Early Notice of Importance of Public Participation in Subsequent Environmental Review: A draft environmental impact statement will be prepared for comment. The second major opportunity for public input will be when the draft EIS is published. The comment period for the draft EIS will be 45 days from the date the Environmental Protection Agency publishes the notice of availability in the **Federal Register**. The Draft EIS is anticipated to be available for public review in February 2013.

Dated: January 24, 2012.

Rick Brazell,

Forest Supervisor.

[FR Doc. 2012–3745 Filed 2–16–12; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF COMMERCE

International Trade Administration

Proposed Information Collection; Comment Request; Applications for Watch Duty-Exemption and 7113 Jewelry Duty-Refund Program

AGENCY: International Trade Administration, 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 April 17, 2012.

ADDRESSES: Direct all written comments to Jennifer Jessup, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230 (or via the Internet at *jjessup@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Supriya Kumar, Statutory Import Programs Staff, (202) 482–3530, *Supriya.Kumar@trade.gov* and fax number (202) 501–7952.

SUPPLEMENTARY INFORMATION:

I. Abstract

The Departments of Commerce and the Interior are required by Public Law 97–446, as amended by Public Law 103–465, Public Law 106–36 and Public Law 108–429, to administer the distribution of watch duty-exemptions and watch and jewelry duty-refunds to program producers in the U.S. insular possessions and the Northern Mariana Islands. The primary consideration in collecting information is the enforcement of the laws and the information gathered is limited to that necessary to prevent abuse of the program and to permit a fair and equitable distribution of its benefits. The Form ITA–340P is used to provide the data to assist in verification of duty-free shipments of watches into the United States and make certain the allocations are not exceeded. Forms ITA–360P and ITA–361P are necessary to implement the duty-refund program for the watch and jewelry producers. Form ITA–360P requires no information unless the recipient wishes to transfer the certificate. Form ITA–361P must be completed each time a certificate holder wishes to obtain a portion, or all, of the duty-refund authorized by the certificate. The duty-refund benefit is issued biannually and the forms are used for the distribution of the duty-refund benefit.

II. Method of Collection

Paper format or electronically.

III. Data

OMB Control Number: 0625–0134.

Form Number(s): ITA–340P, ITA–360P, ITA–361P.

Type of Review: Regular submission (extension of a currently approved information collection).

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 2.

Estimated Time per Response: 6 minutes for Form ITA–340P; 10 minutes for Form ITA–361P; and 1 minute to transfer a certificate using Form ITA–360P.

Estimated Total Annual Burden Hours: 1.

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: February 13, 2012.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2012–3742 Filed 2–16–12; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–890]

Wooden Bedroom Furniture 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: February 17, 2012.

FOR FURTHER INFORMATION CONTACT: Rebecca Pandolph, AD/CVD Operations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230, telephone: (202) 482–3627.

SUPPLEMENTARY INFORMATION: On February 28, 2011, the Department of Commerce (''Department'') published a notice of initiation of an administrative review of the antidumping duty order on wooden bedroom furniture from the People's Republic of China covering the period January 1, 2010, through December 31, 2010.[1] On October 24, 2011, the Department published its preliminary results of the administrative review.[2] The final results of the administrative review are currently due no later than February 21, 2012.

Statutory Time Limits

In antidumping duty administrative reviews, section 751(a)(3)(A) of the Tariff Act of 1930, as amended (''the Act''), requires the Department to 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. However, if it is not practicable to complete the review within this time period, section 751(a)(3)(A) of the Act allows the Department to extend the 120-day period to 180 days after publication of the preliminary results (or 300 days if the Department has not extended the time limit for the preliminary results).

Extension of Time Limit for Final Results

The Department has determined that it is not practicable to complete the review within the 120-day time period because it requires additional time to evaluate the arguments and submissions made by interested parties following the *Preliminary Results.* Therefore, in accordance with section 751(a)(3)(A) of the Act, the Department is extending the time period for completing the final results of the instant administrative review by 30 days until March 22, 2012.

This notice is published pursuant to sections 751(a)(3)(A) and 777(i) of the Act.

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[1] *See Initiation of Administrative Review of the Antidumping Duty Order on Wooden Bedroom Furniture From the People's Republic of China,* 76 FR 10880 (February 28, 2011).

[2] *See Wooden Bedroom Furniture From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Intent To Rescind Review in Part,* 76 FR 65684 (October 24, 2011) (''*Preliminary Results*'').

Dated: February 10, 2012.

Christian Marsh,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2012–3787 Filed 2–16–12; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–583–844]

Narrow Woven Ribbons With Woven Selvedge From Taiwan: Rescission, in Part, of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

DATES: *Effective Date:* February 17, 2012.

FOR FURTHER INFORMATION CONTACT: Hector Rodriguez or Holly Phelps, AD/CVD Operations, Office 2, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–0629 or (202) 482–0656, respectively.

Background

On September 2, 2011, the Department of Commerce (Department) published a notice of opportunity to request an administrative review of the antidumping duty order on narrow woven ribbons with woven selvedge from Taiwan covering the period September 1, 2010, through August 31, 2011. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review,* 76 FR 54735, 54736 (Sept. 2, 2011). The Department received a timely request for an antidumping duty administrative review from the petitioner, Berwick Offray LLC and its wholly-owned subsidiary Lion Ribbon Company, Inc., for the following companies: (1) Apex Ribbon; (2) Apex Trimmings; (3) FinerRibbon.com; (4) Hsien Chan Enterprise Co., Ltd.; (5) Hubschercorp; (6) Intercontinental Skyline; (7) Multicolor Inc.; (8) Novelty Handicrafts Co., Ltd.; (9) Pacific Imports; (10) Papillon Ribbon & Bow (Canada); (11) Shienq Huong Enterprise Co., Ltd.; and (12) Supreme Laces, Inc. On October 31, 2011, the Department published a notice of initiation of administrative review with respect to these companies. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part,* 76 FR 67133, 67138 (Oct. 31, 2011); and *Correction to Initiation of 2010–2011 Antidumping Duty Administrative Review: Narrow Woven Ribbons With Woven Selvedge From Taiwan,* 77 FR 82 (Jan. 3, 2012). On January 30, 2012, the petitioner withdrew its requests for an administrative review for all of the above-listed companies except Hubschercorp.

Rescission, in Part

Pursuant to 19 CFR 351.213(d)(1), the Secretary will rescind an administrative review, in whole or in part, if a party that requested the review withdraws the request within 90 days of the date of publication of notice of initiation of the requested review. The petitioner's request was submitted within the 90-day period and, thus, is timely. Because the petitioner's withdrawal of request for an antidumping duty administrative review is timely and because no other party requested a review of these companies, in accordance with 19 CFR 351.213(d)(1), we are rescinding this administrative review with respect to the following companies: (1) Apex Ribbon; (2) Apex Trimmings; (3) FinerRibbon.com; (4) Hsien Chan Enterprise Co., Ltd.; (5) Intercontinental Skyline; (6) Multicolor Inc.; (7) Novelty Handicrafts Co., Ltd.; (8) Pacific Imports; (9) Papillon Ribbon & Bow (Canada); (10) Shienq Huong Enterprise Co., Ltd.; and (11) Supreme Laces, Inc. The administrative review will continue with respect to Hubschercorp.

Assessment

The Department will instruct U.S. Customs and Border Protection (CBP) to assess antidumping duties on all appropriate entries. Each of the eleven companies listed above shall be assessed antidumping duties at rates equal to the cash deposit of estimated antidumping duties required at the time of entry, or withdrawal from warehouse, for consumption, in accordance with 19 CFR 351.212(c)(1)(i). The Department intends to issue appropriate assessment instructions to CBP 15 days after publication of this notice.

Notification to Importers

This notice serves as a reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

Notification Regarding Administrative Protective Orders

This notice also serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305, which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

This notice is issued and published in accordance with section 777(i)(1) of the Tariff Act of 1930, as amended, and 19 CFR 351.213(d)(4).

Dated: February 13, 2012.

Gary Taverman,

Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2012–3785 Filed 2–16–12; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

[Docket Number 120110038–2037–01]

Buy American Exception Under the American Recovery and Reinvestment Act of 2009

AGENCY: National Institute of Standards and Technology, U.S. Department of Commerce.

SUMMARY: The Department of Commerce, National Institute of Standards and Technology is providing notice of a determination of an exception to the Buy American Provisions of the American Recovery and Reinvestment Act of 2009 (ARRA or Recovery Act), for a heat recovery ventilator necessary for a energy residential test facility at NIST.

FOR FURTHER INFORMATION CONTACT: Michael Szwed, Contracting Officer, Acquisition Management Division, 301–975–6330, National Institute of Standards and Technology, 100 Bureau Drive, Mailstop 1640, Gaithersburg, Maryland 20899.

SUPPLEMENTARY INFORMATION: Section 1605 of the Recovery Act (Pub. L. 111–5) ''prohibits use of recovery funds for a project for the construction, alteration,

maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States.'' 2 CFR 176.60. However, section 1605(b)(1) and (2) of the Recovery Act also allow the head of a Federal department or agency to issue a ''determination of inapplicability'' of these provisions to any procurement of the listed items if the restrictions would be inconsistent with the public interest; if the iron, steel, or relevant manufactured good is only available at an unreasonable cost; or if it is not produced or manufactured in the United States in sufficient and reasonably available quantities and of a satisfactory quality (''non-availability''). Pursuant to sections 1605(b)(1) and (2), NIST has determined that the required heat recovery ventilator is not available in the United States.

In September 2010, NIST awarded an American Recovery and Reinvestment Act of 2009 (ARRA or Recovery Act) contract in the amount of $2,580,110 to Therrien Waddell for the construction of a NETZERO Energy Residential Test Facility (NZERTF) at NIST in Gaithersburg, MD. The objective of the NZERTF is to demonstrate that a home, similar in aesthetics to a home in surrounding communities, can produce as much energy on an annual basis as it uses in on-site renewable resources.

The contract required that the contractor purchase and install one Venmar EKO 1.5 heat recovery ventilator (HRV), which was estimated to cost $1,600. The specified HRV is manufactured in Germany. An HRV is a piece of mechanical equipment that provides mechanical (as opposed to natural) ventilation for facilities like the NZERTF and allows the building to be sealed tight against air leakage.

The specified HRV is essential to meet the project objective, as it reduces the energy required to heat and cool the home while providing acceptable indoor air quality. Without the specified residential-sized HRV, the annual energy required for the home exceeds the amount that can be produced by the solar panels and thus the facility would not meet its design objective of net zero energy on an annual basis.

Based on NIST's and the contractor's review of the market place and various vendors' product availability, NIST determined there were no HRVs manufactured in the United States that met the contract specifications or NIST's requirements. Pursuant to section 1605, NIST has determined that the required heat recovery ventilator is ''not available.''

Authority: Pub. L. 111–5, section 1605.

Dated: February 13, 2012.

Willie E. May,

Associate Director for Laboratory Programs.

[FR Doc. 2012–3837 Filed 2–16–12; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

[Docket Number: 110524296–2097–03]

Recommendations for Establishing an Identity Ecosystem Governance Structure for the National Strategy for Trusted Identities in Cyberspace

AGENCY: National Institute of Standards and Technology, Department of Commerce.

ACTION: Notice.

SUMMARY: The National Institute of Standards and Technology announces the release of a paper entitled Recommendations for Establishing an Identity Ecosystem Governance Structure on Tuesday, February 7, 2012. This paper supports the implementation of the National Strategy for Trusted Identities in Cyberspace and responds to comments received in response to the related Notice of Inquiry published in the **Federal Register** on June 14, 2011.

DATES: The Recommendations for Establishing an Identity Ecosystem Governance Structure paper was made available on February 7, 2012.

ADDRESSES: The Recommendations for Establishing an Identity Ecosystem Governance Structure paper is available at *www.nist.gov/nstic/2012-nstic-governance-recs.pdf*. The NIST Web site for the NSTIC and its implementation is *www.nstic.gov*.

FOR FURTHER INFORMATION CONTACT: For questions about this request contact: Annie Sokol, Information Technology Laboratory, National Institute of Standards and Technology, U.S. Department of Commerce, 100 Bureau Drive, Mailstop 8930, Gaithersburg, MD 20899, telephone (301) 975–2006; email *nsticgovernance@nist.gov*. Please direct media inquiries to the Director of NIST's Office of Public Affairs, *gail.porter@nist.gov*.

SUPPLEMENTARY INFORMATION: The paper entitled Recommendations for Establishing an Identity Ecosystem Governance Structure was written in support of the implementation of the National Strategy for Trusted Identities in Cyberspace (NSTIC). On June 14, 2011, NIST published a Notice of Inquiry in the **Federal Register** (76 FR 34650), requesting input from the public regarding Models for a Governance Structure for the National Strategy for Trusted Identities in Cyberspace. On August 16, 2011, NIST published a Notice in the **Federal Register** (76 FR 50719), extending the deadline for comments. The paper summarizes the comments received in response to the NOI and provides recommendations and intended government actions to serve as a catalyst for establishing such a governance structure. The recommendations result from comments and suggestions received from the NOI respondents as well as best practices and lessons learned from similarly scoped governance efforts. To accelerate the launch of the Steering Group, the paper integrates the recommendations into a proposed Steering Group charter.

Dated: February 13, 2012.

Patrick Gallagher,

Under Secretary of Commerce for Standards and Technology.

[FR Doc. 2012–3835 Filed 2–16–12; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

Presentation of Final Conventional Conformance Test Criteria and Common Air Interface (CAI) Features/Functionalities Under Test in the Project 25 Compliance Assessment Program and Meeting To Seek Comment on Conventional Conformance Tests for Inclusion in the Program

AGENCY: National Institute of Standards and Technology (NIST), Department of Commerce.

ACTION: Notice of Public Meeting and Request for Comments.

SUMMARY: The U.S. Department of Commerce's (DOC) National Institute of Standards and Technology (NIST), Law Enforcement Standards Office (OLES), in partnership with the U.S. Department of Homeland Security (DHS) Office for Interoperability and Compatibility (OIC), will hold a public meeting on Thursday, March 15, 2012 at 1 p.m. Mountain Time, via teleconference. The purpose of the meeting is to present the final criteria for assessing the suitability of P25 Compliance Assessment Program (CAP) conventional conformance tests, as well as the final, prioritized list of features and functionalities that will require conformance testing in the P25 CAP.

DATES: The meeting will be held via teleconference from 1 p.m.–3 p.m. Mountain Time on Thursday, March 15, 2012. Members of the public wishing to attend the meeting must register by 5 p.m. Mountain Time on Monday, March 12, 2012. Please see registration instructions in the **ADDRESSES** section below. In addition, comments regarding the topics and material covered during the meeting will be accepted until 5 p.m. Mountain Time on Monday, April 30, 2012.

ADDRESSES: Members of the public wishing to attend the meeting must register by 5 p.m. Mountain Time on Monday, March 12, 2012 by sending an email request to Dereck Orr at *dereck.orr@nist.gov* or via phone at 303–497–5400. To present comments orally at the meeting and to submit written comments, please see instructions in the **SUPPLEMENTARY INFORMATION SECTION** below. The draft conformance tests to be discussed at the meeting may be found at: *http://www.pscr.gov/outreach/safecom/p25_cap/downloads/downloads.php.*

FOR FURTHER INFORMATION CONTACT: Dereck Orr, Department of Commerce, NIST, 300 Broadway St., Boulder, CO 80305. Telephone: (303) 497–5400. Email: *dereck.orr@nist.gov*. More information about DHS/OIC can be found at *http://www.safecomprogram.gov*.

SUPPLEMENTARY INFORMATION: Emergency responders—emergency medical technicians, fire personnel, and law enforcement officers—need to seamlessly exchange communications across disciplines and jurisdictions in order to successfully respond to day-to-day incidents and large-scale emergencies. P25 focuses on developing standards that allow radios and other components to interoperate, regardless of the manufacturer. In turn, these standards enable emergency responders to seamlessly exchange critical communications with other disciplines and jurisdictions.

An initial goal of P25 is to specify formal standards for interfaces between the components of a land mobile radio (LMR) system. LMR systems are commonly used by emergency responders in portable handheld and mobile vehicle-mounted devices. Although formal standards are being developed, no process is currently in place to confirm that LMR equipment advertised as P25-compliant meets all aspects of P25 standards.

To address discrepancies between P25 standards and industry equipment, DHS and NIST established the P25 CAP. The P25 CAP is a partnership between the DHS/OIC, NIST, industry, and the emergency response community.

The P25 CAP provides an independent process for evaluating P25 equipment for standards compliance and interoperability across manufacturers. By providing manufacturers with a method to consistently test their equipment for compliance with P25 standards and consistently report the results of such testing, the P25 CAP provides emergency response officials with increased confidence that their land mobile radio equipment adheres to the P25 standards.

The P25 CAP requires test laboratories to demonstrate their competence through a rigorous and objective assessment process. Such a process promotes the user community's confidence in, and acceptance of, test results from DHS-recognized laboratories. All equipment suppliers that participate in the P25 CAP must use recognized laboratories to conduct performance, conformance, and interoperability tests on their products. P25 equipment suppliers voluntarily participating in the P25 CAP will release Summary Test Reports and Suppliers' Declarations of Compliance based on testing from laboratories recognized by DHS.

Created by DHS/OIC, Compliance Assessment Bulletins (CABs) describe how the P25 CAP operates and address issues related to the program. The scope of a CAB can range from policy to guidance, covering issues such as specific test standards to be used for a particular P25 interface, or P25 LMR Request for Proposal guidance.

The purpose of this notice and related meeting is to present the final requirements for CAI conventional conformance tests for inclusion in the P25 CAP.

The final list of criteria to be used for assessing a CAI conventional conformance test's suitability for inclusion in the P25 CAP is below:

- Conformance tests should limit devices in the test environment to the device under test and appropriate, validated test equipment (*i.e.,* non-products);
- All packet types should be tested that are relevant to the functionality under test;
- All call/message types tested should be relevant to the functionality under test;
- Packet/message order should be checked relevant to the functionality under test;
- All information and reserved fields should be tested within message packets relevant to the functionality under test;
- For all information fields relevant to the feature under test, there should be a linearly independent set of values used across the entire allowable range including special meaning or reserved values;
- Where behavior of a product is specified for parameter values outside of the normal or permissible range, those values should be tested. Where behavior is not specified, explicit pass/fail criteria should be included;
- Timing between subsequent packets should be identified in cases where, if not within defined parameters, the test or the anticipated response would result in inconsistent or erroneous test results;
- All of the different combinations of status bits should be tested where relevant to a feature under test;
- The test should define the detailed procedural steps and expected results necessary for a test operator to perform the test consistently across multiple laboratories;
- The test procedure should accommodate evaluation of a test article's behavior where multiple defined responses are possible;
- If capable, each unit under test should perform the roles of both transmitter and receiver during the test;
- The test should provide definitive predictive outcomes (behaviors) for all articles under test.

Through this notice, NIST is also presenting this prioritized list of features and functionalities that will require testing conformance in the P25 CAP:

1. Conventional Squelch*
2. Emergency alarm
3. Emergency group voice call
4. Group voice call
5. Radio unit monitoring
6. Transport of Talking Party Identification*
7. Late Entry
8. Location Services
9. Radio unit inhibit/uninhibit
10. Unaddressed voice call
11. Encryption
12. Over The Air Rekeying (OTAR)
13. Emergency Cancel
14. All Call

* Note that Conventional Squelch and Transport of Talking Party Identification tests, included in the original list of features and functionalities, have been rolled into other tests as appropriate.

At the meeting on Thursday, March 15, 2012, NIST will solicit input on the two draft conformance tests it has developed for inclusion in the P25 CAP. NIST has developed tests for Group Voice Call and Radio Unit Monitoring. These tests can be found at: *http://www.pscr.gov/outreach/safecom/*

p25_cap/downloads/downloads.php. NIST will hear comment on these tests at the March 15 meeting and will continue to receive written comments until 5 p.m. Mountain Time on Monday, April 30, 2012.

In addition to the two tests already developed, NIST is in the process of developing conformance tests for the following features and functionalities:

- Emergency Alarm
- Emergency Group Voice Call
- Unaddressed Voice Call
- Emergency Cancel
- All Call

NIST is also seeking comments, suggestions, example tests that can be leveraged or new tests for the following list of features:

- Late Entry
- Location Services
- Radio Unit Inhibit/Uninhibit
- Encryption
- Over the Air Rekeying (OTAR)

More information about the P25 CAP is available at *http://www.safecomprogram.gov*. More information about NIST/OLES can be found at *http://www.nist.gov/oles/*.

Registration: Members of the public wishing to attend the meeting must register by 5 p.m. Mountain Time on Monday, March 12, 2012 by sending an email request to Dereck Orr at *dereck.orr@nist.gov* or via phone at 303–497–5400.

Oral Comments: There will be 40 minutes set aside for public comment. Members of the public wishing to provide oral comments during the meeting on Thursday, March 15, 2012 will be provided up to a total of 8 minutes each (dependent on the number of commenters), and the order of commenters will be based on the order in which the request to provide comments was received. Requests to make oral comments should be submitted to Dereck Orr by 5 p.m. Mountain Time on Monday, March 12, 2012 via email at *dereck.orr@nist.gov* or via phone at 303–497–5400.

Written Comments: Comments also will be accepted electronically and may be emailed to *dereck.orr@nist.gov*. Hard copies of comments may be mailed to Dereck Orr, Department of Commerce, NIST, Building 1, Room 2209, 300 Broadway St., Boulder, CO 80305.

Dated: February 13, 2012.

Willie E. May,

Associate Director for Laboratory Programs.

[FR Doc. 2012–3839 Filed 2–16–12; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[File No. 17086]

RIN 0648–XB005

Marine Mammals

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; receipt of application.

SUMMARY: Notice is hereby given that Robin Baird, Ph.D., Cascadia Research, 218½ W. 4th Avenue, Olympia, WA 98501, has applied in due form for a permit to take marine mammals in the Atlantic Ocean for the purposes of scientific research.

DATES: Written, telefaxed, or email comments must be received on or before March 19, 2012.

ADDRESSES: The application and related documents are available for review by selecting ''Records Open for Public Comment'' from the *Features* box on the Applications and Permits for Protected Species (APPS) home page, *https://apps.nmfs.noaa.gov,* and then selecting File No. 17086 from the list of available applications.

These documents are also available upon written request or by appointment in the following offices:

Permits and Conservation Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301) 427–8401; fax (301) 713–0376;

Northeast Region, NMFS, 55 Great Republic Drive, Gloucester, MA 01930; phone (978) 281–9328; fax (978) 281–9394; and

Southeast Region, NMFS, 263 13th Avenue South, Saint Petersburg, FL 33701; phone (727) 824–5312; fax (727) 824–5309.

Written comments on this application should be submitted to the Chief, Permits and Conservation Division, at the address listed above. Comments may also be submitted by facsimile to (301) 713–0376, or by email to *NMFS.Pr1Comments@noaa.gov.* Please include the File No. in the subject line of the email comment.

Those individuals requesting a public hearing should submit a written request to the Chief, Permits and Conservation Division at the address listed above. The request should set forth the specific reasons why a hearing on this application would be appropriate.

FOR FURTHER INFORMATION CONTACT: Laura Morse or Carrie Hubard, (301) 427–8401.

SUPPLEMENTARY INFORMATION: The subject permit is requested under the authority of the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 *et seq.*), and the regulations governing the taking and importing of marine mammals (50 CFR part 216).

Dr. Baird proposes to conduct research on 27 species of cetaceans including unidentified beaked whales in U.S. and international waters of the Atlantic Ocean from Virginia to Southern Florida. None of the species are listed as threatened or endangered under the Endangered Species Act. The purposes of the proposed research are to study: (1) Population size and structure, (2) range and movement patterns, (3) diving and night-time behavior, (4) social organization, (5) feeding ecology, and (6) disease monitoring of the targeted species. Harassment of all species may occur during vessel approach for dart and suction-cup tagging, sighting surveys, photographic identification, behavioral research, passive acoustic recording, underwater observation with a pole cam, and opportunistic sampling (sloughed skin and fecal material). Import and export of sloughed skin, prey remains, and fecal samples obtained is requested for research purposes. Research would occur over a five-year period.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), an initial determination has been made that the activity proposed is categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

Concurrent with the publication of this notice in the **Federal Register**, NMFS is forwarding copies of the application to the Marine Mammal Commission and its Committee of Scientific Advisors.

Dated: February 10, 2012.

Tammy C. Adams,

Acting Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2012–3705 Filed 2–16–12; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XB011

Mid-Atlantic Fishery Management Council (MAFMC); Public Meeting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of a public meeting.

SUMMARY: The Mid-Atlantic Fishery Management Council's (Council) Ad-Hoc Atlantic Sturgeon Committee will hold a meeting.

DATES: The meeting will be held on March 6, 2012, from 10 a.m. until 4 p.m.

ADDRESSES: The meeting will be held at Four Points by Sheraton BWI Airport, 7032 Elm Road, Baltimore, MD 21240; telephone: (410) 859–3300.

Council address: Mid-Atlantic Fishery Management Council, 800 N. State Street, Suite 201, Dover, DE 19901; telephone: (302) 674–2331.

FOR FURTHER INFORMATION CONTACT: Christopher M. Moore Ph.D., Executive Director, Mid-Atlantic Fishery Management Council, 800 N. State Street, Suite 201, Dover, DE 19901; telephone: (302) 526–5255.

SUPPLEMENTARY INFORMATION: The purpose of this meeting is to identify and discuss potential management actions to minimize incidental catches of Atlantic sturgeon in fisheries managed by the Mid-Atlantic Council. A management response is necessary given the recent classification of Atlantic sturgeon under the Endangered Species Act.

Although non-emergency issues not contained in this agenda may come before this group for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), those issues may not be the subject of formal action during this meeting. Actions will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under Section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to M. Jan Saunders at the Mid-Atlantic Council Office (302) 526–5251 at least 5 days prior to the meeting date.

Dated: February 14, 2012.

Tracey L. Thompson,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2012–3752 Filed 2–16–12; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA902

Taking and Importing Marine Mammals: Taking Marine Mammals Incidental to Navy's Mission Activities at the Naval Surface Warfare Center Panama City Division

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; issuance of a Letter of Authorization.

SUMMARY: In accordance with the Marine Mammal Protection Act (MMPA), as amended, and implementing regulations, notification is hereby given that NMFS has issued a one-year Letter of Authorization (LOA), followed by a revised LOA that is valid for two years, to take marine mammals by harassment incidental to the U.S. Navy's Research, Development, Test and Evaluation (RDT&E) mission activities at the Naval Surface Warfare Center Panama City Division (NSWC PCD) to the Commander, U.S. Naval Surface Warfare Center Panama City Division, 110 Vernon Avenue, Panama City, FL 32407–7001 and persons operating under his authority.

DATES: Effective from January 21, 2012, through January 20, 2014.

ADDRESSES: Copies of the Navy's September 1, 2011, LOA application, the LOA, the Navy's 2011 marine species monitoring report and the Navy's 2011 annual mission activities report are available by writing to P. Michael Payne, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910, by telephoning the contact listed here (see **FOR FURTHER INFORMATION CONTACT**), or online at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications.* Documents cited in this notice may be viewed, by appointment, during regular business hours, at the aforementioned address.

FOR FURTHER INFORMATION CONTACT: Shane Guan, Office of Protected Resources, NMFS (301) 427–8418.

SUPPLEMENTARY INFORMATION:

Background

Section 101(a)(5)(A) of the MMPA (16 U.S.C. 1361 *et seq.*) directs the Secretary of Commerce to allow, upon request, the incidental, but not intentional taking of marine mammals by U.S. citizens who engage in a military readiness activity if certain findings are made and regulations are issued.

Authorization may be granted for periods of 5 years or less if NMFS finds that the taking will have a negligible impact on the species or stock(s), and will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses. In addition, NMFS must prescribe regulations that include permissible methods of taking and other means of effecting the least practicable adverse impact on the species and its habitat, and on the availability of the species for subsistence uses, paying particular attention to rookeries, mating grounds, and areas of similar significance. The regulations also must include requirements pertaining to the monitoring and reporting of such taking.

Regulations governing the taking of marine mammals incidental to the U.S. Navy's RDT&E activities at the NSWC PCD were published on January 21, 2010 (75 FR 3395), and remain in effect through January 21, 2015. They are codified at 50 CFR part 218 subpart S. These regulations include mitigation, monitoring, and reporting requirements for the incidental taking of marine mammals by the Navy's RDT&E activities. For detailed information on these actions, please refer to the January 21, 2010 **Federal Register** notice and 50 CFR part 218 subpart S.

On February 1, 2012, NMFS published a final rule (77 FR 4917) that allows for the issuance of multi-year LOAs, as long as the regulations governing such LOAs are valid.

Summary of LOA Request

NMFS received an application from the U.S. Navy for an LOA covering the Navy's RDT&E activities at NSWC PCD off the U.S. Gulf of Mexico under the regulations issued on January 21, 2010 (75 FR 3395). The application requested authorization, for a period of two years, to take, by harassment, marine mammals incidental to proposed RDT&E activities that involve underwater explosive detonation, projectile firing, and sonar testing.

Summary of Activity Under the 2011 LOA

As described in the Navy's activities report, which covered the period between August 2, 2010, and August 1, 2011, the RDT&E activities conducted by the Navy were within the scope and amounts contemplated by the final rule. None of the testing events exceeded the average annual allotment authorized under the rule. No test activities involving underwater explosive detonations and projectile firing were conducted during the reporting period.

As shown in Tables 1 and 2, most of the mid-frequency active sonar (MFAS) and high-frequency active sonar (HFAS) testing events were far below the levels authorized in the annual LOA.

TABLE 1—TOTAL ANNUAL NUMBER OF EACH TYPE OF MFAS AND HFAS LISTED AT 50 CFR § 218.180 CONDUCTED IN THE NSWC PCD STUDY AREA IN TERRITORIAL WATERS (NUMBER AUTHORIZED VS. CONDUCTED)

Sonar system	Number authorized (hrs)	Number conducted (hrs)
AN/SQS–53/56 Kingfisher	3	0
Sub-bottom profiler (2–9 kHz)	21	0
REMUS SAS–LF	12	1
REMUS Modem	25	20.8
Sub-bottom profiler (2–16 kHz)	24	8
AN/SQQ–32	30	0
REMUS–SAS–LF	20	17.8
SAS–LF	35	34
AN/WLD–1RMS–ACL	33.5	0
BPAUV Sidescan	25	9
TVSS	15	0
F84Y	15	0
BPAUV Sidescan	25	0
REMUS–SAS–HF	10	10
SAS–HF	11.5	8
AN/AQS–20	545	269.57
AN/WLD–11 RMS Navigation	15	4
BPAUV Sidescan	30	0.1

TABLE 2—TOTAL ANNUAL NUMBER OF EACH TYPE OF MFAS AND HFAS LISTED AT 50 CFR § 218.180 CONDUCTED IN THE NSWC PCD STUDY AREA IN NON-TERRITORIAL WATERS (NUMBER AUTHORIZED VS. CONDUCTED)

Sonar system	Number authorized (hrs)	Number conducted (hrs)
AN/SQS–53/56 Kingfisher	1	0
Sub-bottom profiler (2–9 kHz)	1	0
REMUS Modem	12	0
Sub-bottom profiler (2–16 kHz)	1	0
AN/SQQ–32	1	0
SAS–LF	15	0
AN/WLD–1RMS–ACL	5	0
BPAUV Sidescan	38	8
TVSS	16.5	8
F84Y	15	0
REMUS–SAS–HF	25	0
SAS–HF	15	0
AN/AQS–20	15	11
BPAUV Sidescan	25	0

Planned Activities for 2012 and 2013

In 2012 and 2013, the Navy expects to conduct the same type and amount of RDT&E activities identified in the final rules and 2011 LOA. No modification is proposed by the Navy for its planned 2012–2013 activities under the 2010 rule.

Estimated Take for 2012–2013

The estimated takes for the Navy's proposed 2012 RDT&E activities are the same as those in authorized in 2011. No change has been made in the estimated takes from the 2011 LOA.

Summary of Monitoring, Reporting, and Other Requirements Under the 2009 LOA

Annual Mission Activities Report

The Navy submitted their 2011 annual mission activities report covering the period from August 2, 2010, through August 1, 2011 within the required timeframes and it is posted on NMFS Web site: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications*. NMFS has reviewed the report and it contains the information required by the 2011 LOA. The report lists the amount of hours sonar testing was conducted during the reporting period. During this time period, NSWC PCD conducted 409.27 hours of sonar testing, 382.27 hours in territorial waters (Table 1) and 27 hours in non-territorial waters (Table 2). No RDT&E activities associated with underwater detonations were conducted during this period.

Monitoring and Annual Monitoring Reports

The Navy submitted a marine species monitoring report within the required timeframes and it is posted on NMFS Web site: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications*. The monitoring report covers the period between August 2, 2010, and August 1, 2011. NSWC PCD conducted two aerial monitoring events for tests of the AN/AQS–20 sonar system during the reporting period. Observers searched for and subsequently recorded any present cetacean and sea turtle species during pre-test, during-test, and post-test monitoring for both sonar events. No stranded or injured marine mammals or sea turtles were observed during either aerial monitoring effort.

Aerial monitoring was conducted July 5–9, 2011, in good to fair sighting conditions, with all sightings made in Beaufort sea states between 1 and 4. The monitoring included two re-test flights; two flights during the test; and one post-test flight. Focal follow behavioral data were collected during two of the sightings. Observers visually surveyed 2,067 km (1,116 nm) of systematic (on-effort) trackline and 2,749 km (1,484 nm) of total trackline during five days for approximately 14.3 hours of total survey effort. Twenty-one cetacean sightings were recorded: Thirteen groups of bottlenose dolphins; one group of Atlantic spotted dolphins; and seven groups of unidentified dolphins.

The second monitoring event took place July 23–26, 2011, in good to fair sighting conditions, with sightings made in Beaufort sea states between 1 and 4. This monitoring included two pre-test flights; one flight during the test; and one post-test flight. Focal follow behavioral data were collected during two of the sightings. Observers visually surveyed 1,475 km (796 nm) of systematic (on-effort) trackline and 1,937 km (1,046 nm) of total trackline during four days for approximately 7.8 hours of total survey effort. Seventeen cetacean sightings were recorded: Fifteen groups of bottlenose dolphins and two groups of Atlantic spotted dolphins.

No monitoring opportunities were available for explosive events in the NSWC PCD Study Area as none of these activities were conducted during this reporting period.

Adaptive Management

In general, adaptive management allows NMFS to consider new information from different sources to determine (with input from the Navy regarding practicability) if monitoring efforts should be modified if new information suggests that such modifications are appropriate. All of the 5-year rules and LOAs issued to the Navy include an adaptive management component, which includes an annual meeting between NMFS and the Navy. NMFS and the Navy conducted an adaptive management meeting in October 2011, which representatives from the Marine Mammal Commission participated in, wherein we reviewed the Navy monitoring results through August 1, 2011, discussed other Navy research and development efforts, and discussed other new information that could potentially inform decisions regarding Navy mitigation and monitoring. No changes were proposed for the 2012 monitoring plan for the NSWC PCD RDT&E activities.

Integrated Comprehensive Monitoring Report

The 2010 LOA required that the Navy update the ICMP Plan to reflect development in three areas, specifically: (1) Identifying more specific monitoring sub-goals under the major goals that have been identified; (2) characterizing Navy Range Complexes and study areas within the context of the prioritization guidelines described in the ICMP Plan; and (3) continuing to develop data management, organization and access procedures. The Navy has updated the ICMP Plan as required. Because the ICMP is an evolving Program, we posted the ICMP on NMFS Web site: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm*.

2011 Monitoring Meeting

The regulations that established the framework for authorizing the taking of marine mammals incidental to Navy RDT&E activities required the Navy, with guidance and support from NMFS, to convene a Monitoring Workshop in 2011 (50 CFR 218.184(i)). The Marine Mammal Monitoring Workshop, which included scientists, representatives from non-governmental organizations, and Marine Mammal Commission staff, took place in June 2011. Pursuant to the regulations, this workshop presented a consolidated overview of monitoring activities conducted in 2010, as well as the outcomes of selected monitoring-related research. In 2010, the Navy convened a Scientific Advisory Group (SAG), comprised of experts in the fields of marine mammals and underwater acoustics, to review the Navy's current monitoring plans and make recommendations. The results of the SAG's review were also presented at the meeting. Participants engaged in open discussion of the lessons learned, and discussed how to improve the Navy's monitoring plan moving forward. If changes to monitoring approaches are identified at the workshop that can be implemented during the annual LOA renewal process and subsequent 5-year regulations, the Navy and NMFS will modify the Navy-wide monitoring plan and propose appropriate changes to the monitoring measures in specific LOAs for the different Range Complexes and study areas. For Range Complexes or study areas with substantive monitoring modifications, NMFS will subsequently publish proposed LOAs, with the modifications, in the **Federal Register** and solicit public input. After addressing public comments and making changes as appropriate, NMFS will issue new training area LOAs that reflect the new Navy-wide monitoring plan.

Authorization

The Navy complied with the requirements of the 2011 LOA. Based on our review of the Navy's annual mission activities report, which shows that the amount of sonar testing hours was below the annual authorized levels and that no underwater detonation and projectile firing were conducted during FY 2011, NMFS has determined that the effects to marine mammals that resulted from the 2011 NWSC PCD RDT&E activities were likely lower than analyzed. Two monitoring activities were conducted during the period between August 2, 2010, and August 1, 2011, for sonar testing activities, as required by the 2011 LOA. The monitoring results showed that the RDT&E activities at the NSWC PCD had no more than a negligible impact on the affected species or stock of marine mammals. There is no subsistence use of marine mammals that could potentially be impacted by the Navy's activities at NSWC PCD. Further, the level of taking authorized in 2012 and 2013 for the Navy's NSWC PCD RDT&E activities is consistent with our previous findings made for the total taking allowed under the NSWC PCD regulations. Finally, the record supports NMFS' conclusion that the total number of marine mammals taken by the 2012 and 2013 RDT&E PCD activities will have no more than a negligible impact on the affected species or stock of marine mammals and will not have an unmitigable adverse impact on the availability of these species or stocks for taking for subsistence uses. Accordingly, NMFS has issued a one-year LOA for the Navy's RDT&E activities conducted in the NSWC PCD Study Area from January 21, 2012,

through January 20, 2013, followed by a new LOA that is effective from January 21, 2012, through January 20, 2014, after the NMFS' multi-year LOA regulations (77 FR 4917) become effective on February 1, 2012.

Dated: February 9, 2012.

James H. Lecky,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2012–3714 Filed 2–16–12; 8:45 am]

BILLING CODE 3510–22–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Proposed Additions and Deletions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Proposed additions to and deletions from the Procurement List.

SUMMARY: The Committee is proposing to add services to the Procurement List that will be provided by nonprofit agencies employing persons who are blind or have other severe disabilities and delete services previously provided by such agencies.

DATES: *Comments Must Be Received on or Before:* March 19, 2012.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, Virginia 22202–3259.

FOR FURTHER INFORMATION OR TO SUBMIT COMMENTS CONTACT: Barry S. Lineback, Telephone: (703) 603–7740, Fax: (703) 603–0655, or email *CMTEFedReg@AbilityOne.gov.*

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C. 8503(a)(2) and 41 CFR 51–2.3. Its purpose is to provide interested persons an opportunity to submit comments on the proposed actions.

Additions

If the Committee approves the proposed additions, the entities of the Federal Government identified in this notice will be required to procure the services listed below from nonprofit agencies employing persons who are blind or have other severe disabilities.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. If approved, the action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will provide the services to the Government.

2. If approved, the action will result in authorizing small entities to provide the services to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 8501–8506) in connection with the services proposed for addition to the Procurement List.

Comments on this certification are invited. Commenters should identify the statement(s) underlying the certification on which they are providing additional information.

End of Certification

The following services are proposed for addition to the Procurement List for production by the nonprofit agencies listed:

Services

Service Type/Location: Base Supply Center & Individual Equipment Element, 310 M Street, Keesler AFB, MS.
NPA: L.C. Industries for the Blind, Inc., Durham, NC.
Contracting Activity: Dept. of the Air Force, FA3010 81 CONS CC, Keesler AFB, MS.
Service Type/Location: Base Supply Center, Securities and Exchange Commission, 100 F Street NE., Washington, DC.
NPA: Winston-Salem Industries for the Blind, Inc., Winston-Salem, NC.
Contracting Activity: Securities and Exchange Commission, Office of Acquisitions, Alexandria, VA.

Deletions

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. If approved, the action will not result in additional reporting, recordkeeping or other compliance requirements for small entities.

2. If approved, the action may result in authorizing small entities to provide the services to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 8501–8506) in connection with the services proposed for deletion from the Procurement List.

End of Certification

The following services are proposed for deletion from the Procurement List:

Services

Service Type/Location: Custodial Services, Veterans Center, 1642 42nd Street NE., Cedar Rapids, IA.
NPA: Goodwill Industries of the Heartland, Iowa City, IA.
Contracting Activity: Department of Veterans Affairs, NAC, Hines, IL.
Service Type/Location: Janitorial/Custodial, U.S. Federal Building, First and Water Street, Alpena, MI.
NPA: Northeastern Michigan Rehabilitation and Opportunity Center (NEMROC), Alpena, MI.
Contracting Activity: General Services Administration, Public Buildings Service, Property Management Service Center, Detroit, MI.

Barry S. Lineback,

Director, Business Operations.

[FR Doc. 2012–3748 Filed 2–16–12; 8:45 am]

BILLING CODE 6353–01–P

CONSUMER PRODUCT SAFETY COMMISSION

Sunshine Act Meeting

TIME AND DATE: Wednesday, February 22, 2012, 10 a.m.–12 p.m.

PLACE: Hearing Room 420, Bethesda Towers, 4330 East West Highway, Bethesda, Maryland.

STATUS: Commission Meeting—Open to the Public.

MATTER TO BE CONSIDERED: Decisional Matter: Bed Rails—Final Rule.

A live webcast of the Meeting can be viewed at *www.cpsc.gov/webcast.*

For a recorded message containing the latest agenda information, call (301) 504–7948.

CONTACT PERSON FOR MORE INFORMATION: Todd A. Stevenson, Office of the Secretary, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, (301) 504–7923.

Dated: February 14, 2012.

Todd A. Stevenson,

Secretary.

[FR Doc. 2012–3857 Filed 2–15–12; 11:15 am]

BILLING CODE 6355–01–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Defense Policy Board; Federal Advisory Committee Meeting Notice

AGENCY: Department of Defense, Office of the Under Secretary of Defense (Policy).

ACTION: Federal Advisory Committee Meeting Notice.

SUMMARY: Under the provisions of the Federal Advisory Committee Act of

1972 (5 U.S.C., Appendix, as amended) and the Sunshine Act of 1976 (5 U.S.C. 552b, as amended) the Department of Defense announces the following Federal advisory committee meeting of the Defense Policy Board (hereafter referred to as ''the DPB'').

DATES: From Tuesday, March 6, 2012 (8:30 a.m. to 6 p.m.) through Wednesday, March 7, 2012 (7:30 a.m. to 10 a.m.) the DPB will hold a quarterly meeting under the provisions of the Federal Advisory Committee Act of 1972 (5 U.S.C., Appendix, as amended) and the Sunshine Act of 1976 (5 U.S.C. 552b, as amended).

ADDRESSES: The Pentagon, 2000 Defense Pentagon, Washington, DC 20301–2000.

FOR FURTHER INFORMATION CONTACT: Ms. Ann Hansen, 2000 Defense Pentagon, Washington, DC 20301–2000. Phone: (703) 571–9232.

SUPPLEMENTARY INFORMATION:

Purpose of Meeting: To obtain, review and evaluate classified information related to the DPB's mission to advise on: (a) Issues central to strategic DoD planning; (b) policy implications of U.S. force structure and force modernization and on DoD's ability to execute U.S. defense strategy; (c) U.S. regional defense policies; and (d) other research and analysis of topics raised by the Secretary of Defense, the Deputy Secretary or the Under Secretary of Defense for Policy.

Meeting Agenda: Beginning at 8:30 a.m. on March 6 through the end of the meeting on March 7, the DPB will have secret through top secret (SCI) level discussions on national security matters that will deal with potential threats and broad national security issues within the Pacific Rim.

Meeting Accessibility: Pursuant to 5 U.S.C. 552b, as amended, and 41 CFR 102–3.155, the Department of Defense has determined that the meeting shall be closed to the public. The Acting Under Secretary of Defense (Policy), in consultation with the Office of the Department of Defense FACA Attorney, has determined in writing that this meeting be closed to the public because the discussions fall under the purview of 5 U.S.C. 552b(c)(1) and are so inextricably intertwined with unclassified material that they cannot reasonably be segregated into separate discussions without disclosing secret or classified material.

Written Statements: Pursuant to 41 CFR 102–3.105(j) and 102–3.140, the public or interested organizations may submit written statements to the membership of the DPB at any time or in response to the stated agenda of a planned meeting. Written statements should be submitted to the DPB's Designated Federal Officer; the Designated Federal Officer's contact information can be obtained from the GSA's FACA Database—*https://www.fido.gov/facadatabase/public.asp*. Written statements that do not pertain to a scheduled meeting of the DPB may be submitted at any time. However, if individual comments pertain to a specific topic being discussed at a planned meeting then these statements must be submitted no later than five business days prior to the meeting in question. The Designated Federal Officer will review all submitted written statements and provide copies to all committee members.

Dated: February 13, 2012.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2012–3698 Filed 2–16–12; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DOD–2012–OS–0020]

Privacy Act of 1974; System of Records

AGENCY: Defense Logistics Agency, DoD.

ACTION: Notice to Amend a System of Records.

SUMMARY: The Defense Logistics Agency is proposing to amend a system of records in its inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

DATES: The proposed action will be effective on March 19, 2012 unless comments are received which result in a contrary determination.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

- *Federal Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Federal Docket Management System Office, 4800 Mark Center Drive, East Tower, 2nd Floor, Suite 02G09, Alexandria, VA 22350–3100.

Instructions: All submissions received must include the agency name and docket number for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Ms. Jody Sinkler, DLA FOIA/Privacy Act Office, Headquarters, Defense Logistics Agency, ATTN: DGA, 8725 John J. Kingman Road, Suite 1644, Fort Belvoir, VA 22060–6221, or by phone at (703) 767–5045.

SUPPLEMENTARY INFORMATION: The Defense Logistics Agency's system of record subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address in **FOR FURTHER INFORMATION CONTACT**. The proposed changes to the record system being amended are set forth below. The proposed amendment is not within the purview of subsection (r) of the Privacy Act of 1974 (5 U.S.C. 552a), as amended, which requires the submission of new or altered systems reports.

Dated: February 13, 2012.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

S340.10

SYSTEM NAME:

DLA Civilian Time and Attendance, Project and Workload Records (December 2, 2009, 74 FR 63128).

CHANGES:

* * * * *

CATEGORIES OF RECORDS IN THE SYSTEM:

Delete ''educational level; emergency data'' and ''and office telephone numbers; telework location and phone number'' from entry.

* * * * *

SAFEGUARDS:

Delete entry and replace with ''Records are maintained in a controlled facility. Physical entry is restricted by the use of locks, guards, and is accessible only to authorized personnel. Access to computerized data is restricted by passwords, which are changed periodically or by Common Access Cards (CACs). Access to records is limited to person(s) responsible for servicing the records in the performance of their official duties and who are properly screened and cleared for need-to-know. All individuals granted access to this system of records are required to have Information Assurance and Privacy Act training.''

RETENTION AND DISPOSAL:

Replace second paragraph with ''Project and workload records will be destroyed after 6 years, 3 months or when no longer needed.''

SYSTEM MANAGER(S) AND ADDRESS:

Delete entry and replace with ''Defense Logistics Agency, ATTN: Director, DLA Information Operations at Ogden (J6O), 5851 F Avenue, Building 849, Room A70, Hill AFB, UT 84056. For a list of system managers at the DLA Primary Level Field Activities, write to the J6O Director.''

NOTIFICATION PROCEDURE:

Delete entry and replace with ''Individuals seeking to determine whether information about themselves is contained in this system of records should address written inquiries to the DLA FOIA/Privacy Act Office, Headquarters, Defense Logistics Agency, ATTN: DGA, 8725 John J. Kingman Road, Suite 1644, Fort Belvoir, VA 22060–6221.

Inquiry should contain the record subject's full name, User ID or DLA email address, return mailing address, and organizational location of employee.''

RECORD ACCESS PROCEDURES:

Delete entry and replace with ''Individuals seeking access to information about themselves contained in this system of records should address written inquiries to the DLA FOIA/Privacy Act Office, Headquarters, Defense Logistics Agency, ATTN: DGA, 8725 John J. Kingman Road, Suite 1644, Fort Belvoir, VA 22060–6221.

Inquiry should contain the record subject's full name, User ID or DLA email address, return mailing address, and organizational location of employee.''

CONTESTING RECORD PROCEDURES:

Delete entry and replace with ''The DLA rules for accessing records, for contesting contents, and appealing initial agency determinations are contained in 32 CFR part 323, or may be obtained from the DLA FOIA/Privacy Act Office, Headquarters, Defense Logistics Agency, ATTN: DGA, 8725 John J. Kingman Road, Suite 1644, Fort Belvoir, VA 22060–6221.''

RECORD SOURCE CATEGORIES:

Delete entry and replace with ''Record subject, supervisors, timekeepers, leave slips, payroll office and payroll records, including automated payroll systems.''

* * * * *

[FR Doc. 2012–3720 Filed 2–16–12; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Air Force

Air University Board of Visitors Meeting

ACTION: Notice of meeting of the Air University Board of Visitors.

SUMMARY: Under the provisions of the Federal Advisory Committee Act of 1972 (5 U.S.C., Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.150, the Department of Defense announces that the Air Force Institute of Technology (AFIT) Subcommittee of the Air University Board of Visitors will meet on Monday, March 12, 2012, from 8 a.m. to 5 p.m. and Tuesday, March 13, 2012, from 8 a.m. to 5 p.m. The meeting will be held in the AFIT Commander's Conference Room located in building 646 at Wright-Patterson Air Force Base, OH.

In addition, the Air University Board of Visitors' meeting will take place on Monday, April 16, 2011, from 8 a.m. to 5 p.m. and Tuesday, April 17, 2011, from 8 a.m. to 5 p.m. The meeting will be held in the Air University Commander's Conference Room located in building 800 at Maxwell Air Force Base, AL. The purpose of this meeting is to provide independent advice and recommendations on matters pertaining to the educational, doctrinal, and research policies and activities of Air University. The agenda will include topics relating to the policies, programs, and initiatives of Air University educational programs. During this meeting, four subcommittees will meet to discuss issues relating to academic affairs; research; future learning and technology; and institutional advancement during the April meeting.

Pursuant to 5 U.S.C. 552b, as amended, and 41 CFR 102–3.155 all sessions of the Air University Board of Visitors' meeting will be open to the public. Any member of the public wishing to provide input to the Air University Board of Visitors should submit a written statement in accordance with 41 CFR 102–3.140(c) and section 10(a)(3) of the Federal Advisory Committee Act and the procedures described in this paragraph. Written statements can be submitted to the Designated Federal Officer at the address detailed below at any time. Statements being submitted in response to the agenda mentioned in this notice must be received by the Designated Federal Officer at the address listed below at least five calendar days prior to the meeting which is the subject of this notice. Written statements received after this date may not be provided to or considered by the Air University Board of Visitors until its next meeting. The Designated Federal Officer will review all timely submissions with the Air University Board of Visitors' Board Chairperson and ensure they are provided to members of the Board before the meeting that is the subject of this notice. Additionally, any member of the public wishing to attend this meeting should contact either person listed below at least five calendar days prior to the meeting for information on base entry passes.

FOR FURTHER INFORMATION CONTACT: Mrs. Diana Bunch, Designated Federal Officer, Air University Headquarters, 55 LeMay Plaza South, Maxwell Air Force Base, Alabama 36112–6335, telephone (334) 953–4547.

Bao-Anh Trinh,

Air Force Federal Register Liaison Officer.

[FR Doc. 2012–3746 Filed 2–16–12; 8:45 am]

BILLING CODE 5001–10–P

DEPARTMENT OF DEFENSE

Department of the Army

Army National Cemeteries Advisory Commission (ANCAC)

AGENCY: Department of the Army, DoD.

ACTION: Notice of open committee meeting.

SUMMARY: Pursuant to the Federal Advisory Committee Act of 1972 (5 U.S.C., Appendix, as amended), the Sunshine in the Government Act of 1976 (U.S.C. 552b, as amended) and 41 Code of Federal Regulations (CFR 102–3.140 through 160), the Department of the Army announces the following committee meeting:

Name of Committee: Army National Cemeteries Advisory Commission.

Date of Meeting: Thursday, March 8, 2012.

Time of Meeting: 9 a.m.–4 p.m.

Place of Meeting: Women in Military Service for America Memorial, Conference Room, Arlington National Cemetery, Arlington, VA.

Proposed Agenda: Purpose of the meeting is to approve minutes from inaugural meeting on December 1, 2011; formalize subcommittee membership and appointment as approved by the Secretary of Defense; review status of subcommittee topics; and set the proposed calendar for follow-on meetings.

Public's Accessibility to the Meeting: Pursuant to 5 U.S.C. 552b and 41 CFR 102–3.140 through 102–3.165, and the

availability of space, this meeting is open to the public. Seating is on a first-come basis.

FOR FURTHER INFORMATION CONTACT: Lieutenant Colonel Renea Yates; *renea-yates@us.army.mil* or 571.256.4325.

SUPPLEMENTARY INFORMATION: The following topics are on the agenda for discussion:

- Gravesite Accountability Task Force Report (22 December 2011)
- Fiscal Stewardship and Information Technology Update
- Army National Cemeteries Program Campaign Plan
- Subcommittee Activities:
  - ''Honor'' Subcommittee: Independent recommendations of methods to address the long-term future of the Army National Cemeteries, including how best to extend the active burials and on what ANC should focus once all available space has been utilized.
  - ''Remember'' Subcommittee: Recommendations on preserving the Tomb of the Unknown Soldier including the cracks in the large marble sarcophagus, the adjacent marble slabs, and the potential replacement marble stone for the sarcophagus already gifted to the Army.
  - ''Explore'' Subcommittee: Recommendations Section 60 Mementos study and improving the quality of visitors' experiences now and for generations to come.

The Commission's mission is to provide the Secretary of Defense, through the Secretary of the Army, independent advice and recommendations on the Army National Cemeteries Program, including, but not limited to:

a. Management and operational issues, including bereavement practices;

b. Plans and strategies for addressing long-term governance challenges;

c. Resource planning and allocation; and

d. Any other matters relating to Army National Cemeteries that the Commission's co-chairs, in consultation with the Secretary of the Army, may decide to consider.

Filing Written Statement: Pursuant to 41 CFR 102–3.140d, the Committee is not obligated to allow the public to speak; however, interested persons may submit a written statement for consideration by the Commission. Written statements must be received by the Designated Federal Officer at the following address: Army National Cemeteries Advisory Commission, ATTN: Designated Federal Officer (DFO) (LTC Yates), Arlington National Cemetery, Arlington, Virginia 22211 not later than 5 p.m., Monday, March 5, 2012. Written statements received after this date may not be provided to or considered by the Army National Cemeteries Advisory Commission until the next open meeting. The Designated Federal Officer will review all timely submissions with the Commission Chairperson and ensure they are provided to the members of the Army National Cemeteries Advisory Commission.

Brenda S. Bowen,

Army Federal Register Liaison Officer.

[FR Doc. 2012–3749 Filed 2–16–12; 8:45 am]

BILLING CODE 3710–08–P

DEPARTMENT OF DEFENSE

Department of the Army: Corps of Engineers

Public Scoping Meetings and Preparation of Environmental Impact Statement for the Proposed Glades Reservoir

AGENCY: Department of the Army, U.S. Army Corps of Engineers, DoD.

ACTION: Notice of Intent to Prepare an Environmental Impact Statement.

SUMMARY: The U.S. Army Corps of Engineers (USACE), Savannah District, has received an application (File Number SAS–2007–00388) for a Department of the Army Permit pursuant to Section 404 of the Clean Water Act (33 U.S.C. 1344) from the Hall County Board of Commissioners (Applicant) for a proposed water supply reservoir project to be located in Hall County, Georgia. The proposed project would be comprised of a new pump-storage water supply reservoir (Glades Reservoir), as well as pipelines and pumping stations to withdraw water from the Chattahoochee River and to connect with the existing Cedar Creek Reservoir. Water would be pumped to the existing Cedar Creek Reservoir located in eastern Hall County for treatment and distribution to Hall County customers. The Applicant believes this action is needed to supply water for Hall County through the year 2060.

The primary federal involvement associated with the proposed action is the discharge of dredged or fill material into waters of the United States, including jurisdictional wetlands. It is estimated, by the Applicant, that 39.2 acres of jurisdictional wetlands and approximately 95,000 linear feet of streams would be adversely affected by the proposed action. Federal authorizations for the proposed project would constitute a ''major federal action.'' Based on the potential impacts, both individually and cumulatively, the USACE intends to prepare an Environmental Impact Statement (EIS) in compliance with the National Environmental Policy Act to render a final decision on the permit application.

The USACE's decision will be to either issue, issue with modification or deny a Department of the Army permit for the proposed action. The EIS will assess the potential social, economic and environmental impacts of the construction and operation of the reservoir, raw water conveyances, associated facilities, and appurtenances. The EIS is intended to be sufficient in scope to address federal, state and local requirements, environmental issues concerning the proposed action, and permit reviews.

DATES: The scoping period will commence with the publication of this notice. The formal scoping period will end 60 days after the publication of this notice. Comments regarding issues relative to the proposed project should be received by April 17, 2012.

ADDRESSES: You may submit written comments by mail to U.S. Army Corps of Engineers, Attention: Regulatory Division, 100 West Oglethorpe Avenue, Savannah, Georgia 31401–3640. You may also submit written comments on-line at *http://www.gladesreservoir.com.* Documents pertinent to the proposed project may be examined at the Web site *http://www.gladesreservoir.com.*

FOR FURTHER INFORMATION CONTACT: Richard Morgan, Project Manager, U.S. Army Corps of Engineers, at (912) 652–5139.

SUPPLEMENTARY INFORMATION: The USACE Savannah District intends to prepare an EIS on the proposed Glades Reservoir project. The Hall County Board of Commissioners proposes this project and is the applicant for a Department of the Army permit (File Number SAS–2007–00388).

1. Project Description: The Glades Reservoir is a proposed pumped-storage reservoir on Flat Creek, a tributary to the Chattahoochee River upstream of Lake Sidney Lanier. The drainage area for the proposed Glades Reservoir is estimated to be 17.6 square miles. The proposed dam would impound an approximately 850-acre reservoir at a normal pool elevation of 1180 feet mean sea level (msl) and provide 11.7 billion gallons of water storage capacity. The proposed Glades Reservoir would be located approximately 12 miles northeast of Gainesville, Georgia, northeast of US 23/

365, near the US 23/365 State Route (SR) 52 intersection.

The proposed Glades Reservoir water supply project would be comprised of a new water supply reservoir, as well as pipelines and pumping stations for withdrawing water from the Chattahoochee River and for interconnecting with the existing Cedar Creek Reservoir. Water would be withdrawn from the Cedar Creek Reservoir for treatment and distribution to customers in Hall County.

The total system (Glades Reservoir-Cedar Creek Reservoir system) safe yield is estimated to be 80 million gallons per day (mgd) (on an annual average daily basis), which includes 7.5 mgd of safe yield from the existing Cedar Creek Reservoir. The Glades Reservoir water supply project is proposed to meet an unmet projected water demand of 72.5 mgd in 2060.

When adequate flows are available in the Chattahoochee River, water would be withdrawn from the Chattahoochee River and delivered to the Hall County through the existing Cedar Creek Reservoir.

When insufficient flow occurs, water would be released from the Glades Reservoir to meet water supply demand while maintaining the minimum in-stream flow in the Chattahoochee River.

In May 2011, a Jurisdictional Waters of the U.S. Delineation was conducted by the Applicant on the reservoir site using sub-meter global positioning system (GPS). The delineation determined that the impacts at elevation 1,180 feet msl would be 39.2 acres of wetlands and approximately 95,000 linear feet of stream.

2. Scoping and Public Involvement Process: The purpose of the public scoping process is to determine relevant issues that will affect the scope of the environmental analysis and EIS alternatives. Some areas of potential significant impact have been identified, but are not limited to the following:

a. Loss of aquatic resources, including wetlands
b. Water quality
c. Water quantity, including downstream impacts
d. Air quality
e. Secondary and cumulative impacts
f. Federal navigation
g. Federal projects
h. Socioeconomics, including environmental justice
i. Cultural resources
j. Threatened and endangered species.

The EIS process is being implemented so that the application can be fully evaluated and a permit decision can be made. The purpose of the EIS scoping meetings is to gather information on the subjects to be studied in detail in the EIS.

3. Purpose and Need. The purpose of the proposed action is to provide sufficient water supply to meet projected water demand in Hall County through the year 2060.

4. Alternatives. An evaluation of alternatives to the Applicant's preferred alternative initially being considered includes a No Action alternative, alternatives that would avoid, minimize and compensate for impacts to the aquatic environment, alternatives utilizing alternative practices, and other reasonable alternatives that will be developed through the project scoping process which may also meet the identified purpose and need.

5. Additional Resources to be Evaluated. Resource areas to be evaluated that have been identified to date include the following: potential direct effects to waters of the U.S. including aquatic species; environmental justice; socioeconomic environment; archaeological and cultural resources; recreation and recreational resources; energy supply and natural resources; hazardous waste and materials; aesthetics; public health and safety; navigation; erosion and accretion; cumulative impacts; public benefit and needs of the people along with potential effects on the human environment. All parties who express interest will be given an opportunity to participate in the process.

6. Public Scoping Meetings. Three public scoping meetings will be held at the following locations/dates:

a. March 20, 2012, 4 to 8 p.m. at Gainesville State College, 3820 Mundy Mill Road, Oakwood, GA 30566
b. March 21, 2012, 4 to 8 p.m. at Lexington Auburn University Convention Center, 1577 South College Street, Auburn, AL 36832;
c. March 22, 2012, 4 to 8 p.m. at Apalachicola National Estuarine Research Reserve, 108 Island Drive, Eastpoint, FL 32328

The USACE will announce the public scoping meetings through local news media and the Web page at least 15 days prior to the first meeting. Comments are encouraged from the public, federal, state, and local agencies and officials, Indian tribes, and other interested parties so that the scope of the EIS may be properly identified.

7. Coordination. The proposed action is being coordinated with a number of Federal, state, regional and local agencies including, but not limited to, the U.S. Environmental Protection Agency, the U.S. Fish and Wildlife Service, and the Georgia Department of Natural Resources Environmental Protection Division. These agencies were requested by the USACE Savannah District to be cooperating agencies for this EIS per Council on Environmental Quality regulations at 40 CFR 1501.6. The U.S. Environmental Protection Agency and the Georgia Environmental Protection Division have agreed to participate in the EIS process as cooperating agencies. Other agencies, including the state resource protection agencies of the States of Alabama and Florida and the U.S. Fish and Wildlife Service may also comment during the scoping process.

8. Availability of the Draft EIS. The USACE currently expects the Draft EIS to be made available to the public by December 30, 2012.

Russell L. Kaiser,
Chief, Regulatory Division.

[FR Doc. 2012–3359 Filed 2–16–12; 8:45 am]
BILLING CODE 3720–58–P

DEPARTMENT OF DEFENSE

Department of the Army; Corps of Engineers

Notice of Availability of a Draft Environmental Impact Statement in Cooperation With the North Carolina Department of Transportation for the Improvement of a 27.3 Mile Segment of US Highway 64 in Tyrrell and Dare Counties, NC

AGENCY: Department of the Army, U.S. Army Corps of Engineers, DoD.

ACTION: Notice of Availability.

SUMMARY: The U.S. Army Corps of Engineers (COE), Wilmington District, Wilmington Regulatory Division is issuing this notice to advise the public that a State of North Carolina funded Draft Environmental Impact Statement (DEIS) has been prepared for the improvement of US 64 to a multilane facility, and replacement of the Lindsay C. Warren bridge, in Tyrrell and Dare Counties, North Carolina (TIP Projects R–2544 and R–2545).

DATES: Written comments on the DEIS will be received until April 2, 2012.

ADDRESSES: Bill Biddlecome, U.S. Army Corps of Engineers, Washington Regulatory Field Office, 2407 West 5th Street, Washington, NC 27889 or Gregory J. Thorpe, Ph.D., Project Development and Environmental Analysis Unit, North Carolina Department of Transportation, 1548 Mail Service Center, Raleigh, North Carolina 27699–1548.

FOR FURTHER INFORMATION CONTACT: Questions about the proposed action and the DEIS can be directed to Mr. Bill Biddlecome, COE—Regulatory Project Manager, telephone: (910) 251–4558 or Mr. Ted Devens, Project Development Engineer, telephone: (919) 707–6018.

SUPPLEMENTARY INFORMATION: The COE in cooperation with the North Carolina Department of Transportation (NCDOT) has prepared a Draft Environmental Impact Statement (DEIS) on a proposal to make transportation improvements to a 27.3 mile segment of existing US Highway 64 in Tyrrell (TIP No. R–2545) and Dare (TIP No. R–2544) Counties, North Carolina, from a two-lane to a multiple-lane roadway, including replacement of the Lindsay C. Warren Bridge over the Alligator River.

The purpose of the proposed project is to reduce US 64 hurricane evacuation time to better meet state clearance goals in the project study area, to insure consistency with North Carolina's Strategic Highway Corridor Plan (which seeks long-term interconnectivity of consistent transportation corridors in North Carolina) and the Intrastate Highway System, and to maintain a bridge across the Alligator River that meets the needs of highway users.

This project is being reviewed through a Merger 01 process that is designed to streamline the project development and permitting processes; the process was mutually developed by NCDOT, COE, the North Carolina Department of Environment and Natural Resources (Division of Water Quality and Division of Coastal Management), the Federal Highway Administration (not applicable for this project), and supported by other stakeholder agencies and local units of government. Other partnering agencies on this project's Merger 01 team include the: U.S. Environmental Protection Agency; U.S. Fish and Wildlife Service; National Marine Fisheries Service, U.S. Coast Guard, N.C. Wildlife Resources Commission; N.C. Department of Cultural Resources, N.C. Division of Marine Fisheries, and the Alligator River National Wildlife Refuge. During the NEPA/SEPA decision-making phase of transportation projects, the Merger process provides a forum for appropriate agency representatives to discuss and reach consensus on the identification and selection of project alternatives that meet project purpose and need requirements, as well as the regulatory requirements of Section 404 of the Clean Water Act.

In 1989, US 64 was designated as part of the State's Intrastate System under Chapter 136 of the North Carolina General Statutes. In January 1999, NCDOT initiated a study to improve US 64 to a multi-lane facility from Columbia in Tyrrell County east to US 64/US 264 in Dare County. A series of meetings were held with local officials and residents of East Lake and Manns Harbor. There was general support for the project from local officials and residents.

In 2002, the project was presented to Federal and State Resource and Regulatory Agencies to gain concurrence on the purpose and need for the project. Following the meeting, it was agreed that further work on the US 64 project would be postponed pending completion of a revised Hurricane Evacuation study. The hurricane model revisions were completed in 2005. Model development was accomplished in conjunction with an Oversight Committee consisting of representatives from NCDOT, FHWA, numerous state and federal environmental resource and regulatory agencies, and Emergency Management officials from North Carolina's coastal counties. It was agreed that an 18-hour standard for clearance times would be applied to a Category 3 storm with 75 percent tourist occupancy of the Outer Banks. The 18-hour goal was adopted by the North Carolina Legislature in 2005. Following the completion of the new Hurricane Evacuation Study, the project was reinitiated as a State funded Environmental Impact Statement.

A scoping meeting was conducted on February 6, 2007 followed by a Public Officials Meeting and Citizens Informational Workshop on March 14, 2007. Public officials from Tyrrell and Dare Counties and the Towns of Columbia and Manteo attended the public officials meeting. There was unanimous support for the project from all local officials. A NEPA/404 Merger 01 Purpose and Need meeting was conducted on June 14, 2007. The Merger Team agreed that a suitable Purpose and Need exists for the project.

NEPA/404 Merger 01 meetings to determine Alternatives to be Studied were held on June 19 and August 21, 2008. Concurrence was not reached by the Merger Team. The Team provided issue briefs to the next-level Merger Management Team, which includes representatives from COE, North Carolina Department of Environment and Natural Resources Division of Water Quality, Federal Highway Administration, and NCDOT. At a meeting on October 16, 2008, the Merger Management Team agreed on the alternatives to be studied in detail in the DEIS, including lane, shoulder, and median widths; bridge navigation height, and corridor locations. On October 20, 2008, the full Merger Team concurred on typical sections in Tyrrell County and Tyrrell and Dare county corridor locations. They further concurred that additional environmental analysis would be conducted to determine alignments to be evaluated in detail in the DEIS within the selected corridors.

Upon completion of the DEIS, NCDOT submitted a request to COE to solicit comment from the public in order to identify the Least Environmentally Damaging Practicable Alternative (LEDPA) for the project. The Merger Team will meet again during late 2012 to select a LEDPA; however multiple meetings are anticipated which results in a concurrence expectation of late 2012 or early 2013.

Citizen public hearings are being scheduled by NCDOT for early spring 2012, at which time citizens will be able to voice their opinions on the current alternatives under study. Citizen input will be considered during LEDPA deliberations by the Merger Team. After a LEDPA decision is made, the recommended alternative(s) will be reported in a Final Environmental Impact Statement (FEIS), along with any supplementary studies or additional information that is collected after the DEIS.

The DEIS is electronically available on the COE's Web site at: *http://www.saw.usace.army.mil/Wetlands/Projects/US 64Improvements* and also available on the NCDOT Web site at: *http://www.ncdot.gov/projects/us64improvements/*. Any person having difficulty viewing the document online can contact the COE project manager or the NCDOT project manager for a CD copy of the document. Hardcopies of the DEIS are available at the NCDOT's Resident Engineer's Office in Manteo, public libraries in Manteo and Columbia, and county offices in Manteo and Columbia.

After distribution and review of the DEIS and Final Environmental Impact Statement, the Applicant (NCDOT) understands that COE, in coordination with NCDOT, will issue a Record of Decision (ROD) for the project. The ROD will document the completion of the EIS process and will serve as a basis for permitting decisions by federal and state agencies.

To ensure that the full range of issues related to this proposed action is addressed and all significant issues are identified, comments and suggestions are invited from all interested parties. Comments or questions concerning this proposed action and the EIS should be directed to COE at the address provided.

The Wilmington District will periodically issue Public Notices soliciting public and agency comment on the proposed action and alternatives to the proposed action as they are developed.

Dated: February 8, 2012.

Henry M. Wicker,

Acting Chief, Wilmington Regulatory District.

[FR Doc. 2012–3751 Filed 2–16–12; 8:45 am]

BILLING CODE 3720–58–P

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

Process for Requesting a Variance From Vegetation Standards for Levees and Floodwalls; Additional Filings

AGENCY: United States Army Corps of Engineers, Department of Defense.

ACTION: Notice.

SUMMARY: The U.S. Army Corps of Engineers (USACE) is updating the process for requesting a variance from vegetation standards for levees and floodwalls to reflect organizational changes and incorporate current agency-wide review processes.

DATES: Written comments must be submitted on or before April 17, 2012.

ADDRESSES: You may submit comments, identified by docket number COE–2010–0007 by any of the following methods:

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

Email: tammy.conforti@usace.army.mil. Include the docket number, COE–2010–0007 in the subject line of the message.

Mail: U.S. Army Corps of Engineers, Attn: CECW–CE, Tammy Conforti, 441 G Street NW., Washington, DC 20314–1000.

Hand Delivery/Courier: Due to security requirements, we cannot receive comments by hand delivery or courier.

Instructions: Direct your comments to docket number COE–2010–0007. All comments received will be included in the public docket without change and may be made available on-line at *http://www.regulations.gov,* including any personal information provided, unless the commenter indicates that the comment includes information that is Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI, or otherwise protected, through regulations.gov or email. The regulations.gov web site is an anonymous access system, therefore, if you wish to provide your identity or contact information it must be included in the text of your comment. If you send an email directly to USACE, 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, we recommend 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 we cannot read your comment because of technical difficulties and cannot contact you for clarification, we may not be able to consider your comment. Electronic comments should avoid the use of any special characters, any form of encryption, and be free of any defects or viruses.

Docket: For access to the docket to read background documents or comments received, go to *www.regulations.gov.* All documents in the docket are listed. Although listed in the index, some information is not publicly available, such as 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.

FOR FURTHER INFORMATION CONTACT: Tammy Conforti, Levee Safety Program Manager, Headquarters, USACE, Washington, DC at 202–761–4649.

SUPPLEMENTARY INFORMATION: The variance request process was developed to implement Section 202(g) of the Water Resources Development Act (WRDA) of 1996. Consistent with our regulations for implementing NEPA for our Civil Works programs, we have included a Finding of No Significant Impact (FONSI) for review.

To comply with the requirements of the National Environmental Policy Act, a draft environmental assessment (EA) has been prepared. A copy of the draft EA is available at *www.regulations.gov* in docket number COE–2010–0007. If you would like to submit comments on the draft EA, you must do so before the end of the comment period specified in the **DATES** section above.

The current commenting period is the second solicitation for comments on the revised Process for Requesting a Variance from Vegetation Standards for Levees and Floodwalls. The first comment period was open from 9 February 2010 to 26 April 2010. USACE reviewed and considered 561 comments from 110 separate organizations and individuals. The USACE response to these comments received can be found at *http://www.nfrmp.us/guidance.cfm.*

Authority: We are proposing to issue this Policy Guidance Letter under the authority of 33 U.S.C. 701n.

Dated: February 7, 2012.

James C. Dalton,

Chief, Engineering and Construction, Directorate of Civil Works.

Policy Guidance Letter (PGL)—Process for Requesting a Variance From Vegetation Standards for Levees and Floodwalls

1. *Purpose.* This policy guidance letter (PGL) revises the procedures for obtaining a variance from U.S. Army Corps of Engineers (USACE) mandatory vegetation-management standards contained in Engineer Technical Letter (ETL) 1110–2–571—''Guidelines for Landscape Planting and Vegetation Management at Levees, Floodwalls, Embankment Dams, and Appurtenant Structures'' pursuant to Section 202(g) of the Water Resources Development Act (WRDA) of 1996. This PGL also includes timeframes and options for existing variances. These procedures align with the USACE Levee Safety Program goals of ensuring life safety as a top priority and applying consistent processes to make well-informed decisions. This PGL supersedes the existing regional variance policy and process contained in Engineer Regulation (ER) 500–1–1 and Engineer Pamphlet (EP) 500–1–1 (including Appendix E), dated 30 September 2001, and will serve as the applicable guidance until this process is incorporated into a USACE engineer publication.

2. *Applicability.* This PGL applies to all Headquarters USACE (HQUSACE) elements, Major Subordinate Commands (MSCs), districts, and field operating activities having responsibility for Civil Works projects. This policy applies to levees within the USACE Levee Safety Program, including those (1) USACE operated and/or maintained; (2) federally authorized, typically USACE constructed, and locally operated and maintained; and (3) locally constructed and locally operated and maintained, but associated with the USACE Rehabilitation and Inspection Program (RIP) (also known as the Pub. L. 84–99 program).

3. *References.*

a. Engineer Regulation (ER) 500–1–1, Emergency Employment of Army and Other Resources, Civil Emergency Management Program, 30 September 2001.

b. Engineer Circular (EC) 1110–2–6066, Design of I–Walls, 1 April 2011.

c. Engineer Circular (EC) 1165–2–209, Civil Works Review Policy, 31 January 2010.

d. Engineer Pamphlet (EP) 500–1–1, Emergency Employment of Army and Other Resources, Civil Emergency Management Program—Procedures, 30 September 2001.

e. Engineer Manual (EM) 1110–2–1913, Design and Construction of Levees, 30 April 2000.

f. Engineer Manual (EM) 1110–2–1601, Hydraulic Design of Flood Control Channels, 30 June 1994.

g. Engineer Manual (EM) 1110–2–2502, Retaining and Flood Walls, 29 September 1989.

h. Engineer Technical Letter (ETL) 1110–2–575, Evaluation of I-walls, 1 September 2011.

i. Engineer Technical Letter (ETL) 1110–2–571, Guidelines for Landscape Planting and Vegetation Management at Levees, Floodwalls, Embankment Dams, and Appurtenant Structures, 10 April 2009.

j. Engineer Technical Letter, (ETL) 1110–2–569, Design Guidance for Levee Underseepage, 1 May 2005.

k. Memorandum, HQ USACE (CECW–HS), Subject: Policy for Development and Implementation of System-wide Improvement Frameworks (SWIFs), 29 November 2011.

4. *Background.* The purpose stated in Section 202(g) of WRDA of 1996, is ''to provide a coherent and coordinated policy for vegetation management for levees'' so as to ''address regional variations in levee management and resource needs.'' In general, the resulting policy set forth in ER 500–1–1 allowed the levee sponsor, meeting all eligibility criteria for rehabilitation assistance pursuant to 33 U.S.C. 701n (Pub. L. 84–99), to seek a variance to USACE vegetation standards when such a variance would preserve, protect, and/or enhance natural resources and/or protect rights of Tribal Nations. However, it was required that the safety, structural integrity, and functionality of the levee, in addition to accessibility for inspection and floodfighting purposes be retained.

5. *Definitions.* For use in this document:

a. A *levee* consists of one or more earthen embankment or floodwall segments.

b. A *levee system* consists of one or more segments of earthen embankment or floodwall, and all appurtenant structures (such as closures, berms, pumping stations, culverts, and interior drainage) which are interconnected and necessary to reasonably reduce the potential of floodwater entering a defined area.

c. A *variance* is defined as alternative vegetation management standards to be applied to a levee system or portion thereof that provide for the same levee functionality as intended in ETL 1110–2–571.

6. *Eligibility Requirements for Requesting a Vegetation Variance.*

a. For consideration of a vegetation variance that preserves, protects, and/or enhances natural resources, the requester must demonstrate that a variance is the only reasonable means to achieve the following criteria:

(1) Comply with applicable law concerning the environment, cultural or historic preservation; or

(2) Protect the rights of Tribal Nations, pursuant to treaty, statute, or Executive Order; or

(3) Address a unique environmental consideration, such as to maintain sensitive species populations and to preclude the need for future federal listings under the Endangered Species Act (ESA), endorsed by the National Marine Fisheries Service (NMFS) or U.S. Fish and Wildlife Service (USFWS).

b. Levee systems as described below do not have to meet the criteria established in Paragraph 6.a. in order to be eligible to request a variance:

(1) Existing levees, federal or non-federal, in which it can be demonstrated through written documentation that there is an existing vegetation variance or vegetation deviation agreement between the local USACE District and the levee sponsor prior to the date of this memorandum; or,

(2) Levee systems for which a variance is requested for a planting berm.

c. A USACE District may submit a vegetation variance request for the following situations (**Note:** For Paragraphs 1–3 below, criteria established in Paragraph 6.a. do not have to be met and the USACE District must have concurrence from the levee sponsor):

(1) Federally authorized levees that have advanced into the preconstruction, engineering, design (PED) or construction phase of development, but for which USACE has not provided written notice of their completion and of the levee sponsor's duty to begin operation, maintenance, repair, rehabilitation, and replacement as of the date of this memorandum; or,

(2) Existing federally authorized levees in which it can be demonstrated that vegetation was previously part of the original design prior to the date of this memorandum or,

(3) Existing federally authorized levees in which the existing operations and maintenance (O&M) manual allows vegetation within the vegetation-free zone or,

(4) Levee systems for which USACE has operations and/or maintenance responsibilities; or,

(5) In areas with ESA considerations or where the rights of Tribal Nations pursuant to treaty, statute, or Executive Order may be impacted, the USACE District may submit, in advance of actual need, cross-sections for Public Law 84–99 repairs that include vegetation, for a specific levee system. The submittal must:

(a) Have concurrence from the levee sponsor and, if different from the levee sponsor, the maintaining entity and,

(b) Have been shared with and commented on by the appropriate USFWS and/or NMFS office in order to anticipate measures that are likely to adequately address impacts to listed species and critical habitat in order to streamline formal consultation when repairs are to be implemented.

d. In addition to the requirements in Paragraph 6.a., all vegetation variance requests must also demonstrate that the following are retained:

(1) Structural integrity, and functionality of the levee system; and,

(2) Accessibility for operations, maintenance, repair, inspection, monitoring, and floodfighting of the levee system.

7. *Process.* A request for a vegetation variance can originate from a USACE District (see Paragraph 6.c.) or a levee sponsor. In cases where a levee sponsor is considering applying for a vegetation variance, it is recommended that the levee sponsor contact their respective USACE District and review minimum requirements as set forth in Enclosures 1–3. Early coordination between USACE and the levee sponsor is strongly recommended because it will aid in focusing efforts and minimizing costs. Once the vegetation variance request has been submitted, the following describes the process USACE will follow to review the request.

a. The USACE District shall ensure timely coordination with appropriate federal and state agencies and Tribal Nations concerning regional environmental, cultural, and historic considerations throughout the vegetation variance request process. The USACE District shall notify the appropriate regional offices of the federal resource agencies and Tribal Nations in writing within 30 days upon initiation of a vegetation variance request or when a request has been received.

b. The USACE District (along with the levee sponsor if appropriate) shall initiate timely coordination upon initiation of a vegetation variance request with the MSC and the Vegetation Variance Lead for the Risk Management Center (RMC) to assure that the review process is well coordinated and allows for timely feedback on submittal requirements. This early coordination in the development of the variance request is intended to appropriately scale the scope of the request and/or identify conditions for which variance approval is unlikely.

c. The USACE District Levee Safety Officer (LSO) shall review the variance request for completeness and compliance and recommend initiation of an Agency Technical Review (ATR) to the RMC.

d. The RMC shall lead and manage the ATR for each variance request. HQUSACE will fund the ATR. The timeline for the ATR will depend on the complexity of the request, but will not exceed 90 days after the ATR team receives the final request package unless special circumstances warrant additional time. The ATR will be documented and certified as per requirements in EC 1165–2–209. Final ATR documentation shall be part of the variance request package. The following are the typical disciplines that will be included on the ATR team: geotechnical, geological, hydraulics/hydrology, environmental/biological sciences, emergency management, operations/maintenance, and landscape architecture. Other disciplines will be added to the ATR team as needed and based on the variance request.

e. Following completion of the ATR, the USACE District Commander shall either endorse or not endorse the request and provide the rationale for the recommendation. If the request is endorsed, the District Commander shall submit the request package through the MSC LSO to the MSC Commander. The USACE MSC LSO shall review the request and recommend to the MSC Commander, either for or against endorsement. The USACE MSC Commander shall either endorse or not endorse the request and provide the rationale for the recommendation. If endorsed, the USACE MSC Commander shall submit the request to HQUSACE, via the Regional Integration Team (RIT) process, for approval.

f. The HQUSACE LSO, or the HQUSACE LSO designee, will be the final approving official for the request and will document the basis for the decision.

g. The USACE District shall serve as the main point of contact for coordination with the levee sponsor throughout the variance request process, including providing the levee sponsor with documentation of final decision of the vegetation variance request.

h. All final documentation for the vegetation variance request shall be uploaded by the USACE District to the National Levee Database (NLD).

i. Upon final approval but prior to implementation of the variance, the USACE District and the requester shall sign a Vegetation Variance Agreement, based on the template at Enclosure 2. The USACE District shall involve the District Office of Counsel in the drafting of the agreement. The agreement can be approved and executed at the District level unless changes to the template are made that would affect the terms of the approved variance. For levee systems with multiple levee sponsors, each levee sponsor must sign the agreement and certificate of authority.

j. During inspections, levees will be rated for eligibility for federal rehabilitation assistance under Public Law 84–99 in accordance with the levee inspection checklist and requirements set forth in an approved variance(s). Levee systems with an Acceptable or Minimally Acceptable rating will remain eligible for federal rehabilitation assistance under Public Law 84–99, including any features associated with an approved variance such as planting berms and overbuilt sections

k. The associated vegetation management plan and approved variance shall be added to the levee's operation and maintenance (O&M) manual as an addendum.

8. *Vegetation Variance Request Submittal Requirements.* Submittal requirements are detailed in Enclosure 3.

9. *Special Considerations.* The following points should be considered prior to initiating a vegetation variance request.

a. This vegetation variance policy does not apply to embankment dams and their appurtenant structures, channels, or shore-line or river-bank protection systems such as revetments, sand dunes, and barrier islands.

b. New federally authorized cost-shared levee projects shall be designed to meet the current vegetation management standards. It should be noted that landside planting berms may be incorporated into a new levee project design without a vegetation variance request.

c. Regional variances or variances that cover all levees within a geographical area will not be issued. Vegetation variances will be considered only for individual levee systems or portions thereof. However, regional conditions, with regard to soils, local climate and vegetation, and other pertinent factors, will be taken into consideration.

d. To ensure the ability to implement floodfighting activities, such as placement of sandbags or other temporary floodfight measures near the waterside crown, and to see areas of distress on the landside during a flood event, typically the upper third of the waterside slope, the crown, the landside slope, and within 15 feet of the landside toe (subject to preexisting real estate interest) of the levee needs to remain vegetation free, as defined in ETL 1110–2–571. Any vegetation variance requests proposed for these areas will be carefully evaluated to ensure requirements in Paragraph 6 are met.

e. The types of approvable vegetation variances near floodwalls may be very limited, especially for I-walls of concern as identified per Paragraph 3.h. For floodwalls, the landside and waterside corridors are areas of particular concern due to potential impacts of root damage to joints, drains, and foundations, as well as, acute tree-overturning damage (breakage, destabilization and displacement). Any vegetation variance requests proposed for areas containing floodwalls will be carefully evaluated to ensure requirements in Paragraph 6 are met.

f. The vegetation variance process is not a mechanism to validate conditions that have developed as a result of inadequate levee operations and maintenance.

g. Past USACE inspection reports that did not identify noncompliant vegetation as a deficiency do not constitute an existing vegetation variance or approved deviation.

h. In the case of a levee sponsor seeking initial eligibility for federal rehabilitation assistance under Public Law 84–99, prior to acceptance, the levee system must meet all eligibility requirements including current vegetation standards or an approved vegetation variance must be obtained if criteria in Paragraph 6 are met.

i. To avoid duplication of effort, vegetation variance applications involving planting berms that are part of a study or PED should take advantage of the analysis and documentation review performed as part of the authorized project (see Enclosure 3, Figure 3).

j. If implementation of a vegetation variance will constitute a modification or is part modification of a federally authorized levee, then the levee sponsor must also seek approval under 33 U.S.C. 408 as part of the vegetation variance

request. The levee sponsor should work with the USACE District to ensure that the variance request satisfies the requirements of the current guidance on the implementation of 33 U.S.C. 408.

k. USACE District costs for processing or submitting a vegetation variance request shall be funded by the appropriate account based on authorization of the levee system (Operations and Maintenance (O&M) General, Inspection of Completed Works, or Flood Control and Coastal Emergencies).

l. For instances in which a request for a vegetation variance accompanies or is part of other actions that require the execution of an agreement between the levee sponsor and USACE (e.g., modifications under 33 U.S.C. 408 or Public Law 84–99 repairs), a single agreement that satisfies the requirements for each of the actions should be used. In such cases, the template agreement at Enclosure 2 need not be used, but the substantive terms from the template should be incorporated into the agreement that is signed. The USACE District shall ensure coordination with USACE District Office of Counsel on final agreements.

m. The process outlined in this memorandum may be implemented as part of a system-wide improvement framework (SWIF) per Paragraph 3.k. Enclosure 4 contains scenarios for the vegetation variance process and SWIFs.

10. *Timeframes for Existing Vegetation Variances or Other Vegetation Deviations.* Deviation from the national standards as defined in ETL 1110–2–571 is permitted only through a vegetation variance approved by the HQUSACE LSO via the process described herein. USACE recognizes that areas with sensitive environmental considerations will require planning and coordination; therefore, the following provisions are being provided:

a. For levees meeting the requirements of Paragraph 6.b.1, the levee sponsor will have one year from the date of this memorandum to submit a letter of intent to their respective USACE District expressing intent to either submit a vegetation variance request or develop a system-wide improvement framework (SWIF) as per Paragraph 3.k.

(1) If the decision is to submit a vegetation variance, the levee sponsors will have one additional year to submit a vegetation variance request. Until the vegetation request is submitted and the review process is complete, the levee system will continue to be inspected in accordance to the existing vegetation variance or other vegetation deviation for determining Public Law 84–99 rehabilitation assistance eligibility.

(2) If the decision is to develop and implement a SWIF, procedures in Paragraph 3.k. shall be followed. For levee sponsors already implementing an agreed SWIF, no letter of intent is required.

b. For levee sponsors with existing vegetation variances or deviations that do not submit a letter of intent, vegetation variance request, or SWIF by the required timelines, the existing vegetation variances, agreements, or other deviations applied to their levees may no longer be considered valid. The USACE District should verify with the levee sponsors if they wish to continue participating in Public Law 84–99. If the levee sponsor does choose to continue their participation, the USACE District LSO will inform the levee sponsor via letter (copy furnished to the MSC and HQUSACE LSO) of the vegetation management standards to be applied to that levee.

c. For levees that meet the requirements of Paragraph 6.c.2 and/or 6.c.3 and currently have an Acceptable or Minimally Acceptable inspection rating, excluding the vegetation designed into the levee by USACE and/or allowed by USACE in the O&M manual (in other words the levee has been properly maintained in accordance to the current O&M manual), the USACE District will have one year from the date of this memorandum to submit a letter to the MSC LSO expressing intent to either submit a vegetation variance request or pursue a plan to meet ETL 1110–2–571. It must be demonstrated that the letter of intent was coordinated with the levee sponsor(s). For levees that meet the requirements of Paragraph 6.c.2 and/or 6.c.3 and currently have an Unacceptable inspection rating, the levee sponsor must correct the unacceptable deficiencies, excluding the vegetation designed into the levee by USACE and/or allowed by USACE through the O&M manual, prior to the USACE District taking action to seek a vegetation variance or plan to meet ETL 1110–2–571. Should the levee sponsor seek a SWIF per Paragraph 3.k, then the USACE District shall ensure that its action to pursue a variance or other means to meet ETL 1110–2–571 is incorporated into the comprehensive SWIF process.

d. For levees meeting the requirements of Paragraph 6.c.1, depending on the status of the project phase, USACE Districts must either submit vegetation variance request or pursue a plan to meet ETL 1110–2–571 as soon as possible.

e. For levee systems operated and maintained by USACE, the USACE District will have one year from the date of this memorandum to submit a letter to the MSC LSO expressing intent to either submit a vegetation variance request or pursue a plan to meet ETL 1110–2–571.

f. USACE Districts should copy furnish all letters of intent to the HQUSACE LSO.

11. *Environmental Compliance.* USACE is responsible for assuring compliance with all applicable environmental requirements before a decision can be made on a vegetation variance request. As a condition of the levee sponsor choosing to participate in Public Law 84–99, the levee sponsor is responsible for providing all background studies, data, and other information required by USACE to complete the environmental compliance processes under the National Environmental Policy Act (NEPA), ESA, and any other applicable environmental resource protection statute (except for those instances in which a USACE District is the proponent of a variance as provided in Paragraph 6.c.). The documentation must analyze, as alternatives, the effects of the implementation of the proposed vegetation variance and the implementation of the national standards. The levee sponsor must commit to implementation of any measures (such as monitoring, reasonable and prudent alternatives, etc.) needed to comply with ESA or other legal requirements before the levee sponsor may participate, or continue participation, in the Public Law 84–99 program and must commit to bearing the costs for implementation of these measures.

12. *Submittal Process for New Vegetation Related Science and Technology.* For instances in which an entity would like to submit new science or technology related to vegetation for USACE consideration, submitters must ensure that any submitted document produced from research be peer reviewed prior to following the submittal process described below. Documents submitted to USACE through this process must be submitted by the author(s) of the documents. Submittal packages should be sent to the US Army Engineer Research and Development Center (ERDC), 3909 Halls Ferry Road, Vicksburg, MS, 39180, Point of Contact (POC): To Be Determined (TBD).

a. Submittal of a peer-reviewed final document must include the following:

(1) Cover letter by the submitter requesting USACE consideration for

identified relevant areas of application within USACE existing policies; and,

(2) Documentation of the peer review demonstrating that a standard procedure for peer review was followed; and,

(3) Relevant documents for the science and technology submitted.

b. Once a submittal package is received, the responsibilities of ERDC are as follows:

(1) Inform HQUSACE (CERD) of receipt of the submittal; and,

(2) Review the submittal package to ensure that peer review requirements have been met; and,

(3) Review, evaluate, and summarize the methods, procedures, and results; and

(4) Provide the ERDC evaluation and submittal package to HQUSACE within 60 days of receiving the submittal package.

c. Once the ERDC review is received, the responsibilities of HQUSACE (CERD in coordination with applicable Communities of Practice) are as follows:

(1) Review the ERDC summary and submittal documents for potential applicability within USACE; and,

(2) Further coordinate with ERDC, if needed; and,

(3) Provide a written response letter and the basis for the HQUSACE determination to the submitters within 60 days of receiving the ERDC evaluation.

13. After vegetation variance request packages are reviewed through this process, results will be posted by the HQUSACE LSO to the Levee Safety Community of Practice page, on the Technical Excellence Network (TEN) at *https://ten.usace.army.mil.*

14. The points of contact for this guidance are (TBD).

James C. Dalton, P.E., SES,
Chief, Engineering and Construction Directorate of Civil Works

Enclosures:

1. Submittal Checklist and Review and Approval Signature Sheet
2. Vegetation Variance Agreement
3. Submittal Requirements
4. Scenarios and Timelines for Attaining Compliance with USACE Standards
5. Scenarios of Responsibility for Pre-Existing Variances and Other Documented Deviations

Enclosure 1—Submittal Checklist

Vegetation Variance Request Submittal Checklist

The items checked below are submitted herewith, consistent with the requirements outlined in Enclosure 3 (Vegetation Variance Request Submittal Requirements) of Policy Guidance Letter (PGL)—Process for Requesting a Variance from Vegetation Standards for Levees and Floodwalls, dated TBD.

☐ (1) A general description of the levee system.

☐ (2) A brief narrative describing the proposed vegetation variance.

☐ (3) A brief narrative explaining why the proposed changes are necessary to address the criteria presented in PGL Paragraph 6.

☐ (4) Detailed, annotated, plan and section drawings and photographs.

☐ (5) All pertinent engineering analyses: cross-section, hydraulic, geotechnical, and structural, as needed.

☐ (6) The most recent Routine Inspection Report and Periodic Inspection Report completed by the USACE District.

☐ (7) A summary of levee system performance history for all significant flood events.

☐ (8) A Vegetation Management Plan, detailing the conditions to be maintained.

☐ (9) Any National Environmental Policy Act (NEPA), Endangered Species Act (ESA), or other environmental compliance documentation that the USACE District determines necessary to the review.

☐ (10) Any requested excerpts of the current project O&M manual.

☐ (11) Any other information, as appropriate to specific conditions.

☐ (12) ATR team review documentation.

☐ (13) The Requester's primary point(s) of contact (POCs) for this request, as follows.

NAME:
ORGANIZATION:
TITLE:
TELEPHONE:
E-MAIL ADDRESS:

Enclosure 1—REVIEW AND APPROVAL SIGNATURE SHEET

SUBMITTED BY:

The *(name of entity) (signature)*

(full name, typed) (title, in full)

DATE

(If a USACE District is the submitter, additional levee sponsor signature blocks shall be added to ensure all levee sponsors concur. If a levee system has multiple levee sponsors, additional levee sponsor signature blocks shall be added for each levee sponsor's signature.)

REVIEWED BY:

U.S. Army Corps of Engineers, (*insert name*) District

(signature)

(full name, typed)

Levee Safety Officer

DATE

ENDORSED BY:

U.S. Army Corps of Engineers, Risk Management Center

(signature)

(full name, typed)

Leader, Agency Technical Review Team

DATE

ENDORSED BY:

U.S. Army Corps of Engineers, (*insert name*) District

(signature)

(full name, typed)

Commander

DATE

REVIEWED BY:

U.S. Army Corps of Engineers, (*insert name*) MSC

(signature)

(full name, typed)

DATE

Levee Safety Officer

ENDORSED BY:

U.S. Army Corps of Engineers, (*insert name*) MSC

(signature)

(full name, typed)

Commander

DATE

APPROVED BY:

U.S. Army Corps of Engineers, HQ

(signature)

(full name, typed)

Levee Safety Officer

DATE

Enclosure 2—VEGETATION VARIANCE AGREEMENT

Vegetation Variance Agreement

for

(*enter the levee system name, location and ID number, as defined in the National Levee Database*)

I. *Purpose.* The purpose of this Agreement is to allow for specific and limited variance from US Army Corps of Engineers (USACE) vegetation standards, for the levee named above.

II. *Authority.* This Agreement is made pursuant to the authority of Public Law 99, 84th Congress (33 U.S.C. 701n), as regulated by Title 33, Code of Federal

Regulations, Sections 203 and 208.10, and as implemented by policy guidance letter, Subject: Policy Guidance Letter—Requesting a Variance from Vegetation Standards for Levees and Floodwalls, dated TBD.

III. *Applicability.* This Agreement is applicable only to those portions of the above-named levee system that are identified as *vegetation variance zones* in the attached submittal drawings.

IV. *References. (Insert any references that are applicable, including the existing project cooperation agreement. This could include state law, county ordinances, Federal or state court documents, technical manuals, etc. References may be incorporated into this Agreement).*

V. *Scope.* A detailed description of the conditions proposed under this Agreement is provided in attachment *(attach approved vegetation request package).*

VI. Actions During and After Emergencies

A. Definition of Emergency. For the purposes of application of this Agreement, the term *emergency* is defined as any situation as declared by the District Commander in which a levee is threatened with either failure or overtopping.

B. Definition of Flood Fight. For the purposes of application of this Agreement, the term *flood fight* is defined as actions taken immediately before or during a flood to protect human life and reduce flood damages, such as evacuation, emergency sandbagging and diking, and providing assistance to flood victims.

C. Conduct of Flood Fight Activities. During an emergency, any responsible party engaged in flood fight activities, to specifically include the USACE, the *(list states, cities, or counties as necessary),* and the levee sponsor may take whatever actions are necessary to preserve the structural integrity of the levee addressed by this Agreement. Actions necessary to preserve the structural integrity of the system may include removal of any and all vegetation on or near the levee or floodwall.

D. Rehabilitation. Any levee repairs, modifications, or improvements following the emergency event shall be in accordance with current USACE vegetation management standards or the approved vegetation variance for the levee.

VII. Obligations of the Levee Sponsor

A. The levee sponsor agrees to maintain the levee system in accordance with the attached approved vegetation variance and assume the responsibility for implementing and bearing the costs of any measures that are required for compliance with the ESA or any mitigation requirements that result from environmental compliance processes such as the NEPA or required permits.

B. The levee sponsor shall hold and save the Government free from all damages arising from any and all activities associated with this Agreement.

VIII. Notices

A. All notices, requests, demands, and other communications required or permitted to be given under this Agreement shall be deemed to have been duly given if in writing and delivered personally, given by prepaid telegram, or mailed by first-class (postage prepaid), registered, or certified mail, to the address provided.

B. A party may change the address to which such communications are to be directed by giving written notice to the other parties in the manner provided in Paragraph C (below).

C. Any notice, request, demand, or other communication made pursuant to this Article shall be deemed to have been received by the addressee at such time as it is personally delivered, or, seven calendar days after it is mailed.

IX. Expiration of This Agreement

(Approval of this agreement may be contingent upon agreement to an expiration mechanism. Use one of the three conditions below to complete this paragraph.)

(This Vegetation Variance is intended to be permanent.)

(This Vegetation Variance shall expire on [insert date].)

(This Vegetation Variance shall expire upon [explain event].)

However, the Corps reserves the right to revoke this Agreement if USACE determines that it results in conditions that threaten levee system reliability and public safety.

X. Signatures

IN WITNESS HEREOF, the parties hereto have executed this Agreement, which shall become effective upon the date it is signed by the USACE District Commander.

THE DEPARTMENT OF THE ARMY

BY: _____

(signature)

(full name, typed)

DISTRICT COMMANDER

(district name) DISTRICT

DATE: _____

BY: _____

(name of requester)

(signature)

(full name, typed)

(title)

DATE: _____

(Other signature blocks may be added as necessary.)

XI. Certificate of Authority

Certificate of Authority

I, _____ _____ _____, do hereby certify that I am the principal legal officer of the *(Name of Public Sponsor),* that *(Name of Public Sponsor)* is a legally constituted public body with full authority and legal capability to perform the terms of the Agreement between the Department of the Army and the *(Name of Public Sponsor)* in connection with this Vegetation Variance Request and Agreement Addressing the Vegetation Standards for *(enter the levee system name and location, as defined in the National Levee Database)* and that the persons who have executed this Agreement on behalf of *(Name of Public Sponsor)* have acted within their statutory authority.

IN WITNESS WHEREOF, I have made and executed this certification this __ _____ day of _____ 20____.

(Name of Counsel for signing entity)

(Full Formal title)

Enclosure 3—VEGETATION VARIANCE REQUEST SUBMITTAL REQUIREMENTS

Submittal Requirements

Recommended First Steps

1. Contact the local USACE District. Early coordination may help to focus efforts and minimize costs.

2. Consider submittal requirement in Paragraph 4.b.(2) below. If the *prism* is not smaller than the existing levee cross section, it is unlikely that a variance involving woody vegetation will be approved without compensating structural modifications.

3. Please note the following points:

a. A variance may not result in an expected level of reliability below that provided by a structure designed to minimum standards as detailed in the following USACE Engineer Manuals (EMs), Engineer Technical Letters (ETLs), and Engineer Circular (EC).

(1) EM 1110–2–1913, Engineering and Design—Design and Construction of Levees, 30 April 2000

(2) EM 1110–2–1601, Engineering and Design—Hydraulic Design of Flood Control Channels, 30 June 1994

(3) EM 1110–2–2502, Engineering and Design—Retaining and Flood Walls, 29 September 1989

(4) ETL 1110–2–575, Evaluation of I-walls, 1 September 2011

(5) ETL 1110–2–569, Engineering and Design—Design Guidance for Levee Underseepage, 1 May 2005 (in-effect through August 2012, content to be incorporated into other guidance)

(6) EC 1110–2–6066, Engineering and Design—Design of I–Walls, 1 April 2011

b. Minimum design standards may not be sufficient for all situations: sufficiency of minimum standards, for specific conditions, will be subject to engineering analysis and evaluation.

c. The levee, or floodwall, and any appurtenant structures are designed to function together, as a system. Any likely incidental impacts to system functionality must also be considered.

d. A request for a vegetation variance for a planting berm need not satisfy the environmental or Tribal criteria outlined in Paragraph 6.a. of the PGL, and it need not address the associated submittal requirement in Paragraph 3 (below).

e. The graphic information provided in response to the submittal requirements in Paragraph 4 (below), and the *vegetation management plan* provided in response to Paragraph 8 (below), together shall fully define the extent and conditions of the vegetation variance.

f. The USACE District shall assure the accuracy of all information submitted in satisfaction of the Submittal Requirements.

Submittal Requirements

Information satisfying the numbered requirements below shall be submitted in Adobe Systems portable document format (PDF), under cover of the completed *Submittal Checklist* provided herein, Enclosure 1. The Review and Approval Signature Sheet shall then be attached to the vegetation variance request package for tracking of the review process. Advance coordination between the requestor(s), the USACE District/MSC, and the Risk Management Center (RMC), prior to preparing the variance request, is recommended and may result in situation-specific amendment to these submittal requirements. Any clarifications to this guidance, and examples of vegetation variance request documents, will be available through the USACE District.

1. A general description of the levee system including system name, project authority, location, and National Levee Database (NLD) identification number (available through the USACE District).

2. A brief narrative describing the proposed deviations from the USACE vegetation-free-zone standards prescribed in ETL 1110–2–571 *Guidelines for Landscape Planting and Vegetation Management at Levees, Floodwalls, Embankment Dams, and Appurtenant Structures.* Include a general description of existing and proposed plant locations, and type of vegetation (e.g. tree or shrub). Also include a representative list of species and the following characteristics of each, at maturity and, if different, at the maximum maturity to be permitted under the *vegetation management plan:* height, crown diameter, and root pattern and extent (horizontal and vertical). Cite source(s) used for information on plant characteristics.

3. A brief narrative explaining why the proposed variance(s) are necessary to address the criteria presented in Paragraph 6.a. of the main policy memorandum. Explain why these needs cannot be satisfied at a location other than on the levee; what alternatives to a vegetation variance were considered, and why the requested variance the only reasonable means to address applicable criteria. If Paragraph 6.a. of the PGL does not apply then simply state why it does not.

4. Detailed, annotated, plan and section drawings, and photographs, using an 11 x 17 format at a scale and resolution appropriate to the level of detail and enlarged on-screen viewing, which clearly convey pertinent information as follows:

a. Provide a plan-view drawing, showing the overall levee system, in context, and identifying each reach to which the variance is to apply. As used here, the term ''reach'' may be defined as follows: a length of levee that may be accurately represented by a single cross-section drawing and set of conditions. Provide overall stationing (in feet or miles), and identify the beginning and ending points for each levee reach to be considered. The variance request should not include any portion of the levee system for which there are reasonable alternatives; for example, a variance will not be granted for an entire levee system when only a portion of that system meets the criteria described in Paragraph 6.a. of the PGL.

b. Provide a cross-section drawing for each levee reach to which the variance is to apply. Each cross-section drawing shall include the following information.

(1) Show, label, and dimension the entire levee and/or floodwall. Include any existing or proposed planning berms. Include any appurtenant structures (e.g. berms, reinforcement, cut-off walls, drains, relief wells) necessary for reliable performance. Include the stream bank (to the stream bottom) and any other pertinent features, such as roads or trails.

(2) Show, label, and dimension the levee *prism* (see Figure 1). The prism is the minimum analytical cross section that, given site-specific soil conditions, satisfies all applicable design criteria with regard to seepage and slope stability, as defined in EM 1110–2–1913 and ETL 1110–2–569. In addition, if the USACE District levee design standards exceed the minimums defined in EM 1110–2–1913, or conditions warrant, the USACE District may require a larger prism. The prism must also satisfy the requirements of any other applicable standard. For example, some USACE District projects adhere to the *Code for Utilization of Soil Data for Levees,* Mississippi River Commission, Vicksburg, Mississippi, April 1947, applicable to Mississippi River and Tributaries levees. The determination and documentation of site-specific soil conditions shall be consistent with the requirements and procedures outlined in EM 1110–2–1913, and must be confirmed by the District. The prism shall assume loading to the top of the structure; or, where loading to top of structure is not possible, maximum possible loading. Note: variance approval is unlikely where the analytical prism is equal to or larger than the existing levee cross section.

(3) Show, label, and dimension the project right-of-way.

(4) Show to-scale, annotated soil profiles, to an appropriate depth but not less than 20 feet below the levee toe. The determination and documentation of site-specific soil conditions shall be consistent with the requirements and procedures outlined in EM 1110–2–1913.

(5) Show, label, and dimension the extent of the requested Variance Zone and the remaining Vegetation-Free Zone.

(6) Show, label, and dimension any structural modifications proposed in conjunction with existing or proposed vegetation.

(7) Include a graphic velocity profile, on the waterside, indicating flow rates at pertinent water surface elevations, including the design-event, the flood of record, and top-of-structure.

(8) Indicate the *normal water elevation.* For variance purposes, the *normal water elevation* is that below which riparian terrestrial plant species are unable to thrive, due to the frequency and duration of inundation.

(9) Indicate the *Ordinary High Water Mark.* The *Ordinary High Water Mark* is used to establish waterway boundaries, it is a regulatory term defined in ETL 1110–2–571 and in the Code of Federal Regulations (CFR)—33 CFR Part 328.3 (e).

(10) List the dominant plant species likely to occupy the proposed variance zone: include those known to be the largest (in cross-sectional crown area) and to have the most extensive root systems. Cite source(s) used for information on plant characteristics.

(a) Of these species, select the one with the most extensive likely root system: this will often be the species with the largest cross-sectional crown area at maturity. If two species have the most extensive likely root system (one for depth and one for spread) select both.

(b) Develop a cross-sectional illustration of the selected species: if two species were selected, the illustration shall show the larger of the two, with a composite root system showing the complete root systems of both. The entire individual (or composite) shall be shown to-scale, at maturity (or, if different, at the maximum maturity to be permitted under the *vegetation management plan*), as developed in-the-open, under local conditions (e.g. climate, soils, and moisture conditions)—and shall clearly show the typical extent and character of the mature root system, truncated at the point where roots are no greater than 0.5 in. in diameter. Root depth assumptions must be developed specific to species and local conditions. Unless reliable information to the contrary is presented, it shall be assumed that roots greater than 0.5 in. in diameter will extend to the edge of the natural canopy of the mature tree or shrub. The ATR team will determine the acceptability of information on a case-by-case basis.

(c) Place the completed illustration of this individual in the cross-section drawing(s). If specific planting locations are not known, then place an instance of the illustration, centered, on both the upper and lower boundary line of the proposed variance area. If the distance between the two is such that the illustrated root systems do not meet or overlap, then place one or more additional illustrations between the two. In the cross section below each of these illustrations, show the *potential pit,* as an arc (as shown in Figure 2b.), centered under the trunk of each illustrated tree.

c. For each levee reach, provide representative, appropriately-scaled photographs both plan view (aerial) and cross-sectional (oblique angle photos taken from ground level looking towards the cross-sectional view) of the levee clearly showing existing conditions.

d. Provide details of any structural measures (such as armoring or overbuilt sections) intended to preserve system reliability and resiliency by preventing or mitigating vegetation impacts.

5. Provide the following analyses illustrating that the changes proposed will result in conditions consistent with the criteria in PGL Paragraph 6.d. of this policy. Include graphics, text, and other information (e.g. construction materials, methods, and standards) as needed to clearly support conclusions. Analyses must show that the levee *prism* (or floodwall) remains intact and consistent with the design and performance intent of the USACE design standards detailed in EM 1110–2–1913 (EM 1110–2–2502 and/or EC 1110–2–6066 (with consideration of ETL 1110–2–575) for floodwalls) and ETL 1110–2–569.

a. Cross section analysis. The cross-section drawing(s) must demonstrate the following.

(1) No significant roots (those greater than 0.5 in. in diameter) will enter the levee *prism* or approach within 8 feet of structures critical to performance, such as drains or seepage-cutoff walls.

(2) No tree-overthrow pit will penetrate the levee *prism.* The *assumed pit/mound* is illustrated in Figure 2a and, in plan-view, is less than a full circle; however, because the tree may fall in any direction, the *potential* pit must be assumed to be a full circle. Unless reliable information to the contrary, acceptable to the ATR team, is available for a specific situation, the dimensions provided in Figure 2 shall be used. These dimensions, which are consistent with USACE observation and experience, were derived from field data presented in the following paper: Clinton, B.D. and C.R. Baker. 2000. ''Catastrophic windthrow in the southern Appalachians: characteristics of pits and mounds and initial vegetation responses.'' *Forest Ecology and Management* 126:51–60.

(3) No roots or tree-overthrow pit will significantly impact the function of any appurtenant structure, such as those designed to control seepage.

b. Hydraulic analyses must demonstrate the following, assuming worst-case combinations of flow, elevation, hydraulic roughness, duration, and velocity. Analysis must include the full range of flows encompassing the lowest levee-toe elevation to the highest top-of-levee elevation within the variance reach. Generally, the worst-case hydraulic condition results from a high-flow/low-tailwater-elevation combination. However, a full range of flow/tailwater combinations should be analyzed to ensure that the worst-case condition is accounted for. The worst-case size and density of vegetation must also be considered, assuming the highest annual crown foliage density.

(1) The overall level of flood risk reduction and reliability of the system must be maintained. Channel geometry and roughness changes shall result in no increase in water surface elevations for the required range of flows, as demonstrated by a graphic and a tabular summary of changes in water surface elevation and velocity that extends sufficiently upstream, because hydraulic impacts are typically transmitted upstream. If an increase in water surface elevations or velocities cannot be avoided, they must be mitigated.

(2) Erosion and scour, associated with standing vegetation, will not impact the levee *prism.* This analysis should utilize an appropriate methodology, such as application of an adapted bridge scour model or 2D/3D hydraulic design model, with sediment transport, that shall provide a quantitative assessment of the maximum extent of erosion and local scour potential. This analysis shall provide an estimate of the maximum extent of erosion and scour, which shall be illustrated in the cross-section drawing(s). This assessment shall cover long-term trends as well as event-driven scour/erosion.

(3) In the event of waterside tree overthrow, subsequent erosion and scour at the overthrow site will not impact the levee *prism.* Analyses must consider assumed pit/mound topography (as illustrated in Figure 2a) at all possible points on the variance cross section, determining the worst-case orientation to flow and the resulting extent of erosion and scour. This analysis should utilize an appropriate methodology, such as application of an adapted bridge scour model or 2D/3D hydraulic design model, with sediment transport, that considers the erosion mechanisms and local scour potential. This analysis shall provide an estimate of the maximum extent of erosion and scour, which shall be illustrated in the cross-section drawing(s).

c. Geotechnical analyses or review must determine that the levee *prism,* defined in submittal requirement in Paragraph 4.b.(2) (above), is sufficiently buffered from vegetation impacts.

d. Structural analyses must determine that floodwalls and other non-earthen structures are sufficiently buffered from vegetation impacts and that any proposed structures will function as intended.

e. Analysis must find that access is retained, consistent with the intent of Paragraph 6.d of the main PGL.

6. Provide the most recent Routine Inspection Report and Periodic Inspection Report completed by the USACE district.

7. Provide a summary of levee performance history for all significant flood events. Indicate the levee's authorized capacity (formerly referred to as the design flood or design water surface elevation) and, for each event, the year of occurrence, event probability (e.g., the 0.2% flood), flood duration, and description of any floodfighting challenges, failures, and outcomes.

8. Provide a *vegetation management plan,* detailing (1) the vegetation conditions to be maintained, (2) how and on what schedule the maintenance will be performed, and (3) how the boundaries of the vegetation variance zone will be clearly identifiable, on site, for maintenance and inspection purposes. The *vegetation management plan* shall also stipulate that all grades and cross sections shall be maintained as approved and that any reduction to grade or cross section will be restored in a timely fashion.

9. Provide any National Environmental Policy Act (NEPA), Endangered Species Act (ESA), or any other environmental compliance documentation that the district determines is required to conduct the review. Identify the pertinent paragraphs or sections.

10. Provide excerpts of the current project operations and maintenance (O&M) manual as requested as supplemental information for the review process.

11. Provide other information, as appropriate to specific conditions.

12. Provide the levee sponsor's primary point of contact (POC) for this request.

GLOSSARY OF TERMS USED IN FIGURES 1–3

Bank (Figure 1)

The *bank* is the ground line between the bottom and the top of the channel. When there is no significant horizontal separation between the top of the *bank* and the waterside levee *toe,* such that the *bank* slope and the waterside levee *slope* are essentially continuous, then the *bank* becomes critical to levee reliability, as significant erosion of the *bank* may result in a loss of *prism.*

Corridors (Figure 1)

Corridors provide a functional platform from which to conduct operations and maintenance activities, especially those involving major improvements or repairs. In addition, the landside *corridor* provides critical access during floodfighting operations, especially under conditions that prevent adequate access from the *crown.*

Crown (Figure 1)

The *crown* is the level top of the levee *design cross section.* It serves as the primary means of access for routine operations, but during major flood events may not be useable due either to saturation-induced reduction in stability or to floodfighting measures such as sandbagging.

Design Cross Section (Figure 1)

The *design cross section* consists of the *prism* plus any additional material provided to increase *crown* width and/or flatten *slopes* in order to reduce erosion or improve accessibility. Additional material and placement methods are often similar or identical to that used for the *prism.* While accessibility may be the purpose, the additional material also increases levee resiliency. A levee that meets USACE design standards has a *design cross section* that is equal to or larger than the *prism.*

Pit/Mound Topography (Figure 2)

The topography that results from the overturning of a tree; it includes the pit, the mound (or rootball) and the overturned tree.

Planting Berm—Landside (Figure 3)

Additional cross section required to accommodate desired vegetation. It preserves access and protects the *prism* from root-related damage. Analyses results may require cross section in excess of the prescribed minimums. To serve as compensation for lost landside access, the planting-berm *crown* must support all vehicular access necessary to inspection, maintenance, and floodfighting.

Planting Berm—Waterside (Figure 3)

Additional cross section required to accommodate desired vegetation. It preserves access and protects the *prism* from root-related damage. Analyses results may require cross section in excess of the minimums. Analysis must show no unacceptable impacts to channel capacity. The berm crown must support all vehicular access necessary to conduct inspection, maintenance, and floodfighting.

Prism (Figure 1)

The *prism* is the portion of the levee identified as the minimum acceptable cross section as defined in Paragraph 4.b. 2 (above, Enclosure 3), for a given water elevation, such as the design flood event. *Prism* dimensions, slopes, materials, and placement methods are designed to meet standards that will give reasonable assurance of successful performance. The *prism* is not typically designed to control underseepage.

Setbacks (Figure 1)

Setbacks are a sustainability measure for both the levee and environment. *Setbacks* are an important consideration that should be addressed in the plan-formulation process. While they are critical to sustainability of a floodplain, they are not specifically prescribed in the levee design manual (EM 1110–2–1913). The *waterside setback* provides space in which to maintain a measure of floodplain function and riparian habitat: this serves the environment, but also protects the levee from pressures to develop critical riparian habitat. Additionally, in-place riparian habitat serves as a protective buffer between the levee and erosive flows. The *landside setback* reserves space for future levee improvements or repairs: while this space is in reserve it may be used as a recreational greenway and/or a landscape buffer between the levee and adjacent development.

Slopes (Figure 1)

Levee *slopes,* among other considerations, must be sufficiently accessible to facilitate effective operation and maintenance activities that might be impractical on steeper *prism* slopes. A *slope* may have a spatial/functional relationship coincident with a *bank* (see Figures 1a. and 1b., respectively).

Toe (Figure 1)

The landside *toe* is generally the point at which the levee *slope* intersects with adjacent level ground. The waterside *toe* is generally the point on the waterside *slope* at which the elevation is equal to that of the landside *toe.* This is a general definition and there are nuances and exceptions.

Vegetation–Free Zone

The vegetation free zone (VFZ) includes the ground on, or within 15 feet of, the levee and its appurtenant structures. The VFZ shall remain free of any vegetation other than grasses, except as allowed in ETL 1110–2–571 and USACE vegetation variance policy.

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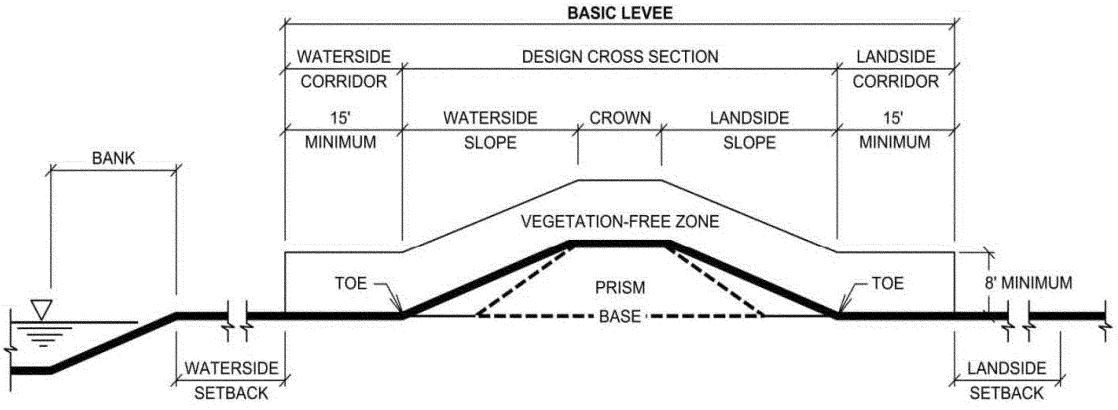
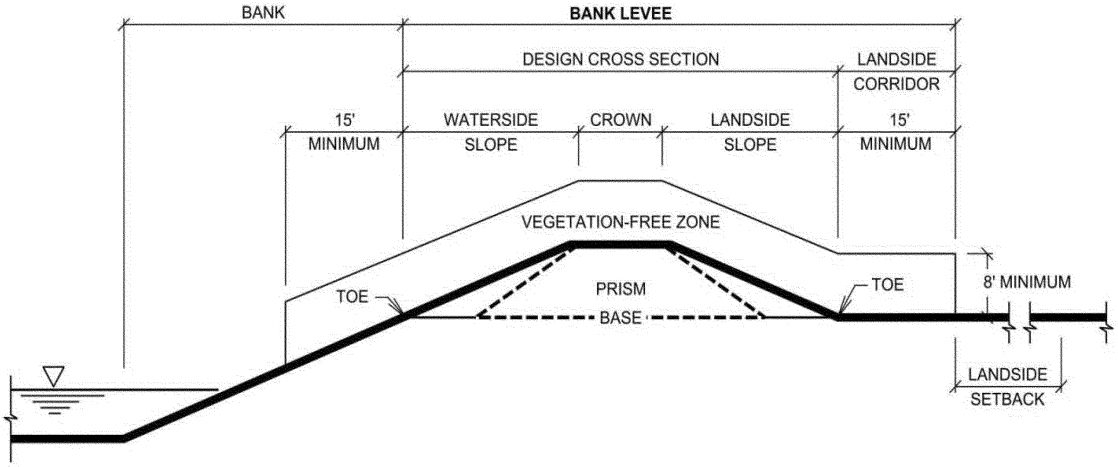
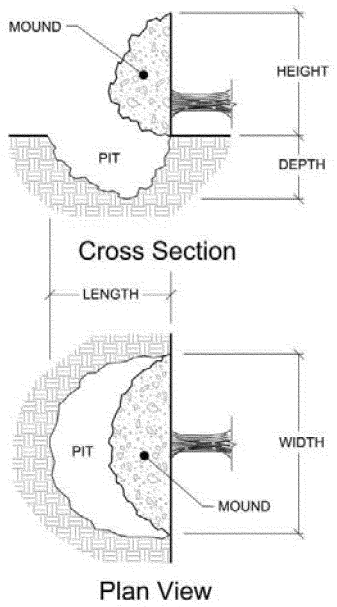


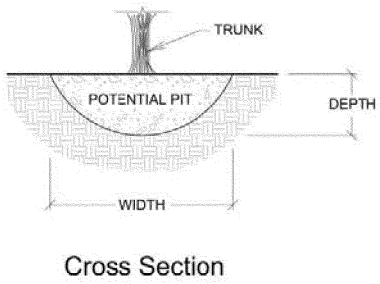
a. *Basic Levee* (above).



b. *Bank Levee* (above).

Enclosure 3, Figure 1: **Typical Levee Cross Sections.** The purpose of these illustrations is to define terms. These illustrations do not include appurtenant structures and do not represent all possible levee configurations. Analysis such as detailed in Enclosure 3, Paragraph 5.b.2 (above in Enclosure 3) may or may not show the *prism* to be smaller than the existing levee *cross section*.





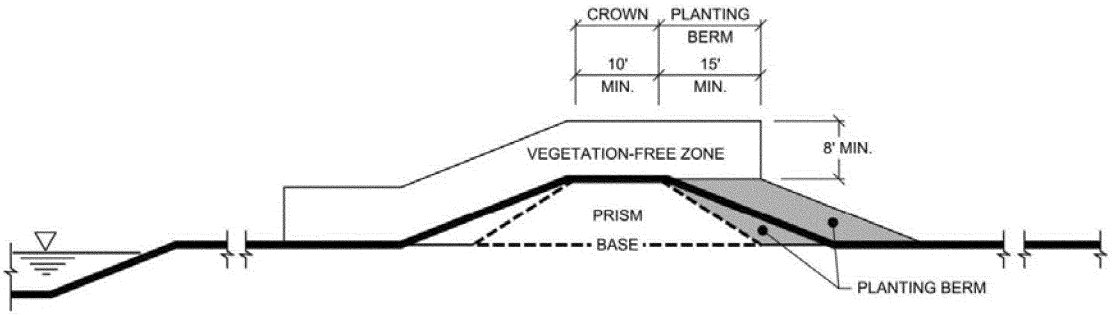
a. Assumed Pit/Mound (above). The *assumed pit/mound* represents the typical configuration and maximum likely dimensions of an overturning alteration to the cross section. It is provided as a standard basis for scour analysis.

b. Potential Pit (above). The *potential pit* is the total cross sectional area subject to loss on overturning. Because the direction of overturning may not be known in advance of overturning, the potential pit must account for overturning in any possible direction. It is provided as a means to determine whether or not overturning alone, without consideration for scour, would impact the prism.

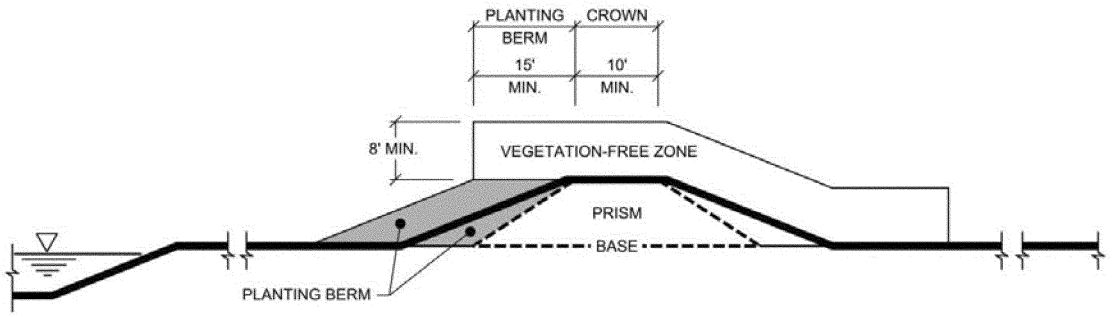
Maximum Plant Height (in feet, at maturity or as maintained)	< 10	10-20	20-30	30-40	40-60	60-80	80-100	>100
Depth (D)	NA	2	3	4	5	6	7	case by case
Length/Height (2D)		4	6	8	10	12	14	
Width (3D)		6	9	12	15	18	21	

c. Pit/Mound Dimension Values (above, in feet). Pit/mound dimensions other than the above may be considered for situations in which (a) the variance request presents reliable supporting information or (b) the ATR team deems it appropriate based on specific conditions.

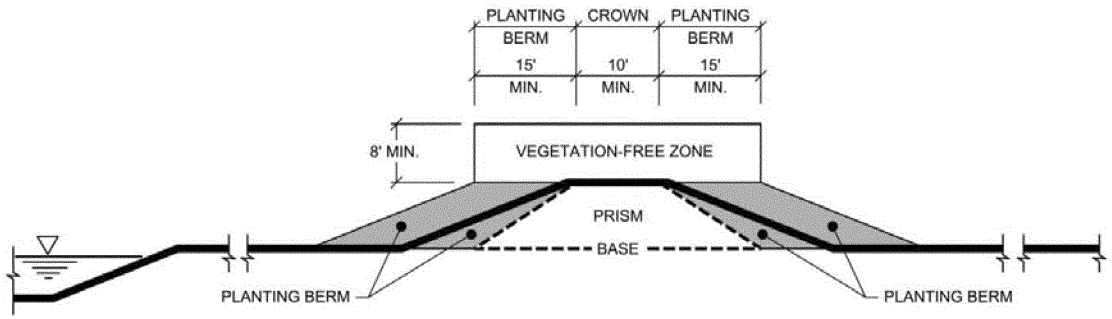
Enclosure 3, Figure 2: Pit/Mound Topography. The cross sections above assume no slope and must be adapted to actual slope conditions.



a. Landside Planting Berm (above).



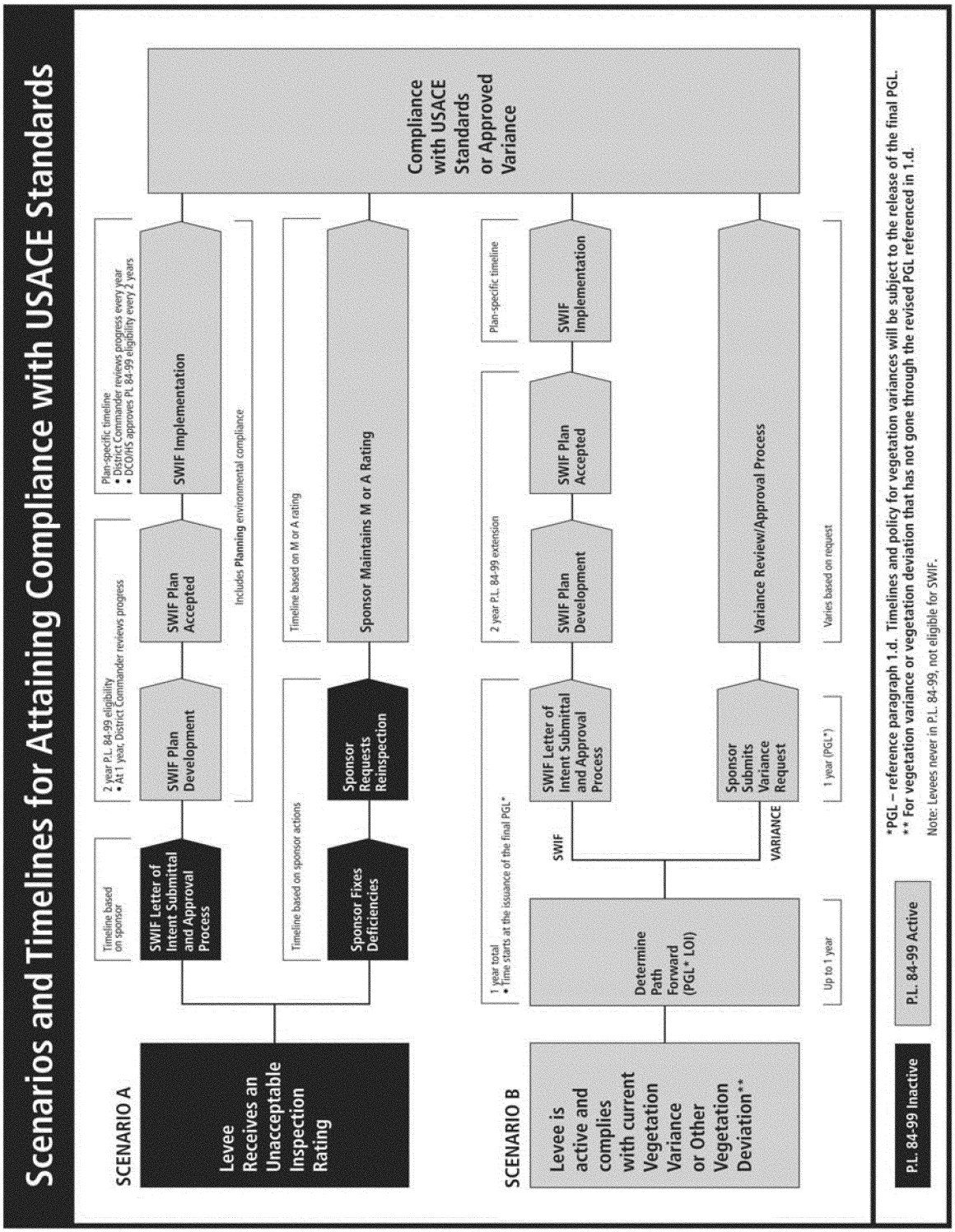
b. Waterside Planting Berm (above).



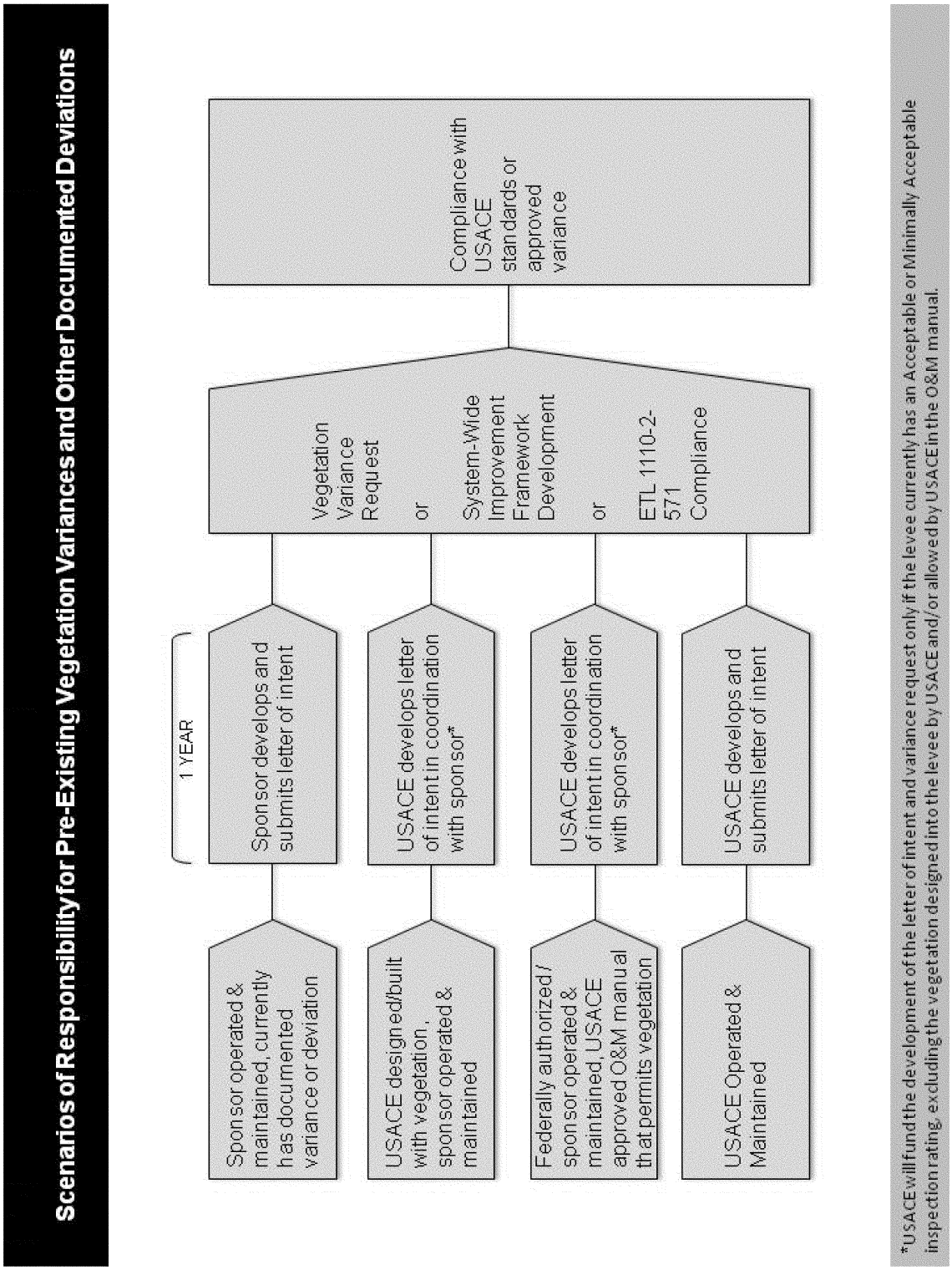
c. Landside and Waterside Planting Berms (above).

Enclosure 3, Figure 3: Planting Berms. The examples shown here assume a *basic levee*, with no appurtenant structures. Principles are similar for a *bank levee*. Additional examples are provided in ETL 1110-2-571. The intent of a planting berm is to allow for additional vegetation while preserving adequate access and protecting the *prism* from root-related damage: the result should be a level of reliability equivalent to a standards-compliant, non-vegetated condition. Illustrated above are the minimum acceptable dimensions of planting berms and associated vegetation-free zones. The sufficiency of these minimums must be determined case-by-case: intended vegetation, and site-specific conditions, may require a more robust planting berm. Planting berms may incorporate any existing material that is in excess of the *prism*, as shown above. They may be added to an existing levee, included in new construction, or identified within an existing levee section. Configurations differing from those above may be considered: for example, a planting berm need not necessarily be the full height of the levee *prism*.

Enclosure 4 - SCENARIOS AND TIMELINES FOR ATTAINING COMPLIANCE WITH USACE STANDARDS



Enclosure 5 – SCENARIOS OF RESPONSIBILITY FOR PRE-EXISTING VARIANCES AND OTHER DOCUMENTED DEVIATIONS



[FR Doc. 2012–3701 Filed 2–16–12; 8:45 am]
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DEPARTMENT OF EDUCATION

National Advisory Committee on Institutional Quality and Integrity (NACIQI) Teleconference

AGENCY: National Advisory Committee on Institutional Quality and Integrity, Office of Postsecondary Education, U.S. Department of Education.

ADDRESSES: U.S. Department of Education, Office of Postsecondary Education, 1990 K Street NW., Room 8073, Washington, DC 20006.

ACTION: Notice of open teleconference meeting of the National Advisory Committee on Institutional Quality and Integrity (NACIQI) and information related to members of the public submitting third-party written comments and/or making oral comments at the meeting.

SUMMARY: This notice sets forth the schedule and proposed agenda item for the upcoming teleconference meeting of the NACIQI, which is scheduled for Friday, April 13, 2012, and provides information for members of the public wishing to submit written comments, attend the meeting, and/or make oral comments during the meeting. The notice of this teleconference meeting is required under Section 10(a)(2) of the Federal Advisory Committee Act (FACA) and Section 114(d)(1)(B) of the Higher Education Act (HEA) of 1965, as amended.

SUPPLEMENTARY INFORMATION: The NACIQI teleconference meeting will be held on Friday, April 13, 2012, beginning at 11 a.m. and ending approximately at 2:30 p.m., Eastern Daylight Savings Time. The proposed agenda for this teleconference meeting consists of public comment, discussion, and final action pertaining to the NACIQI's draft report on the reauthorization of the Higher Education Act. The report may be accessed at *http://www2.ed.gov/about/bdscomm/list/naciqi.html.*

Submission of Written Comments Concerning the Committee's Report on the Reauthorization of the HEA

Written comments should be submitted as a Microsoft Word document that is attached to an electronic mail message (email) or provide comments in the body of an email message. Email messages must be received no later than Friday, March 16, 2012, by the *accreditationcommittees@ed.gov* with the subject line ''Written Comments regarding the draft final report on the reauthorization of the HEA.''

The Department intends to post the submissions on the NACIQI Web site. To help ensure accessibility to all interested parties, we are requesting that all submissions comply with the requirements of Section 508 of the Rehabilitation Act, or be submitted in an electronic format that can be made accessible, such as Microsoft Word. However, we will accept comments in any electronic or written form provided, but comments submitted in other forms, which are inaccessible, will not be posted online. Instead we will index the inaccessible comments received and make them available upon request. Also, if copyrighted materials are submitted, written permission to post the materials on the U.S. Department of Education's NACIQI Web site must accompany the copyrighted materials.

Only materials submitted by the deadline to the email address listed in this notice, and in accordance with these instructions, become part of the official record concerning the reauthorization of the HEA report and are considered by the NACIQI in their deliberations. Do not send material directly to NACIQI members or to staff.

Registration for the Teleconference Meeting and Instructions for Requests to Make Oral Comments Concerning the Committee's Report on the Reauthorization of the HEA

The deadline for the teleconference meeting registration is Friday, March 16, 2012. Space for the teleconference meeting is limited, and you are encouraged to register early if you plan to attend. To register to attend the teleconference meeting and not make any oral comments, email your registration to *accreditationcommittees@ed.gov* and enter ''Registration for NACIQI—No Comments'' in the subject line of the message. In the body of the email message, please include your name, title, affiliation, mailing address, email address, and telephone and fax numbers.

To register to attend the teleconference meeting and request to make oral comments during the meeting, email your registration and request to make oral comments to *accreditationcommittees@ed.gov* and enter ''Registration for NACIQI and Make Oral Comments'' in the subject line of the email message. In the body of the email message, please provide your name, title, affiliation, mailing address, email address, and telephone and fax numbers as well as a brief explanation of no more than five sentences that summarize your anticipated comments.

A total of 40 minutes will be allotted for public comment. Only ten commenters will be selected on a first-come, first served basis. Each commenter will be allotted no more than four minutes. The Department will inform all requesters of their selection status in advance of the meeting. Individuals who need accommodations for a disability in order to attend the teleconference meeting should contact Cathy Sheffield at (202) 219–7011, or email *accreditationcommittees@ed.gov* no later than March 30, 2012. The teleconference site is accessible to individuals with disabilities.

NACIQI's Statutory Authority and Function

The NACIQI is established under Section 114 of the HEA of 1965, as amended, 20 U.S.C. 1011c. The NACIQI advises the Secretary of Education about:

- The establishment and enforcement of the criteria for recognition of accrediting agencies or associations under Subpart 2, Part H, Title IV, of the HEA, as amended.
- The recognition of specific accrediting agencies or associations or a specific State approval agency.
- The preparation and publication of the list of nationally recognized accrediting agencies and associations.
- The eligibility and certification process for institutions of higher education under Title IV, of the HEA, together with recommendations for improvement in such process.
- The relationship between (1) accreditation of institutions of higher education and the certification and eligibility of such institutions, and (2) State licensing responsibilities with respect to such institutions.
- Any other advisory function relating to accreditation and institutional eligibility that the Secretary may prescribe.

Access to Records of the Teleconference Meeting

The Department will record the teleconference meeting and post the official transcript of the teleconference meeting on the NACIQI Web site shortly after the meeting. Pursuant to the FACA, the public may also inspect the materials at 1990 K Street NW., Washington, DC, by emailing *accreditationcommittees@ed.gov* to schedule an appointment.

FOR FURTHER INFORMATION CONTACT: Carol Griffiths, Acting Executive Director, NACIQI, U.S. Department of Education, 1990 K Street NW., Room 8073, Washington, DC. Telephone: (202) 219–7035, or email:

Carol.Griffiths@ed.gov. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern Standard Time, Monday through Friday.

Electronic Access to This Document

The official version of this document is the document published in the **Federal Register.** Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *www.gpo.gov/fdsys.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register,** in text or Adobe Portable Document Format (PDF). To use PDF, you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Eduardo M. Ochoa,

Assistant Secretary for Postsecondary Education.

[FR Doc. 2012–3783 Filed 2–16–12; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–9001–6]

Environmental Impacts Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information (202) 564–7146 or *http://www.epa.gov/compliance/nepa/*

Weekly receipt of Environmental Impact Statements

Filed 02/06/2012 Through 02/10/2012

Pursuant to 40 CFR 1506.9.

Notice

Section 309(a) of the Clean Air Act requires that EPA make public its comments on EISs issued by other Federal agencies. EPA's comment letters on EIS are available at: *http://www.epa.gov/compliance/nepa/eisdata.html.*

EIS No. 20120031, Final EIS, DOE, GA, ADOPTION—Vogtle Electric Generating Plant, Unit 3 and 4, Issuance a Loan Guarantee to Support Funding for Construction, Burke County, GA, Review Period Ends: 03/19/2012, Contact: Matthew McMillen 202–586–7248 The Department of Energy has adopted the Nuclear Regulatory Commission's FEIS 20080322 filed 08/15/2008 and FSEIS 20110088 filed 03/18/2011. DOE was not a Cooperating Agency on the above FEIS and FSEIS. Under Section 1506.3(b) of the CEQ Regulations, the FEIS must be recirculated for a 30-day Wait Period. This document is available on the Internet at: *www.energy.gov/nepa.*

EIS No. 20120032, Final EIS, NOAA, 00, Amendment 18A to the Fishery Management Plan for the Snapper-Grouper Fishery of the South Atlantic Region, To Limit Participation and Effort in the Black Sea Bass Pot Fishery, South Atlantic Region, NC, SC, FL, and GA, Review Period Ends: 03/19/2012, Contact: Dr. Roy E. Crabtree 727–824–5305.

EIS No. 20120033, Draft EIS, BLM, AZ, Restoration Design Energy Project, Identifying Lands Across Arizona Suitable for Renewable Energy Development, AZ, Comment Period Ends: 05/16/2012, Contact: Kathy Pedrick 602–417–9235.

EIS No. 20120034, Draft EIS, USFS, CA, Harris Vegetation Management Project, To Improve Forest Health and Restore Fire-Adapted Ecosystem Characteristic on National Forest System Land, Implementation, Shasta-McCloud Management Unit, Shasta-Trinity National Forest, Siskiyou County, CA, Comment Period Ends: 04/02/2012, Contact: Emelia Barnum 530–926–4511.

EIS No. 20120035, Draft EIS, USACE, NC, US 64 Improvements, Widening from Columbia to US 264 and Replacement of Lindsey C. Warren Bridge, USCG Bridge Permit, Tyrrell and Dare Counties, NC, Comment Period Ends: 04/02/2012, Contact: Bill Biddlecome 910–251–4558.

EIS No. 20120036, Draft EIS, FHWA, TN, SR–126 (Memorial Boulevard) Corridor Improvement Project, from East Center Street to Interstate 81, Funding, USACE Section 404 Permit, Sullivan County, TN, Comment Period Ends: 04/02/2012, Contact: Charles J. O'Neill 615–781–5770.

Amended Notices

EIS No. 20110353, Draft EIS, USFS, UT, Fishlake National Forest Oil and Gas Leasing Analysis Project, To Exploration, Development, and Production of Mineral and Energy Resources and Reclamation of Activities, Beaver, Garfield, Iron, Juab, Millard, Piute, Sanpete, Sevier, and Wayne Counties, UT, Comment Period Ends: 04/02/2012, Contact: Diane Freeman 435–896–1050. This document is available on the Internet at: *http://fs.usda.gov/goto/fishlake/projects.*

Revision to FR Notice Published 10/21/2011:

Re-opening Comment Period to End 4/2/2012 due to two appendices that was inadvertently not included in the Draft EIS.

EIS No. 20110438, Draft EIS, USFS, ID, Scriver Integrated Restoration Project, Improve Watershed Conditions by Reducing Road-Related Impacts to Wildlife, Fish, Soil, and Water Resources and Restoration of 2010 Forest Plan Vegetation Conditions, Emmett Ranger District, Boise National Forest, Boise and Valley Counties, ID, Comment Period Ends: 03/05/2012, Contact: Melissa Yenko 208–373–4245.

Revision to FR Notice Published 02/30/2011:

Extending Comment Period from 2/13/2012 to 3/5/2012.

Dated: February 14, 2012.

Cliff Rader,

Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 2012–3801 Filed 2–16–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9631–5]

Proposed CERCLA Administrative Cost Recovery Settlement; Lake Linden Superfund Site in Lake Linden, Houghton County, MI

AGENCY: Environmental Protection Agency.

ACTION: Notice; request for public comment.

SUMMARY: In accordance with Section 122(i) of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended (''CERCLA''), 42 U.S.C. 9622(i), notice is hereby given of a proposed administrative settlement for recovery of past response costs concerning the Lake Linden Superfund Site in Lake Linden, Houghton County, Michigan with Honeywell Specialty Materials, LLC. The settlement requires the settling party to pay $357,149.47 to the Hazardous Substance Superfund. The settlement includes a covenant not to sue the settling party pursuant to Section 107(a) of CERCLA, 42 U.S.C. 9607(a). For thirty (30) days following the date of publication of this notice, the

Agency will receive written comments relating to the settlement. The Agency will consider all comments received and may modify or withdraw its consent to the settlement if comments received disclose facts or considerations which indicate that the settlement is inappropriate, improper, or inadequate. The Agency's response to any comments received will be available for public inspection at the U.S. EPA Records Center, Room 714, 77 W. Jackson Boulevard, Chicago, IL 60604.

DATES: Comments must be submitted on or before 30 days from date of publication.

ADDRESSES: The proposed settlement is available for public inspection at the U.S. EPA Records Center, Room 714, 77 W. Jackson Boulevard, Chicago, IL 60604. A copy of the proposed settlement may be obtained from Larry Johnson, U.S. Environmental Protection Agency, Office of Regional Counsel, 77 W. Jackson Boulevard, Chicago, Illinois, C–14J, 60604, (312) 886–6609. Comments should reference the Lake Linden Superfund Site in Lake Linden, Houghton County, Michigan and EPA Docket No. V–W–11–C–988 and should be addressed to LaDawn Whitehead, U.S. Environmental Protection Agency, Office of Enforcement and Compliance and Assurance, 77 W. Jackson Boulevard, Chicago, Illinois, E–19J, 60604, (312) 886–3713.

FOR FURTHER INFORMATION CONTACT: Larry Johnson, U.S. Environmental Protection Agency, Office of Regional Counsel, C–14J, 77 W. Jackson Boulevard, Chicago, Illinois, 60604, (312) 886–6609.

Dated: February 2, 2012.

Richard C. Karl,

Director, Superfund Division, Region 5, United States Environmental Protection Agency.

Spill ID Number B5 KY

[FR Doc. 2012–3789 Filed 2–16–12; 8:45 am]

BILLING CODE 6560–50–P

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Sunshine Act Meeting

DATE AND TIME: Wednesday, February 22, 2012, 9:30 a.m. Eastern Time.

PLACE: Commission Meeting Room on the First Floor of the EEOC Office Building, 131 ''M'' Street, NE., Washington, DC 20507.

STATUS: Part of the meeting will be open to the public and part of the meeting will be closed.

MATTERS TO BE CONSIDERED:

Open Session

1. Announcement of Notation Votes, and
2. EEOC Strategic Plan for Fiscal Years 2012–2016.

Closed Session

Agency Adjudication and Determination on Federal Agency Discrimination Complaint Appeals

Note: In accordance with the Sunshine Act, the open session of the meeting will be open to public observation of the Commission's deliberations and voting. The remainder of the meeting will be closed. Any matter not discussed or concluded may be carried over to a later meeting.

For the open session, seating is limited and it is suggested that visitors arrive 30 minutes before the meeting in order to be processed through security and escorted to the meeting room. (In addition to publishing notices on EEOC Commission meetings in the **Federal Register**, the Commission also provides information about Commission meetings on its Web site, *eeoc.gov.*, and provides a recorded announcement a week in advance on future Commission sessions.)

Please telephone (202) 663–7100 (voice) and (202) 663–4074 (TTY) at any time for information on these meetings. The EEOC provides sign language interpretation and Communication Access Realtime Translation (CART) services at Commission meetings for the hearing impaired. Requests for other reasonable accommodations may be made by using the voice and TTY numbers listed above.

CONTACT PERSON FOR MORE INFORMATION: Bernadette B. Wilson, Acting Executive Officer on (202) 663–4077.

This Notice Issued February 15, 2012.

Bernadette B. Wilson,

Acting Executive Officer, Executive Secretariat.

[FR Doc. 2012–3961 Filed 2–15–12; 4:15 pm]

BILLING CODE 6570–01–P

FEDERAL COMMUNICATIONS COMMISSION

[WC Docket Nos. 10–90 and 05–337; DA 12–137]

Comment Sought on Potential Data for Connect America Fund Phase One Incremental Support

AGENCY: Federal Communications Commission.

ACTION: Notice; solicitation of comments.

SUMMARY: In this document, the Wireline Competition Bureau begins the process of implementing CAF Phase I by seeking comment on potential data that can be used as inputs to the equation that will be used to determine distribution of the $300 million, and on a proposed list of wire centers that would be eligible to receive CAF Phase I incremental support.

DATES: Comments are due on or before March 19, 2012.

ADDRESSES: Interested parties may file comments on or before March 19, 2012. All pleadings are to reference WC Docket Nos. 10–90 and 05–337. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS), or by filing paper copies, by any of the following methods:

- *Electronic Filers:* Comments may be filed electronically using the Internet by accessing the ECFS: *http://fjallfoss.fcc.gov/ecfs2/*.
- *Paper Filers:* Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.
- *People with Disabilities:* To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (tty).

For detailed instructions for submitting comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Joseph Cavender, Wireline Competition Bureau at *Joseph.Cavender@fcc.gov* or (202) 418–7400 or TTY (202) 418–0484.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Public Notice in WC Docket Nos. 10–90 and 05–337; DA 12–137, released February 6, 2012. The complete text of this document is available for inspection and copying during normal business hours in the FCC Reference Information Center, Portals II, 445 12th Street SW. Room CY–A257, Washington, DC 20554. The document may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone (800) 378–3160 or (202) 863–2893, facsimile (202) 863–2898, or via the Internet at *http://www.bcpiweb.com*.

1. On November 18, 2011, the Commission released the *USF/ICC Transformation Order and FNPRM,* 76 FR 76623, December 8, 2011, which comprehensively reforms and modernizes the universal service and

intercarrier compensation systems. Among other things, the Commission established a transitional mechanism to distribute high cost universal service support to price cap carriers, known as the Connect America Fund Phase I (''CAF Phase I''). CAF Phase I incremental support is designed to provide an immediate boost to broadband deployment in areas that are unserved by any broadband provider.

2. In particular, in CAF Phase I, the Commission allocated up to $300 million of additional, incremental universal service support to price cap carriers to be distributed using cost estimates based on the cost model the Commission used to determine High Cost Model Support previously. In adopting CAF Phase I, the Commission specified the process by which such support would be distributed, including the equation to be used to generate cost estimates, and delegated to the Wireline Competition Bureau (Bureau) the task of performing the calculations necessary to determine support amounts and selecting the necessary data.

3. In the Public Notice, the Bureau begins the process of implementing CAF Phase I by seeking comment on potential data that can be used as inputs to the equation that will be used to determine distribution of the $300 million, and on a proposed list of wire centers that would be eligible to receive CAF Phase I incremental support.

4. First, Windstream Communications submitted, pursuant to our protective order, data, on a wire center basis, for each of the input variables used in the equation adopted by the Commission. Windstream proposes that we use these data to calculate support amounts. We seek comment on the data submitted by Windstream. Should we use these data as a basis for determining eligible support amounts in CAF Phase I? Should we use an alternate source? We encourage commenters with concerns about the data Windstream submitted to provide alternate data along with an explanation of how those data were derived, or to explain how we could obtain more appropriate data. We observe that Windstream's submission does not purport to provide data for all wire centers. For example, Windstream has not provided data for Alaska or the U.S. Territories. Although the Bureau has delegated authority to exclude such areas from the analysis for CAF Phase I incremental support if we conclude that we do not have appropriate data available, we invite commenters to provide appropriate data for such areas. We note that it might be possible for the Commission to develop input variables for some portion of the areas for which Windstream did not provide data by, for example, applying statistical methods to estimate the number of business locations in a wire center given information about the number of residential locations and area of the wire center. We seek comment on the use of such an approach and whether we should use such derived data, provided that we are able to do so consistent with the Commission's expectation that the Bureau complete our work and announce support amounts on or before March 31, and that we believe that such data are sufficiently reliable.

5. Second, because the Commission limited CAF Phase I incremental support to price cap carriers, the Bureau must therefore exclude from our analysis the wire centers of non-price cap carriers. The Bureau, after conducting its own analysis based on the Telcordia LERG Routing Guide and Commission data for carriers' common control names, has developed a list of wire centers for price cap carriers, identified by the eight-digit Common Language Location Identifier (CLLI) code, which is available through EDOCS at *http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-12-137A2.xls.* We seek comment on this proposed list. Are all wire centers of price cap carriers and rate-of-return areas affiliated with price cap carriers included? Are there any wire centers listed that should not be? We encourage commenters identifying errors or omissions in our proposed list to provide correct information along with an explanation of where those data were obtained, or explaining how we could obtain correct data.

6. Interested parties may file comments on or before March 19, 2012. All pleadings are to reference WC Docket Nos. 10–90 and 05–337. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS), or by filing paper copies.

- *Electronic Filers:* Comments may be filed electronically using the Internet by accessing the ECFS: *http://fjallfoss.fcc.gov/ecfs2/.*
- *Paper Filers:* Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St. SW., Room TW–A325, Washington, DC 20554. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of *before* entering the building. The filing hours are 8 a.m. to 7 p.m. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street SW., Washington, DC 20554.

People with Disabilities: To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (tty).

In addition, one copy of each pleading must be sent to each of the following:

(1) The Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street SW., Room CY–B402, Washington, DC 20554, *www.bcpiweb.com;* phone: (202) 488–5300 fax: (202) 488–5563;

(2) Joseph Cavender, Telecommunications Access Policy Division, Wireline Competition Bureau, 445 12th Street SW., Room 5–A176, Washington, DC 20554; email: *Joseph.Cavender@fcc.gov;* and

(3) Charles Tyler, Telecommunications Access Policy Division, Wireline Competition Bureau, 445 12th Street SW., Room 5–A452, Washington, DC 20554; email: *Charles.Tyler@fcc.gov.*

Filings and comments are also available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street SW., Room CY–A257, Washington, DC 20554. They may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., Portals II, 445 12th Street SW., Room CY–B402, Washington, DC 20554, telephone: (202) 488–5300, fax: (202) 488–5563, or via email *www.bcpiweb.com.*

This matter shall be treated as a ''permit-but-disclose'' proceeding in accordance with the Commission's *ex parte* rules. Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries

of the substance of the presentation and not merely a listing of the subjects discussed.

More than a one or two sentence description of the views and arguments presented generally is required. Other rules pertaining to oral and written *ex parte* presentations in permit-but-disclose proceedings are set forth in § 1.1206(b) of the Commission's rules.

Federal Communications Commission.

Trent Harkrader,

Division Chief, Wireline Competition Bureau.

[FR Doc. 2012–3836 Filed 2–16–12; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[AU Docket No. 12–25; DA 12–187]

Mobility Fund Phase I Auction Updated List of Potentially Eligible Census Blocks

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: In this document, the Commission's Wireless Telecommunications and Wireline Competition Bureaus provide an updated list of potentially eligible census blocks for Auction 901 scheduled to commence on September 27, 2012, as well as other updated information consistent with the revised list.

DATES: Pursuant to the *Auction 901 (*Mobility Fund Phase I) *Comment Public Notice,* 77 FR 7152, February 10, 2012, comments are due on or before February 24, 2012. Reply comments are due on or before March 9, 2012.

ADDRESSES: Pursuant to the *Auction 901 (*Mobility Fund Phase I) *Comment Public Notice,* 77 FR 7152, February 10, 2012, all filings in response to the notice must refer to AU Docket No. 12–25. The Wireless Telecommunications and Wireline Competition Bureaus strongly encourage interested parties to file comments electronically, and request that an additional copy of all comments and reply comments be submitted electronically to the following address: *auction901@fcc.gov*. Comments may be submitted by any of the following methods:

- *Electronic Filers:* Federal Communications Commission's Web Site: *http://fjallfoss.fcc.gov/ecfs2/*. Follow the instructions for submitting comments.
- *Paper Filers:* Parties who choose to file by paper must file an original and one copy of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Attn: WTB/ASAD, Office of the Secretary, Federal Communications Commission.
- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St. SW., Room TW–A325, Washington, DC 20554. The filing hours are 8 a.m. to 7 p.m. Eastern Time. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street SW., Washington, DC 20554.
- People with Disabilities: Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by email: *FCC504@fcc.gov* or phone: 202–418–0530 or TTY: 202–418–0432.

FOR FURTHER INFORMATION CONTACT: *Wireless Telecommunications Bureau, Auctions and Spectrum Access Division:* Lisa Stover at (717) 338–2868.

SUPPLEMENTARY INFORMATION: This is a summary of the *Mobility Fund Phase I Auction Updated List of Potentially Eligible Census Blocks Public Notice* (Public Notice) released on February 10, 2012. The *Public Notice* and related Commission documents may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc. (BCPI), 445 12th Street SW., Room CY–B402, Washington, DC 20554, telephone 800–378–3160, or you may contact BCPI at its Web site: *http://www.BCPIWEB.com*. When ordering documents from BCPI, please provide the appropriate FCC document number, for example, DA 12–187 for this Public Notice. The *Public Notice* and related documents also are available on the Internet at the Commission's Web site: *http://wireless.fcc.gov/auctions/901/* or by using the search function for AU Docket No. 12–25 on the Commission's Electronic Comment Filing System (ECFS) web page at *http://www.fcc.gov/cgb/ecfs/*.

1. The Wireless Telecommunications and Wireline Competition Bureaus (the Bureaus) announce the availability of an updated list, based on January 2012 American Roamer data, of census blocks potentially eligible for Mobility Fund Phase I support to be offered in Auction 901, as well as other updated information consistent with the revised list.

2. The Bureaus scheduled Auction 901 for September 27, 2012, and sought comment on procedures for the auction and certain program requirements in the *Auction 901* (Mobility Fund Phase I) *Comment Public Notice,* 77 FR 7152, February 10, 2012. The Bureaus concluded that they would identify census blocks eligible for the Mobility Fund Phase I support to be offered in Auction 901 based on an analysis of the most recent available American Roamer data, from January 2012. The Bureaus described the methodology for identifying potentially eligible blocks and provided a preliminary list of such blocks based on their analysis of October 2011 American Roamer data, in electronic format as Attachment A files, as well as certain summary information (based on the same data) in Attachments A and B released with the *Auction 901 Comment Public Notice.* Further, the Bureaus stated that upon completion of their analysis of the January 2012 American Roamer data they would provide an updated list of potentially eligible census blocks and related updated information for Attachments A and B.

3. The Bureaus have finished that analysis and are now providing the updated information. The updated list of potentially eligible blocks based on January 2012 American Roamer data is available in electronic format only, as separate Attachment A files at *http://wireless.fcc.gov/auctions/901/*. For each potentially eligible block, individually identified by its Federal Information Processing Series (FIPS) code, these files provide the population and area of the block; the associated state, county, tract, and block group; any associated Tribe and Tribal land; and the number of road miles in each road mile category.

4. Attachment A to the *Public Notice* provides a summary of the updated list of potentially eligible census blocks based on January 2012 American Roamer data. For each state and territory, Attachment A provides the total number of potentially eligible census blocks (unserved census blocks with road miles), the total number of block groups with such blocks, the total number of tracts with such blocks, the total number of counties with such blocks, and the number of cellular market areas (CMAs) with such blocks. For each state and territory, Attachment A also provides the total population and

area of the potentially eligible blocks, and the total number of road miles in each of the road mile categories. The Bureaus note that the U.S. Census Bureau has not yet released 2010 Census block-level data for American Samoa, the Commonwealth of the Northern Mariana Islands, and Guam. Consequently, the population of the unserved blocks in these territories is not provided in the Attachment A files.

5. As noted in the *Auction 901 Comment Public Notice,* for Auction 901, the Bureaus will use road miles from the Census Bureau's TIGER data for calculating the units in each eligible census block for purposes of comparing bids and measuring performance of Mobility Fund Phase I recipients. Attachment B of the *Public Notice* provides nine categories of roads in the TIGER data, their descriptions, and the total number of miles of each category in the potentially eligible census blocks on the updated list the Bureaus announce with the *Public Notice.* The information on TIGER road categories is from Appendix F—MAF/TIGER Feature Class Code (MTFCC) Definitions, pages F–186 and F–187 at *http://www.census.gov/geo/www/tiger/tgrshp2010/documentation.html*.

6. Concurrent with the release of the *Public Notice,* the Bureaus announce the availability of a map of the potentially eligible blocks on the updated list. The map is an interactive visual representation of data from the updated Attachment A files. The Attachment A files contain more information and generally more detail than is displayed on the map. The map is available at *http://wireless.fcc.gov/auctions/901/* and at *http://www.fcc.gov/maps/*.

7. For additional information about Auction 901, including an overview of requirements to participate in the auction and proposals for auction procedures, you should consult the *Auction 901 Comment Public Notice.*

Federal Communications Commission.

Gary D. Michaels,

Deputy Chief, Auctions and Spectrum Access Division, WTB.

[FR Doc. 2012–3838 Filed 2–16–12; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Sunshine Act Meeting

Pursuant to the provisions of the ''Government in the Sunshine Act'' (5 U.S.C. 552b), notice is hereby given that at 9:34 a.m. on Tuesday, February 14, 2012, the Board of Directors of the Federal Deposit Insurance Corporation met in closed session to consider matters related to the Corporation's supervision, corporate, and resolution activities.

In calling the meeting, the Board determined, on motion of Director Thomas J. Curry (Appointive), seconded by Director John G. Walsh (Acting Comptroller of the Currency), concurred in by Director Richard Cordray (Director, Consumer Financial Protection Bureau) and Acting Chairman Martin J. Gruenberg, that Corporation business required its consideration of the matters which were to be the subject of this meeting on less than seven days' notice to the public; that no earlier notice of the meeting was practicable; that the public interest did not require consideration of the matters in a meeting open to public observation; and that the matters could be considered in a closed meeting by authority of subsections (c)(4), (c)(6), (c)(8), (c)(9)(A)(ii), (c)(9)(B), and (c)(10) of the ''Government in the Sunshine Act'' (5 U.S.C. 552b(c)(4), (c)(6), (c)(8), (c)(9)(A)(ii), (c)(9)(B), and (c)(10)).

The meeting was held in the Board Room of the FDIC Building located at 550—17th Street, NW., Washington, DC.

Dated: February 14, 2012.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2012–3872 Filed 2–15–12; 11:15 am]

BILLING CODE P

FEDERAL MARITIME COMMISSION

Sunshine Act Meeting

TIME AND DATE: February 22, 2012—10 a.m.

PLACE: 800 North Capitol Street, NW., First Floor Hearing Room, Washington, DC

STATUS: A part of the meeting will be in Open Session and the remainder of the meeting will be in Closed Session.

MATTERS TO BE CONSIDERED:

Open Session

1. Docket No. 11–05: Rules of Practice and Procedure—Staff Recommendation and Draft Proposed Rule Regarding 46 CFR 502 Subparts E and L.
2. Docket No. 11–16: Update on Concordia Disaster and Staff Recommendation on Small Business Impacts of Financial Responsibility Requirements for Nonperformance of Transportation.

Closed Session

1. Staff Briefing on Economic and Trade Conditions.
2. Discussion of Ocean Transportation Intermediary Licensing Requirement.

CONTACT PERSON FOR MORE INFORMATION: Karen V. Gregory, Secretary, (202) 523–5725.

Karen V. Gregory,

Secretary.

[FR Doc. 2012–3993 Filed 2–15–12; 4:15 pm]

BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License Reissuance

Notice is hereby given that the following Ocean Transportation Intermediary license has been reissued by the Federal Maritime Commission pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. Chapter 409) and the regulations of the Commission pertaining to the licensing of Ocean Transportation Intermediaries, 46 CFR part 515.

License No.	Name/Address	Date Reissued
001890F	JIB International, Incorporated dba JIB International dba JIB Worldwide Freight Forwarding, 1822 W. Kettleman Lane, Suite 2, Lodi, CA 95242.	December 31, 2011.

Tanga FitzGibbon,

Deputy Director, Bureau of Certification and Licensing.

[FR Doc. 2012–3772 Filed 2–16–12; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License Applicants

Notice is hereby given that the following applicants have filed with the Federal Maritime Commission an application for a license as a Non-Vessel-Operating Common Carrier (NVO) and/or Ocean Freight Forwarder (OFF)—Ocean Transportation Intermediary (OTI) pursuant to section 19 of the Shipping Act of 1984 as amended (46 U.S.C. Chapter 409 and 46 CFR 515). Notice is also hereby given of the filing of applications to amend an existing OTI license or the Qualifying Individual (QI) for a license.

Interested persons may contact the Office of Transportation Intermediaries, Federal Maritime Commission, Washington, DC 20573, by telephone at (202) 523–5843 or by email at *OTI@fmc.gov*.

A A Shipping Incorporated (NVO), 11526 Harwin Drive, Houston, TX 77072, Officers: Barbara C. Mozie, President, (Qualifying Individual), Geraldine Ononiba, Vice President, Application Type: New NVO.

Cargo Partner Network, Inc. (NVO & OFF), One Cross Island Plaza, Suite 203, Rosedale, NY 11422, Officers: Fergal Keenan, President, (Qualifying Individual), Stefan Krauter, Owner, Application Type: Add OFF Service.

Cargo Tours International, Inc. dba CTI Global Logistics (NVO & OFF), 167–10 South Conduit Avenue, Suite 106, Jamaica, NY 11434, Officer: Giuseppe D. Carpini, President/Treasurer/Secretary, (Qualifying Individual), Application Type: Trade Name Change/QI Change.

Deckwell Sky (USA) Inc. dba Monarch Container Line (NVO & OFF), 14343 E. Don Julian Road, City of Industry, CA 91746, Officer: ShuHsien aka Prescillia Chu, Pres./Treas./Sec./COO, (Qualifying Individual), Application Type: QI Change/Add OFF Service.

Eagle Van Lines, Inc. (NVO & OFF), 5041 Beech Place, Temple Hills, MD 20748, Officers: Christos Georgeakopoulos, Vice President, (Qualifying Individual), George Georgekopoulos, President, Application Type: Add NVO Service.

Expert Log LLC (NVO & OFF), 3563 NW 82nd Avenue, Miami, FL 33122, Officers: Denise Leinig, Member, (Qualifying Individual), Bruno Chaiben, Member, Application Type: New NVO & OFF License.

G Trading Group, Inc. dba Cargomax International (NVO & OFF), 10230 NW 80th Avenue, Hialeah Gardens, FL 33016, Officers: Abel Gonzalez, President/Treasurer, (Qualifying Individual), Ailyn Gonzalez, Vice President/Secretary, Application Type: New NVO & OFF License.

J.A. Logistics, Inc. (NVO & OFF), 3905 West Albany Street, McHenry, IL 60050, Officers: Arthur N. Nutig, Chief Operating Officer, (Qualifying Individual), Joseph M. Alger, President, Application Type: QI Change.

J K Moving & Storage, Inc. (NVO & OFF), 44112 Mercure Circle, Sterling, VA 20166, Officer: Charles S. Kuhn, President, (Qualifying Individual), Application Type: Add NVO Service.

Maxworld Logistics, Inc. (NVO & OFF), 133–33 Brookville Blvd. One Cross Island Plaza, #101, Rosedale, NY 11422, Officer: Hong Guo, President/Director/Secretary/Treasurer, (Qualifying Individual), Application Type: License Transfer.

NIT Logistics, Inc. (NVO), 241 Hudson Street, Hackensack, NJ 07601, Officers: Esra Tezer, Corporate Secretary, (Qualifying Individual), Zeki Sensoz, President/Treasurer, Application Type: New NVO License.

Purely Global, Inc (NVO & OFF), 9462 NW 13th Street, Bay 70, Doral, FL 33172, Officer: Gabriela M. Haddadi, Director/Corporate Secretary/President, (Qualifying Individual), Application Type: New NVO & OFF License.

Sifa USA, Inc. (NVO & OFF), 8600 N.W. 17th Street, Suite 145, Miami, FL 33126, Officers: Marcia F. Carlson, Operation & Logistics Coordinator, (Qualifying Individual), Patrice Marraud, Director/President, Application Type: New NVO & OFF License.

TBIF, LLC (NVO), 140 East Main Street, Suite G, Bozeman, MT 59715, Officers: Wayne J. Anderson, Vice President Operations, (Qualifying Individual), Gregg Cummings, President, Application Type: New NVO License.

UTi, United States, Inc. dba Unitainer dba UTi (NVO & OFF), 100 Oceangate, #1500, Long Beach, CA 90802, Officers: Christian Boettcher, Vice President, (Qualifying Individual), Christopher Dale, Director/President/CEO, Application Type: Trade Name Change/QI Change.

Dated: February 13, 2012.

Rachel E. Dickon,

Assistant Secretary.

[FR Doc. 2012–3723 Filed 2–16–12; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License Revocation

The Federal Maritime Commission hereby gives notice that the following Ocean Transportation Intermediary license has been revoked pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. Chapter 409) and the regulations of the Commission pertaining to the licensing of Ocean Transportation Intermediaries, 46 CFR part 515, effective on the corresponding date shown below:

License Number: 2178N.
Name: Leschaco, Inc.
Address: One Evertrust Plaza, Suite 304, Jersey City, NJ 07302.
Date Revoked: January 18, 2012.
Reason: Voluntarily surrendered license.

License Number: 2452F.
Name: R.C. Shipping Company, Inc.
Address: 5811 Green Terrace Lane, Houston, TX 77088–5413.
Date Revoked: January 30, 2012.
Reason: Voluntarily surrendered license.

License Number: 3729N.
Name: Tratto International Forwarders Corporation.
Address: 801 Madrid Street, Suite 1, Coral Gables, FL 33134.
Date Revoked: January 20, 2012.
Reason: Failed to maintain a valid bond.

License Number: 11374N.
Name: S P C Consolidators, Inc.
Address: 1950 S. Starpoint Drive, Houston, TX 77032.
Date Revoked: January 30, 2012.
Reason: Voluntarily surrendered license.

License Number: 018356N.
Name: Americar Global Logistics, Inc.
Address: 6931 NW 87th Avenue, Miami, FL 33178.
Date Revoked: January 9, 2012.
Reason: Failed to maintain a valid bond.

License Number: 020297N.
Name: Lorimer Cargo Express, Inc.
Address: 9811 NW 80th Avenue, Bay U–7, Hialeah Gardens, FL 33016.
Date Revoked: January 23, 2012.
Reason: Failed to maintain a valid bond.

License Number: 022406N.
Name: GTO Autotrade, Inc. dba Global Trade Organization.
Address: 8840 NW 18th Terrace, Doral, FL 33172.
Date Revoked: January 1, 2012.
Reason: Failed to maintain a valid bond.

License Number: 022436NF.

Name: RLE International, Inc.
Address: 8243 NW 66th Street, Miami, FL 33166.
Date Revoked: January 20, 2012.
Reason: Failed to maintain valid bonds.

License Number: 022258N.
Name: Platinum Moving Services, Inc.
Address: 7610–P Rickenbacker Drive, Gaithersburg, MD 20879.
Date Revoked: January 4, 2012.
Reason: Failed to maintain a valid bond.

License Number: 022750NF.
Name: Viva Logistics Inc.
Address: 1338 64th Street, Brooklyn, NY 11219.
Dates Revoked: January 8, 2012 & January 9, 2012.
Reason: Failed to maintain valid bonds.

License Number: 022799N.
Name: Atlantic Cargo Logistics, LLC.
Address: 120 South Woodland Blvd., Suite 216, Deland, FL 32720.
Date Revoked: January 9, 2012.
Reason: Failed to maintain a valid bond.

Tanga FitzGibbon,
Deputy Director, Bureau of Certification and Licensing.

[FR Doc. 2012–3774 Filed 2–16–12; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Sunshine Act Meeting

February 14, 2012.

TIME AND DATE: 10 a.m., Thursday, February 23, 2012.

PLACE: The Richard V. Backley Hearing Room, 9th Floor, 601 New Jersey Avenue NW., Washington, DC.

STATUS: Open.

MATTERS TO BE CONSIDERED: The Commission will hear oral argument in the matter *Secretary of Labor* v. *Black Beauty Coal Co.,* Docket No. LAKE 2008–477. (Issues include whether the judge erred in concluding that adequate berms had not been provided and that the violations were ''significant and substantial'' and due to unwarrantable failures to comply.)

Any person attending this oral argument who requires special accessibility features and/or auxiliary aids, such as sign language interpreters, must inform the Commission in advance of those needs. Subject to 29 CFR 2706.150(a)(3) and 2706.160(d).

CONTACT PERSON FOR MORE INFO: Jean Ellen (202) 434–9950/(202) 708–9300 for TDD Relay/1–800–877–8339 for toll free.

Emogene Johnson,
Administrative Assistant.

[FR Doc. 2012–3876 Filed 2–15–12; 11:15 am]

BILLING CODE 6735–01–P

GENERAL SERVICES ADMINISTRATION

[OMB Control No. 3090–0252; Docket 2012–0001; Sequence 6]

General Services Administration Acquisition Regulation; Information Collection; Preparation, Submission, and Negotiation of Subcontracting Plans

AGENCY: Office of Acquisition Policy, GSA.

ACTION: Notice of request for comments regarding an extension to an existing OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act, the Regulatory Secretariat will be submitting to the Office of Management and Budget (OMB) a request to review and approve a renewal of a previously approved information collection requirement regarding preparation, submission, and negotiation of subcontracting plans.

This information collection will ensure that small and small disadvantaged business concerns are afforded the maximum practicable opportunity to participate as subcontractors in construction, repair, and alteration or lease contracts. Preparation, submission, and negotiation of subcontracting plans requires for all negotiated solicitations having an anticipated award value over $500,000 ($1,000,000 for construction), submission of a subcontracting plan with other than small business concerns when a negotiated acquisition meets all four of the following conditions.

1. When the contracting officer anticipates receiving individual subcontracting plans (not commercial plans).

2. When the award is based on trade-offs among cost or price and technical and/or management factors under FAR 15.101–1.

3. The acquisition is not a commercial item acquisition.

4. The acquisition offers more than minimal subcontracting opportunities.

Public comments are particularly invited on: Whether this collection of information is necessary and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected.

DATES: Submit comments on or before: April 17, 2012.

FOR FURTHER INFORMATION CONTACT: Ms. Kathy Rifkin, Procurement Analyst, General Services Acquisition Policy Division, GSA, (816) 823–2170 or email *Kathy.rifkin@gsa.gov.*

ADDRESSES: Submit comments identified by Information Collection 3090–0252, Preparation, Submission and Negotiation of Subcontracting Plans by any of the following methods:

- *Regulations.gov: http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by inputting ''Information Collection 3090–0252, Preparation, Submission and Negotiation of Subcontracting Plans'' under the heading ''Enter Keyword or ID'' and selecting ''Search''. Select the link ''Submit a Comment'' that corresponds with ''Information Collection 3090–0252, Preparation, Submission and Negotiation of Subcontracting Plans''. Follow the instructions provided at the ''Submit a Comment'' screen. Please include your name, company name (if any), and ''Information Collection 3090–0252, Preparation, Submission and Negotiation of Subcontracting Plans'' on your attached document.
- *Fax:* 202–501–4067.
- *Mail:* General Services Administration, Regulatory Secretariat (MVCB), 1275 First Street NE., Washington, DC 20417. ATTN: Hada Flowers/IC 3090–0252, Preparation, Submission and Negotiation of Subcontracting Plans.

Instructions: Please submit comments only and cite Information Collection 3090–0252, Preparation, Submission and Negotiation of Subcontracting Plans, in all correspondence related to this collection. All comments received will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided.

SUPPLEMENTARY INFORMATION:

A. Purpose

The GSAR provision at 552.219–72 requires a contractor (except small business concerns) to submit a subcontracting plan when a negotiated acquisition including construction, repair, and alterations and lease contracts (except those solicitations using simplified procedures) meets all four of the following conditions.

1. When the contracting officer anticipates receiving individual subcontracting plans (not commercial plans).

2. When award is based on trade-offs among cost or price and technical and/or management factors under FAR 15.101–1.

3. The acquisition is not a commercial item acquisition.

4. The acquisition offers more than minimal subcontracting opportunities.

B. Annual Reporting Burden

Respondents: 1,020.
Responses per Respondent: 1.
Hours per Response: 12.
Total Burden Hours: 12,240.
Obtaining Copies of Proposals: Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat (MVCB), 1275 First Street NE., Washington, DC 20417, telephone (202) 501–4755. Please cite OMB Control No. 3090–0252, Preparation, Submission, and Negotiation of Subcontracting Plans, in all correspondence.

Dated: February 9, 2012.

Joseph A. Neurauter,

Director, Office of Acquisition Policy, Senior Procurement Executive.

[FR Doc. 2012–3755 Filed 2–16–12; 8:45 am]

BILLING CODE 6820–61–P

GENERAL SERVICES ADMINISTRATION

[OMB Control No. 3090–0286; Docket 2012–0001; Sequence 1]

General Services Administration Acquisition Regulation; Information Collection; GSA Mentor-Protégé Program

AGENCIES: Office of the Chief Acquisition Officer, General Services Administration (GSA).

ACTION: Notice of request for public comments regarding an extension to an existing OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act, the Regulatory Secretariat will be submitting to the Office of Management and Budget (OMB) a request to review and approve a previously approved Information collection concerning the GSA Mentor-Protégé Program, General Service Administration Acquisition Manual (GSAM).

Public comments are particularly invited on: Whether this collection of information is necessary; whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

DATES: Submit comments on or before April 17, 2012.

ADDRESSES: Submit comments identified by Information Collection 3090–0286, GSA Mentor-Protégé Program by any of the following methods:

- *Regulations.gov: http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by inputting ''Information Collection 3090–0286, GSA Mentor-Protégé Program'' under the heading ''Enter Keyword or ID'' and selecting ''Search''. Select the link ''Submit a Comment'' that corresponds with ''Information Collection 3090–0286, GSA Mentor-Protégé Program''. Follow the instructions provided at the ''Submit a Comment'' screen. Please include your name, company name (if any), and ''Information Collection 3090–0286, GSA Mentor-Protégé Program'' on your attached document.
- *Fax:* 202–501–4067.
- *Mail:* General Services Administration, Regulatory Secretariat (MVCB), 1275 First Street NE., Washington, DC 20417. ATTN: Hada Flowers/IC 3090–0286, GSA Mentor-Protégé Program.

Instructions: Please submit comments only and cite Information Collection 3090–0286, GSA Mentor-Protégé Program, in all correspondence related to this collection. All comments received will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Ms. Kathy Rifkin, Procurement Analyst, General Services Acquisition Policy Division, GSA (816) 823–2170 or via email at *kathy.rifkin@gsa.gov.*

SUPPLEMENTARY INFORMATION:

A. Purpose

The GSA Mentor-Protégé Program is designed to encourage GSA prime contractors to assist small businesses, small disadvantaged businesses, women-owned small businesses, veteran-owned small businesses, service-disabled veteran-owned small businesses, and HUBZone small businesses in enhancing their capabilities to perform GSA contracts and subcontracts, foster the establishment of long-term business relationships between these small business entities and GSA prime contractors, and increase the overall number of small business entities that receive GSA contract and subcontract awards.

B. Annual Reporting Burden

Respondents: 300.
Responses per Respondent: 4.
Annual Responses: 1200.
Hours per Response: 3.
Total Burden Hours: 3600.
Obtaining Copies of Proposals: Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat (MVCB), 1275 First Street NE., Washington, DC 20417, telephone (202) 501–4755. Please cite OMB Control No. 3090–0286, GSA Mentor-Protégé Program, in all correspondence.

Dated: February 9, 2012.

Joseph A. Neurauter,

Director, Office of Acquisition Policy & Senior Procurement Executive.

[FR Doc. 2012–3754 Filed 2–16–12; 8:45 am]

BILLING CODE 6820–61–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Committee on Vital and Health Statistics: Meeting

Pursuant to the Federal Advisory Committee Act, the Department of Health and Human Services (HHS) announces the following advisory committee meeting.

Name: National Committee on Vital and Health Statistics (NCVHS), Subcommittee on Quality Meeting.

Time and Date:

February 28, 2012; 9 a.m.–5:30 p.m. EST.

February 29, 2012; 9 a.m.–1 p.m. EST.

Place: Double Tree Hilton Hotel Silver Spring, 8727 Colesville Road, Silver Spring, Maryland 20910, Tel: 1–301–589–5200.

Status: Open.

Purpose: The purpose of this meeting is to gain input from diverse patient, consumer, community, and healthcare stakeholders to identify opportunities for improving the relevance, usefulness and use of quality of care measures for consumers/patients.

Contact Person for More Information: Substantive program information as well as summaries of meetings and a roster of committee members may be

obtained from Marjorie S. Greenberg, Executive Secretary, NCVHS, National Center for Health Statistics, Centers for Disease Control and Prevention, 3311 Toledo Road, Room 2402, Hyattsville, Maryland 20782, telephone (301) 458–4245. Information also is available on the NCVHS home page of the HHS Web site: *http://www.ncvhs.hhs.gov/,* where further information including an agenda will be posted when available.

Should you require reasonable accommodation, please contact the CDC Office of Equal Employment Opportunity on (301) 458–4EEO (4336) as soon as possible.

Dated: February 9, 2012.

James Scanlon,

Deputy Assistant Secretary for Planning and Evaluation, Office of the Assistant Secretary for Planning and Evaluation.

[FR Doc. 2012–3758 Filed 2–16–12; 8:45 am]

BILLING CODE 4151–05–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Committee on Vital and Health Statistics: Meeting

Pursuant to the Federal Advisory Committee Act, the Department of Health and Human Services (HHS) announces the following advisory committee meeting.

Name: National Committee on Vital and Health Statistics (NCVHS), Full Committee Meeting.

Time and Date: March 1, 2012; 9:00 a.m.–3:45 p.m. EST. March 2, 2012; 10:00 a.m.–4:00 p.m. EST.

Place: Double Tree Hilton Hotel Silver Spring, 8727 Colesville Road, Silver Spring, Maryland 20910, Tel: 1–301–589–5200.

Status: Open.

Purpose: At this meeting the Committee will hear presentations and hold discussions on several health data policy topics. On the morning of the first day the Committee will hear updates from the Department (HHS), the Centers for Medicare and Medicaid Services (CMS), and the Office of the National Coordinator (ONC). There will also be discussion on items for approval: (1) Recommendation letter on standards for Claims Attachments; (2) recommendation letter on ACA requirements to seek input on improving standardization and uniformity in new financial and administrative activities beyond those already being addressed under HIPAA; and (3) a recommendation letter on the Standards/Operating Rule Maintenance Process. After lunch, an update will be given on the March 8–9, 2012 NCVHS Socioeconomic Status (SES) Workshop, and a briefing on the preparation for use of data after transition to ICD–10 Code Sets.

On the morning of the second day there will be a review of the final action items discussed on the first day. Additionally, the Committee will hear subcommittee reports, strategic plans and discuss next steps. After lunch, there will be a briefing on the new CMS Line of Service for Information Resources Initiative. The public will be invited to comment on the information presented. Further information will be provided on the NCVHS Web site at *http://www.ncvhs.hhs.gov/.*

The times shown above are for the full Committee meeting. Subcommittee breakout sessions are scheduled for late in the afternoon on the first day and in the morning prior to the full Committee meeting on the second day. Agendas for these breakout sessions will be posted on the NCVHS Web site (URL below) when available.

Contact Person for More Information: Substantive program information as well as summaries of meetings and a roster of committee members may be obtained from Marjorie S. Greenberg, Executive Secretary, NCVHS, National Center for Health Statistics, Centers for Disease Control and Prevention, 3311 Toledo Road, Room 2402, Hyattsville, Maryland 20782, telephone (301) 458–4245. Information also is available on the NCVHS home page of the HHS Web site: *http://www.ncvhs.hhs.gov/*, where further information including an agenda will be posted when available.

Should you require reasonable accommodation, please contact the CDC Office of Equal Employment Opportunity on (301) 458–4EEO (4336) as soon as possible.

Dated: February 9, 2012.

James Scanlon,

Deputy Assistant Secretary for Planning and Evaluation, Office of the Assistant Secretary for Planning and Evaluation.

[FR Doc. 2012–3750 Filed 2–16–12; 8:45 am]

BILLING CODE 4150–05–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–12–0814]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call 404–639–7570 or send comments to Kimberly Lane, CDC Reports Clearance Officer, 1600 Clifton Road, MS D–74, Atlanta, GA 30333 or send an email to *omb@cdc.gov.*

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Written comments should be received within 60 days of this notice.

Proposed Project

CDC Cervical Cancer Study (CX3)(OMB No. 0920–0814, exp. 6/30/2012)—Revision—National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The National Breast and Cervical Cancer Early Detection Program (NBCCEDP) is the only organized national screening program in the United States. The program offers breast and cervical cancer screening to underserved women. Given resource limitations, the screening standards for cervical cancer in the program include an annual Pap test until a woman has had three consecutive normal Pap tests, at which time the Pap test frequency is reduced to every three years. HPV DNA testing has been approved in the U.S. as a secondary screening tool for ASCUS (Atypical Squamous Cells of Undetermined Significance), and as a primary screening tool for women 30 years of age and older, but it is not currently a reimbursable expense under program guidelines. Adopting HPV testing along with Pap testing in women over 30 could help the program better utilize resources by extending the screening interval of women who are cytology negative and HPV test negative, which is estimated to be 80–90% of women. In 2005, the NBCCEDP convened an expert panel to determine policies on reimbursement of the HPV DNA test with the Pap test (co-test) for primary screening. The panel recommended that the program not reimburse for the HPV DNA test but instead requested that pilot studies be performed to measure the feasibility, acceptability and barriers to use of the test.

A pilot study, the CDC Cervical Cancer Study (CX3), is currently being conducted in 15 clinics in the state of Illinois. A total of 2,246 women between the ages of 30 and 60 who visited one

of the participating clinics for routine cervical cancer screening were recruited for the study. Patients who agreed to participate in the study received an HPV DNA test in addition to the Pap test. The clinics were assigned to one of two study arms. Clinics in the intervention group administered the HPV DNA tests to eligible patients, along with a multi-component educational intervention involving both providers and patients. Clinics in the comparison group administered the HPV tests but patients and providers did not receive the educational intervention.

The purpose of the CX3 study is to examine whether or not there is an increase in the cervical cancer screening interval to three years for women in the target age range with a normal Pap test and a negative HPV DNA test. Primary goals of the study are to: (1) Assess whether provider and patient education will lead to extended screening intervals for women who have negative screening results; (2) identify facilitators and barriers to acceptance and appropriate use of the HPV test and longer screening intervals; (3) track costs associated with HPV testing and educational interventions; and (4) identify the HPV genotypes among this sample of low income women. Secondary goals of the study are to: (1) Assess follow-up of women with positive test results and (2) determine provider knowledge and acceptability of the HPV vaccine.

During the first three years (Phase I) of the study, data were collected from a number of sources. Completed data collection activities include: before beginning patient recruitment a provider baseline survey was administered to providers at the participating clinics who routinely perform Pap testing; a patient baseline survey was administered to a sample of patients during their initial clinic visit prior to the patient's HPV test; a monthly clinic survey was administered to all participating clinics during the first year of patient recruitment to obtain information regarding resources associated with participating in the study; and a provider follow-up survey was administered to clinic providers 12 months following study initiation. In addition, information collection for an 18-month follow-up survey was initiated among patients who completed a baseline survey.

Approval is currently being requested to continue data collection during Phase II of the study. These data collection activities include: continuing administration of the patient follow-up survey 18 months following the patient's initial clinic visit; administration of a provider follow-up survey 36 months following study initiation; and conducting qualitative interviews with providers to identify facilitators and barriers to acceptance and appropriate use of the HPV test and longer screening intervals. The follow-up surveys for patients and providers will assess changes in knowledge, attitudes, beliefs and behavior regarding cervical cancer screening. An additional source of data for the analysis includes patient medical and billing records, which will be reviewed to provide information necessary to determine whether or not HPV co-testing leads to extended screening intervals for women with negative results (and to determine what type of follow-up care was provided to women with positive HPV test results).

The results of this study will provide information regarding the extent to which providers are willing to extend the cervical cancer screening interval to three years for women in the target age range with a normal Pap test and a negative HPV DNA test. It will also provide information regarding whether provider and patient education will lead to extended screening intervals for women who have negative screening results. In addition, the study results will provide information regarding the level of knowledge regarding cervical cancer screening among low-income, underserved women—who represent the demographic most needy of highly sensitive screening methodologies that can increase the likelihood of detecting cervical dysplasia at less frequent screening intervals. The findings from this study will help inform standards regarding the HPV DNA test on a national level for cervical cancer screening in the NBCCEDP. Participation in the CX3 study is voluntary and there are no costs to respondents other than their time. OMB approval is requested for one year.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondent	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden (in hours)
Patients	Follow-up Patient Survey	150	1	10/60	25
Providers	Follow-up Provider Survey	70	1	30/60	35
	Focus Group Moderator Guide	75	1	1	75
Total					135

Dated: February 10, 2012.

Ronald Otten,

Deputy Chief, Centers for Disease Control and Prevention.

[FR Doc. 2012–3620 Filed 2–16–12; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–R–305]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Centers for Medicare & Medicaid Services (CMS) is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality,

utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

1. *Type of Information Collection Request:* Revision of a currently approved collection. *Title of Information Collection:* External Quality Review Protocols. *Use:* The results of Medicare reviews, Medicare accreditation services, and Medicaid external quality reviews will be used by States in assessing the quality of care provided to Medicaid beneficiaries by managed care organizations and to provide information on the quality of care provided to the general public upon request. The revised protocols are in draft and must not be used until they are approved by OMB through the PRA process. *Form Number:* CMS–R–305 (OCN 0938–0786).

Frequency of Reporting: Yearly. *Affected Public:* State, Local or Tribal Governments. *Number of Respondents:* 42. *Total Annual Responses:* 70. *Total Annual Hours:* 415,643. (For policy questions regarding this collection contact Gary B. Jackson at 410–786–1218. For all other issues call 410–786–1326.)

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access CMS' Web Site address at *http://www.cms.hhs.gov/PaperworkReductionActof1995,* or Email your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov,* or call the Reports Clearance Office on (410) 786–1326.

In commenting on the proposed information collections please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be submitted in one of the following ways by April 17, 2012:

1. *Electronically.* You may submit your comments electronically to *http://www.regulations.gov.* Follow the instructions for ''Comment or Submission'' or ''More Search Options'' to find the information collection document(s) accepting comments.

2. *By regular mail.* You may mail written comments to the following address: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development, Attention: Document Identifier/OMB Control Number CMS–R–305 (OCN 0938–0786), Room C4–26–05, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

Dated: February 13, 2012.

Martique Jones,

Director, Regulations Development Group, Division B, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2012–3790 Filed 2–16–12; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Comment Request

Title: Low Income Home Energy Assistance Program LIHEAP Leveraging Report.

OMB No.: 0970–0121.

Description: The LIHEAP leveraging incentive program rewards LIHEAP grantees that have leveraged non-federal home energy resources for low-income households. The LIHEAP leveraging report is the application for leveraging incentive funds that these LIHEAP grantees submit to the Department of Health and Human Services for each fiscal year in which they leverage countable resources. Participation in the leveraging incentive program is voluntary and is described at 45 CFR 96.87. The LIHEAP leveraging report obtains information on the resources leveraged by LIHEAP grantees each fiscal year (as cash, discounts, waivers, and in-kind); the benefits provided to low-income households by these resources (for example, as fuel and payments for fuel, as home heating and cooling equipment, and as weatherization materials and installation); and the fair market value of these resources/benefits.

HHS needs this information in order to carry out statutory requirements for administering the LIHEAP leveraging incentive program, to determine countability and valuation of grantees leveraged non-federal home energy resources, and to determine grantees shares of leveraging incentive funds. HHS proposes to request a three-year extension of OMB approval for the currently approved LIHEAP leveraging report information collection.

Respondents: State, local or tribal governments.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
LIHEAP Leveraging Report	70	1	38	2,660

Estimated Total Annual Burden Hours: 2,660.

Additional Information: Copies of the proposed collection may be obtained by writing to the Administration for Children and Families, Office of Planning, Research and Evaluation, 370 L'Enfant Promenade SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. All requests should be identified by the title of the information collection. Email address: *infocollection@acf.hhs.gov.*

OMB Comment: OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following:

Office of Management and Budget, Paperwork Reduction Project, Fax: 202–395–7285, Email: *OIRA_SUBMISSION@OMB.EOP.GOV,* Attn: Desk Officer for the Administration for Children and Families.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 2012–3680 Filed 2–16–12; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2012–N–0114]

Agency Information Collection Activities; Proposed Collection; Comment Request; Request for Samples and Protocols

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal Agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on the information collection requirements relating to the regulations which state that protocols for samples of biological products must be submitted to the Agency.

DATES: Submit either electronic or written comments on the collection of information by April 17, 2012.

ADDRESSES: Submit electronic comments on the collection of information to *http://www.regulations.gov.* Submit written comments on the collection of information to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Ila S. Mizrachi, Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, 301–796–7726, *Ila.Mizrachi@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Request for Samples and Protocols—(OMB Control Number 0910–0206)—Extension

Under section 351 of the Public Health Service Act (42 U.S.C. 262), FDA has the responsibility to issue regulations that prescribe standards designed to ensure the safety, purity, and potency of biological products and to ensure that the biologics licenses for such products are only issued when a product meets the prescribed standards. Under § 610.2 (21 CFR 610.2), the Center for Biologics Evaluation and Research (CBER) or the Center for Drug Evaluation and Research may at any time require manufacturers of licensed biological products to submit to FDA samples of any lot along with the protocols showing the results of applicable tests prior to distributing the lot of the product. In addition to § 610.2, there are other regulations that require the submission of samples and protocols for specific licensed biological products: §§ 660.6 (21 CFR 660.6) (Antibody to Hepatitis B Surface Antigen); 660.36 (21 CFR 660.36) (Reagent Red Blood Cells); and 660.46 (21 CFR 660.46) (Hepatitis B Surface Antigen).

Section 660.6(a) provides requirements for the frequency of submission of samples from each lot of Antibody to Hepatitis B Surface Antigen product, and § 660.6(b) provides the requirements for the submission of a protocol containing specific information along with each required sample. For § 660.6 products subject to official release by FDA, one sample from each filling of each lot is required to be submitted along with a protocol consisting of a summary of the history of manufacture of the product, including all results of each test for which test results are requested by CBER. After official release is no longer required, one sample along with a protocol is required to be submitted at 90-day intervals. In addition, samples, which must be accompanied by a protocol, may at any time be required to be submitted to CBER if continued evaluation is deemed necessary.

Section 660.36(a) requires, after each routine establishment inspection by FDA, the submission of samples from a lot of final Reagent Red Blood Cell product along with a protocol containing specific information. Section 660.36(a)(2) requires that a protocol contain information including, but not limited to, manufacturing records, certain test records, and identity test results. Section 660.36(b) requires a copy of the antigenic constitution matrix specifying the antigens present or absent to be submitted to the CBER Director at the time of initial distribution of each lot.

Section 660.46(a) contains requirements as to the frequency of submission of samples from each lot of Hepatitis B Surface Antigen product, and § 660.46(b) contains the requirements as to the submission of a protocol containing specific information along with each required sample. For § 660.46 products subject to official release by FDA, one sample from each filling of each lot is required to be submitted along with a protocol consisting of a summary of the history of manufacture of the product, including all results of each test for which test results are requested by CBER. After notification of official release is received, one sample along with a protocol is required to be submitted at 90-day intervals. In addition, samples, which must be accompanied by a protocol, may at any time be required to be submitted to CBER if continued evaluation is deemed necessary.

Samples and protocols are required by FDA to help ensure the safety, purity, or potency of a product because of the potential lot-to-lot variability of a product produced from living organisms. In cases of certain biological products (e.g., Albumin, Plasma Protein Fraction, and therapeutic biological products) that are known to have lot-to-lot consistency, official lot release is not normally required. However,

submissions of samples and protocols of these products may still be required for surveillance, licensing, and export purposes, or in the event that FDA obtains information that the manufacturing process may not result in consistent quality of the product.

The following burden estimate is for the protocols required to be submitted with each sample. The collection of samples is not a collection of information under 5 CFR 1320.3(h)(2). Respondents to the collection of information under § 610.2 are manufacturers of licensed biological products. Respondents to the collection of information under §§ 660.6(b), 660.36(a)(2) and (b), and 660.46(b) are manufacturers of the specific products referenced previously in this document. The estimated number of respondents for each regulation is based on the annual number of manufacturers that submitted samples and protocols for biological products including submissions for lot release, surveillance, licensing, or export. Based on information obtained from FDA's database system, approximately 77 manufacturers submitted samples and protocols in fiscal year (FY) 2011, under the regulations cited previously in this document. FDA estimates that approximately 73 manufacturers submitted protocols under § 610.2 and 2 manufacturers submitted protocols under the regulation (§ 660.6) for the other specific product. FDA received no submissions under § 660.36 or § 660.46; however, FDA is using the estimate of one protocol submission under each regulation in the event that protocols are submitted in the future.

The estimated total annual responses are based on FDA's final actions completed in FY 2011 for the various submission requirements of samples and protocols for the licensed biological products. The average burden per response is based on information provided by industry. The burden estimates provided by industry ranged from 1 to 5.5 hours. Under § 610.2, the average burden per response is based on the average of these estimates and rounded to 3 hours. Under the remaining regulations, the average burden per response is based on the higher end of the estimate (rounded to 5 or 6 hours) since more information is generally required to be submitted in the other protocols than under § 610.2.

FDA estimates the burden of this information collection as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN[1]

21 CFR section	No. of respondents	No. of responses per respondent	Total annual responses	Average burden per response	Total hours
610.2	73	92.9	6,782	3	20,346
660.6(b)	2	21.5	43	5	215
660.36(a)(2) and (b)	1	1	1	6	6
660.46(b)	1	1	1	5	5
Total	77		6,827		20,572

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Dated: February 10, 2012.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2012–3743 Filed 2–16–12; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Funds for Leadership Training in Pediatric Dentistry's Current Grantees; One-Year Extension

AGENCY: Health Resources and Services Administration (HRSA), HHS.

ACTION: Notice of a Non-competitive One-Year Extension with Funds for Leadership Training in Pediatric Dentistry's (T17) Current Grantees.

SUMMARY: The Health Resources and Services Administration (HRSA) will be issuing a non-competitive one-year extension with funds for the Leadership Training in Pediatric Dentistry awards to Columbia University, The Regents of the University of California and the University of Washington. Up to $196,506 per grantee will be awarded over a one-year extended project period. The Leadership Training in Pediatric Dentistry program supports a national focus on leadership training in pediatric dentistry through the support of: (1) The postdoctoral training of dentists in the primary care specialty of pediatric dentistry for leadership roles in education, research, public health, advocacy, and public service related to oral health programs for populations of mothers and children (infants through adolescents), particularly children with special health care needs; (2) the development and dissemination of curricula, teaching models, and other educational resources to enhance maternal and child health (MCH) oral health programs; and (3) the continuing education, consultation, and technical assistance in pediatric oral health which address the needs of the MCH community. This extension with funds will allow HRSA's Maternal and Child Health Bureau (MCHB) to align its leadership training initiatives in oral health with HRSA's other oral health training investments.

SUPPLEMENTARY INFORMATION: Grantees of record and intended award amounts are:

Grantee/organization name	Grant number	State	FY2011 Authorized funding level	FY2012 Estimated funding level
Columbia University	T17MC06359	NY	$196,506	$196,506
The Regents of the University of California, Los Angeles	T17MC08055	CA	196,506	196,506
University of Washington	T17MC00020	WA	196,506	196,506

Amount of the Award(s): Up to $196,506 per grantee over a one-year project period.

CFDA Number: 93.110.

Current Project Period: 7/1/2007 through 6/30/2012.

Period of Supplemental Funding: 7/1/2012 through 6/30/2013.

Authority: Title V of the Social Security Act, Section 501(a)(2) (42 U.S.C. 701(a)(2)).

Justification

HRSA is extending funding for the Leadership Training in Pediatric Dentistry grants by one year for the following reason: MCHB has been working with leaders within HRSA involved in oral health, the Bureau of Health Professions (BHPr) on oral health training investments, and other oral health leaders in the field to align its leadership training in oral health with HRSA's other oral health training investments. With HRSA prioritizing oral health integration in primary care, MCHB is focusing on the best possible use of its funds to continue to promote oral health training in a coordinated way related to efforts and initiatives within HRSA and the field.

HRSA's BHPr plans to hold a stakeholders meeting on oral health training in 2012 that would impact the scope and nature of all HRSA's oral health training initiatives. To ensure coordinated and non-duplicative HRSA program planning and future oral health grant funding, it is crucial to fund MCHB's current training program for one year to sustain MCH oral health leadership training, while developing the next MCH oral health leadership training initiative in a systemically coordinated way with other HRSA oral health training initiatives.

FOR FURTHER INFORMATION CONTACT: Christopher Dykton, Health Resources and Services Administration, Maternal and Child Health Bureau, 5600 Fishers Lane, Room 18A–55, Rockville, Maryland 20857 or email *cdykton@hrsa.gov*.

Dated: February 10, 2012.

Mary K. Wakefield,

Administrator.

[FR Doc. 2012–3792 Filed 2–16–12; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Submission for OMB Emergency Review; Comment Request: A Multi-Center International Hospital-Based Case-Control Study of Lymphoma in Asia (AsiaLymph) (NCI)

Summary: In accordance with Section 3507(j) of the Paperwork Reduction Act of 1995, the National Cancer Institute (NCI), the National Institutes of Health (NIH), has submitted to the Office of Management and Budget (OMB) a request for emergency review and processing this information collection by March 5, 2012. NCI is requesting emergency processing of this information collection, pursuant to 5 CFR 1320.13, because NCI cannot reasonably comply with the normal clearance procedures which would cause a delay and likely prevent or substantially disrupt the collection of information. A delay in starting the information collection would hinder the agency in accomplishing its mission to the detriment of the public good. Public harm could result through the loss of critically needed information to understand and reduce the cancer burden from lymphoid malignancies in the Asian population. The National Institutes of Health may not conduct or sponsor, and the respondent is not required to respond to, an information collection that has been extended, revised, or implemented on or after October 1, 1995, unless it displays a currently valid OMB control number.

Proposed Collection: Title: A Multi-Center International Hospital-Based Case-Control Study of Lymphoma in Asia (AsiaLymph) (NCI). *Type of Information Collection Request:* Emergency. *Need and Use of Information Collection:* Incidence rates of certain lymphomas have increased in several centers in Asia thereby increasing the cancer burden in these populations, but the causes remain unknown. AsiaLymph is a multi-disciplinary case-control study that will confirm and extend previous findings and yield novel insights into the causes of lymphoma in both Asia and the West. The major postulated risk factors for evaluation in this study are chemical exposures (i.e., organochlorines, trichloroethylene, and benzene) and genetic susceptibility. Other factors potentially related to lymphoma, such as viral infections, ultraviolet radiation exposure, medical conditions, and other lifestyle factors will also be studied. Patterns of key risk factors, including range of exposures, prevalence of exposures, correlations between exposures, and variation in gene regions are of particular interest. Patients from 19 participating hospitals will be screened and enrolled. There will be a one-time computer-administered interview, and patients will also be asked to provide a one-time blood and buccal cell mouth wash sample and lymphoma cases will be asked to make available a portion of their pathology sample. *Frequency of Response:* Once. *Affected Public:* Individuals. *Type of Respondents:* Newly diagnosed patients with lymphoma or patients undergoing surgery or other treatment for non-cancer related medical issues who live in Hong Kong, Taiwan, and Chengdu and Tianjin, China will be enrolled at treating hospitals. The annual reporting burden is estimated at 3,377 hours (see Table below). There are no Capital Costs, Operating Costs, and/or Maintenance Costs to report.

ESTIMATES OF ANNUAL BURDEN HOURS

Category of respondents	Types of respondents	Number of respondents	Frequency of response	Average time per response (Hours)	Annual burden hours
Individuals	Patients to be Screened	3,100	1	5/60	258
	Patients with Lymphoma	1,100	1	105/60	963
	Other Patients	1,100	1	105/60	963
	Study Pathologists	19	58	5/60	92
	Interviewers	19	116	30/60	1102
Total					3,377

Request for Comments: Written comments and/or suggestions from the public and affected agencies should address one or more of the following points: (1) Evaluate whether the proposed collection of information is

necessary for the proper performance of the function of the agency, including whether the information will have practical utility; (2) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) enhance the quality, utility, and clarity of the information to be collected; and (4) minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Direct Comments to OMB: 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 Attention: NIH Desk Officer, Office of Management and Budget, at *OIRA_submission@omb.eop.gov* or by fax to 202–395–6974. To request more information on the proposed project or to obtain a copy of the data collection plans and instruments, contact Nathaniel Rothman, Senior Investigator for the Occupational and Environmental Epidemiology Branch, Division of Epidemiology and Genetics, National Cancer Institute, 6120 Executive Boulevard, Room 8118, Rockville, MD 20892 or call non-toll-free number 301–496–9093 or email your request, including your address to: *rothmann @mail.nih.gov.*

Comments Due Date: Comments regarding this information collection are best assured of having their full effect if received within 15 days of the date of this publication.

Dated: February 13, 2012.

Vivian Horovitch-Kelley,

NCI Project Clearance Liaison, National Institutes of Health.

[FR Doc. 2012–3830 Filed 2–16–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Child Health and Human Development; New Proposed Collection; Comment Request Stress and Cortisol Measurement for the National Children's Study

Summary: In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, for opportunity for public comment on proposed data collection projects, the National Institute of Child Health and Human Development (NICHD), the National Institutes of Health (NIH) will publish periodic summaries of proposed projects to be submitted to the Office of Management and Budget (OMB) for review and approval.

Proposed Collection

Title: Stress and Cortisol Measurement Substudy for the National Children's Study (NCS). *Type of Information Collection Request:* NEW. *Need and Use of Information Collection:* The Children's Health Act of 2000 (Pub. L. 106–310) states:

(a) PURPOSE.—It is the purpose of this section to authorize the National Institute of Child Health and Human Development to conduct a national longitudinal study of environmental influences (including physical, chemical, biological, and psychosocial) on children's health and development.

(b) IN GENERAL.—The Director of the National Institute of Child Health and Human Development shall establish a consortium of representatives from appropriate Federal agencies (including the Centers for Disease Control and Prevention, the Environmental Protection Agency) to—

(1) Plan, develop, and implement a prospective cohort study, from birth to adulthood, to evaluate the effects of both chronic and intermittent exposures on child health and human development; and

(2) Investigate basic mechanisms of developmental disorders and environmental factors, both risk and protective, that influence health and developmental processes.

(c) REQUIREMENT.—The study under subsection (b) shall—

(1) Incorporate behavioral, emotional, educational, and contextual consequences to enable a complete assessment of the physical, chemical, biological, and psychosocial environmental influences on children's well-being;

(2) Gather data on environmental influences and outcomes on diverse populations of children, which may include the consideration of prenatal exposures; and

(3) Consider health disparities among children, which may include the consideration of prenatal exposures.

To fulfill the requirements of the Children's Health Act, the Stress and Cortisol Measurement Substudy will develop an optimized, item-reduced measure of self-reported stress that is supported empirically through convergent validity analysis of stress biomarkers. Specifically, key moderators of stress biomarkers will be evaluated to inform the efficiency and quality of measurements during pregnancy. Development of a scientifically robust maternal stress measure would measure chronic stress more efficiently, would not require biospecimen collection and biomarker analyses, and would thereby reduce participant burden and NCS Vanguard (Pilot) and NCS Main Study costs. With this information collection request, the NCS seeks to obtain OMB's clearance to conduct a substudy aimed at developing a validated questionnaire that will reflect specific biological and physiological measures of maternal stress.

Background

The National Children's Study is a prospective, national longitudinal study of the interaction between environment, genetics on child health and development. The Study defines ''environment'' broadly, taking a number of natural and man-made environmental, biological, genetic, and psychosocial factors into account. By studying children through their different phases of growth and development, researchers will be better able to understand the role these factors have on health and disease. Findings from the Study will be made available as the research progresses, making potential benefits known to the public as soon as possible. The National Children's Study is led by a consortium of federal partners: the U.S. Department of Health and Human Services (*http://www.hhs.gov/*) (including the Eunice Kennedy Shriver National Institute of Child Health and Human Development (*http://www.nichd.nih.gov/*) and the National Institute of Environmental Health Sciences (*http://www.niehs.nih.gov/*) of the National Institutes of Health (*http://www.nih.gov/*) and the Centers for Disease Control and Prevention (*http://www.cdc.gov/*)), and the U.S. Environmental Protection Agency (*http://www.epa.gov/*).

To conduct the detailed preparation needed for a study of this size and complexity, the NCS was designed to include a preliminary pilot study known as the Vanguard Study. The purpose of the Vanguard Study is to assess the feasibility, acceptability, and cost of the recruitment strategy, study procedures, and outcome assessments that are to be used in the NCS Main Study. The Vanguard Study begins prior to the NCS Main Study and will run in parallel with the Main Study. At every phase of the NCS, the multiple methodological studies conducted during the Vanguard phase will inform the implementation and analysis plan for the Main Study.

In this information collection request, the NCS requests approval from OMB to perform a multi-center substudy, called the Stress and Cortisol Measurement Substudy. This substudy aims to

determine the most reliable, acceptable, and cost-efficient approach for assessing maternal stress. Maternal stress is of particular interest to the NCS due to studies that have shown an association between maternal stress and negative health outcomes, including preterm birth which is one of the most important problems in maternal-child health in the US. Stress factors are also more prevalent in the population of socio-demographically disadvantaged women who are at an increased risk for preterm birth. Maternal stress is associated with additional health outcomes, such as still-birth, low birth weight, problems in offspring brain function and behavior (including lower IQ and impaired executive function), immune-related problems such as allergies and asthma, congenital malformations, infections, and numerous disorders of organ systems.

Development of a scientifically robust and validated questionnaire to reflect specific physiological measures of stress would allow us to measure chronic stress more efficiently, would not require biospecimen collection and biomarker analyses, and would thereby reduce participant burden and Study costs. To develop this instrument, the NCS will collect several types of information from substudy participants through medical record abstraction, questionnaires (a series of validated stress measures), physiological measures (heart rate and self-reported stress), and several types of biospecimens.

Frequency of Response: Annual [As needed].

Affected Public: Pregnant women and their children.

Type of Respondents: Pregnant women who are not geographically eligible to enroll in the NCS Vanguard Study.

Annual Reporting Burden: See Table 1. The annualized cost to respondents is estimated at: $74,677 (based on $10 per hour). There are no Capital Costs to report. There are no Operating or Maintenance Costs to report.

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN SUMMARY, STRESS AND CORTISOL MEASUREMENTS

Data collection activity	Type of respondent	Estimated number of respondents	Estimated number of responses per respondent	Average burden hours per response	Estimated total annual burden hours
Screening	Members of NCS target population (not NCS participants).	2,100	1	0.08	175
Consent	Members of NCS target population (not NCS participants).	700	1	0.17	117
Saliva Self-Collection Demonstration	Members of NCS target population (not NCS participants).	700	1	0.25	175
Urine Self-Collection Instructions	Members of NCS target population (not NCS participants).	700	1	0.08	58
Ecological Momentary Assessment Training.	Members of NCS target population (not NCS participants).	700	1	0.50	350
Visit 1 Stress Questionnaire	Members of NCS target population (not NCS participants).	700	1	1.00	700
Adult Blood	Members of NCS target population (not NCS participants).	700	2	0.50	700
Adult Urine	Members of NCS target population (not NCS participants).	700	1	0.25	175
Adult Hair	Members of NCS target population (not NCS participants).	700	2	0.25	350
Adult Saliva	Members of NCS target population (not NCS participants).	700	28	0.05	980
Demographic and Health Interview	Members of NCS target population (not NCS participants).	700	1	1.00	700
Participant Contact Information Sheet.	Members of NCS target population (not NCS participants).	700	1	0.08	58
Take-Home Questionnaire	Members of NCS target population (not NCS participants).	700	1	0.50	350
Time Diary	Members of NCS target population (not NCS participants).	700	72	0.03	1,680
Heart Monitoring	Members of NCS target population (not NCS participants).	700	1	0.03	23
Visit 2 Stress Questionnaire	Members of NCS target population (not NCS participants).	700	1	0.75	525
Stressful Life Events Schedule Checklist.	Members of NCS target population (not NCS participants).	700	1	0.50	350
Total		700			7,467

Request for Comments

Written comments and/or suggestions from the public and affected agencies are invited on one or more of the following points: (1) Whether the proposed collection of information is necessary for the proper performance of the function 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 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.

For Further Information

To request more information on the proposed project or to obtain a copy of the data collection plans and instruments, contact Dr. Sarah L. Glavin, Deputy Director, Office of Science Policy, Analysis and Communication, National Institute of Child Health and Human Development, 31 Center Drive Room 2A18, Bethesda, Maryland, 20892, or call non-toll free number (301) 496–1877 or Email your request, including your address to *glavins@mail.nih.gov*.

Comments Due Date

Comments regarding this information collection are best assured of having their full effect if received within 60 days of the date of this publication.

Dated: February 10, 2012.

Sarah L. Glavin,

Deputy Director, Office of Science Policy, Analysis and Communications, National Institute of Child Health and Human Development.

[FR Doc. 2012–3809 Filed 2–16–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Government-Owned Inventions; Availability for Licensing

AGENCY: National Institutes of Health, Public Health Service, HHS.

ACTION: Notice.

SUMMARY: The inventions listed below are owned by an agency of the U.S. Government and are available for licensing in the U.S. in accordance with 35 U.S.C. 207 to achieve expeditious commercialization of results of federally-funded research and development. Foreign patent applications are filed on selected inventions to extend market coverage for companies and may also be available for licensing.

ADDRESSES: Licensing information and copies of the U.S. patent applications listed below may be obtained by writing to the indicated licensing contact at the Office of Technology Transfer, National Institutes of Health, 6011 Executive Boulevard, Suite 325, Rockville, Maryland 20852–3804; telephone: 301–496–7057; fax: 301–402–0220. A signed Confidential Disclosure Agreement will be required to receive copies of the patent applications.

Selective Inhibitors of Polo-Like Kinase 1 (PLK1) Polo-Box Domains as Potential Anticancer Agents

Description of Technology: PLK1 is a regulator of cell growth that represents a new target for anticancer therapeutic development. High expression of PLK1 has been associated with several types of cancer (e.g., breast cancer, prostate cancer, ovarian cancer, non-small cell lung carcinoma). Inhibiting PLK1 could be an effective treatment for cancer patients without significant side-effects. Available for licensing are synthetic peptides with the ability to bind to polo-like kinase 1 (PLK1) polo-box domains (PBDs) with selectivity and nanomolar affinity and induce apoptosis in cancer cells. By inhibiting the functions of PLK1, these peptides could serve as potential anti-cancer therapies. This technology is related to and an extension of HHS technology reference E–181–2009.

Potential Commercial Applications:

- New anticancer therapies that specifically target PLK1.
- Platform for the development of further improved PLK1 inhibitors.

Competitive Advantages:

- High PBD binding affinity.
- High binding selectivity.

Development Stage: Early-stage.

Inventors: Terrence R. Burke, Jr. (NCI), et al.

Publications:

1. Liu F, et al. Serendipitous alkylation of a Plk1 ligand uncovers a new binding channel. Nat Chem Biol. 2011 Jul 17;7(9):595–601. [PMID 21765407]
2. Qian W, et al. Investigation of unanticipated alkylation at the N(pi) position of a histidyl residue under Mitsunobu conditions and synthesis of orthogonally protected histidine analogues. J Org Chem. 2011 Nov 4;76(21):8885–8890. [PMID 21950469]

Intellectual Property: HHS Reference No. E–053–2012/0—U.S. Provisional Application No. 61/588,470 filed 19 Jan 2012.

Related Technology: HHS Reference No. E–181–2009/3—U.S. Provisional Application No. 61/474,621 filed 12 Apr 2011.

Licensing Contact: Patrick McCue, Ph.D.; 301–435–5560; *mccuepat@mail.nih.gov.*

Influenza Vaccine

Description of Technology: It has been shown that the fusion peptide, a sequence comprised of fourteen amino acids at the N-terminal of the influenza hemagglutinin 2 protein is conserved among A and B influenza viruses. Monoclonal antibodies against this peptide are capable of binding all influenza virus HA proteins and inhibit viral growth by impeding the fusion process between the virus and the target cell. This application claims immunogenic conjugates comprising the fusion peptide region linked to a carrier protein. In preclinical studies, these conjugates were immunogenic and induced booster responses. The induced antibodies bound to the recombinant HA protein. This methodology of linking the highly conserved fusion peptide region to a carrier protein can broaden the protective immune response to include influenza A and B virus strains. This would eliminate the need for annual influenza vaccination.

Potential Commercial Applications:

- Influenza vaccines
- Influenza diagnostics
- Research tools

Competitive Advantages:

- Universal influenza vaccine
- Efficient manufacturing process
- May eliminate need for yearly influenza vaccination

Development Stage:

- Pre-clinical
- In vitro data available
- In vivo data available (animal)

Inventors: Joanna Kubler-Kielb, Jerry M. Keith, Rachel Schneerson (NICHD).

Intellectual Property: HHS Reference No. E–271–2011/0—U.S. Provisional Application No. 61/541,942 filed 30 Sep 2011.

Licensing Contact: Peter A. Soukas, J.D.; 301–435–4646; *ps193c@nih.gov.*

Collaborative Research Opportunity: The NICHD is seeking statements of capability or interest from parties interested in collaborative research to further develop, evaluate or commercialize conjugate influenza vaccines comprising fusion peptide region. For collaboration opportunities, please contact Joseph Conrad, Ph.D., J.D. at 301–435–3107 or *jmconrad@mail.nih.gov.*

ACSF3-Based Diagnostics and Therapeutics for Combined Malonic and Methylmalonic Aciduria (CMAMMA) and Other Metabolic Disorders

Description of Technology: Combined malonic and methylmalonic aciduria (CMAMMA) is a metabolic disorder in which malonic acid and methylmalonic acid, key intermediates in fatty acid metabolism, accumulate in the blood and urine. This disorder is often undetected until symptoms manifest, which can include developmental delays and a failure to thrive in children, and psychiatric and neurological disorders in adults. Once thought to be a very rare disease,

CMAMMA is now thought to be one of the most common forms of methylmalonic acidemia, and perhaps one of the most common inborn errors of metabolism, with a predicted incidence of one in 30,000.

Investigators at the National Human Genome Research Institute (NHGRI) have identified the genetic cause of CMAMMA, an enzyme encoded by the ACSF3 (Acyl-CoA Synthetase Family Member 3) gene. This enzyme is located in the mitochondrion, and appears to be a methylmalonyl-CoA and malonyl-CoA synthetase, which catalyzes the first step of intra-mitochondrial fatty acid synthesis. As such, this discovery may not only be critical for the development of diagnostic tools and treatments for CMAMMA, but also holds promise for the treatment of other related metabolic disorders.

Potential Commercial Applications:

- Diagnosis of CMAMMA or other metabolic diseases.
- Therapies for CMAMMA or other metabolic diseases, such as lipoic acid administration, gene therapy or enzyme replacement therapy.

Competitive Advantages:

- Mutation of ACSF3 has been shown to be the genetic cause of CMAMMA, and there are no existing methods to diagnose this disorder.
- Therapies based on ACSF3 may be applicable to a variety of metabolic disorders.

Development Stage:

- In vivo data available (animal).
- In vivo data available (human).

Inventors: Charles P. Venditti, Leslie G. Biesecker, Jennifer L. Sloan, Jennifer J. Johnston, Eirini Manoli, Randy J. Chandler (all of NHGRI).

Publication: Sloan JL, et al. Exome sequencing identifies ACSF3 as a cause of combined malonic and methylmalonic aciduria. Nat Genet. 2011 Aug 14;43(9):883–886. [PMID 21841779]

Intellectual Property: HHS Reference No. E–209–2011/0—U.S. Provisional Application No. 61/504,030 filed 01 Jul 2011.

Licensing Contact: Tara L. Kirby, Ph.D.; 301–435–4426; *tarak@mail.nih.gov.*

Antagonists of the Hedgehog Pathway as Therapeutics for the Treatment of Heterotopic Ossification, Vascular Calcification, and Pathologic Mineralization

Description of Technology: Heterotopic ossification (HO) results from osteoid formation of mature lamellar bone in soft tissue sites outside the skeletal periosteum (skeletal system), most commonly around proximal limb joints. HO can also be caused by genetic diseases such as progressive osseous heteroplasia (POH) and fibrodysplasia ossificans progressiva (FOP). Currently, all forms of HO lack adequate treatments and definite cure. Vascular calcification is a complex process that involves biomineralization and resembles osteogenesis. It is exacerbated during such conditions as diabetes, osteoporosis, menopause, hypertension, metabolic syndrome, chronic kidney disease, and end stage renal disease. In the present technology, the inventors describe novel methods for preventing or treating HO and vascular calcification using one or more antagonists of the Hedgehog pathway. The inventors, using both in vitro (limb culture experiments) and in vivo studies using Prx1-cre; Gsf/f mice model discovered that the antagonists of the Hedgehog pathway prevent formation of HO. The inventors also observed that Prx1-cre; Gsf/f mice developed calcification or mineralization around their blood vessels, and treatment with Hedgehog antagonists reduced mineralization throughout the body of these mice, including regions around the blood vessels, as observed by mineral staining. The antagonists that can be used to develop effective therapeutics include zerumbone epoxide, arcyriaflavin C, 5,6-dihyroxyarcyriaflavin A, physalin F, physalin B, arsenic trioxide (ATO), sodium arsenite, etc.

Potential Commercial Applications: Development of therapeutics for heterotopic ossification, vascular calcification, and pathologic mineralization.

Competitive Advantages: Several clinically tested and FDA-approved Hedgehog antagonists are currently available and these compounds will expedite the commercial development of this technology.

Development Stage:

- Early-stage.
- Pre-clinical.
- In vitro data available.
- In vivo data available (animal).

Inventors: Yingzi Yang and Jean Regard (NHGRI).

Intellectual Property: HHS Reference No. E–116–2011/0—U.S. Provisional Application No. 61/504,041 filed 01 Jul 2011.

Licensing Contact: Suryanarayana (Sury) Vepa, Ph.D.; 301–435–5020; *vepas@mail.nih.gov.*

Collaborative Research Opportunity: The National Human Genome Research Institute (NHGRI) is seeking statements of capability or interest from parties interested in collaborative research to further develop, evaluate or commercialize antagonists of the Hedgehog pathway for treatment of ossification and calcification disorders. For collaboration opportunities, please contact Claire T. Driscoll at 301–594–2235 or *cdriscoll@mail.nih.gov.*

A Novel Treatment for Malarial Infections

Description of Technology: The inventions described herein are antimalarial small molecule inhibitors of the plasmodial surface anion channel (PSAC), an essential nutrient acquisition ion channel expressed on human erythrocytes infected with malaria parasites. These inhibitors were discovered by high-throughput screening of chemical libraries and analysis of their ability to kill malaria parasites in culture. Two separate classes of inhibitors were found to work synergistically in combination against PSAC and killed malaria cultures at markedly lower concentrations than separately. These inhibitors have high affinity and specificity for PSAC and have acceptable cytotoxicity profiles. Preliminary in vivo testing of these compounds in a mouse malaria model is currently ongoing.

Potential Commercial Applications: Treatment of malarial infections.

Competitive Advantages:

- Novel drug treatment for malarial infections.
- Synergistic effect of these compounds on PSAC.

Development Stage:

- In vitro data available.
- In vivo data available (animal).

Inventor: Sanjay A. Desai (NIAID).

Publications:

1. Kang M, et al. Malaria parasites are rapidly killed by dantrolene derivatives specific for the plasmodial surface anion channel. Mol. Pharmacol. 2005 Jul;68(1):34–40. [PMID 15843600]
2. Desai SA, et al. A voltage-dependent channel involved in nutrient uptake by red blood cells infected with the malaria parasite. Nature. 2000 Aug 31;406(6799):1001–1005. [PMID 10984055]

Patent Status: HHS Reference No. E–202–2008/0—U.S. Patent Application No. 13/055,104 filed 20 Jan 2011; various international patent applications.

Licensing Contact: Kevin W. Chang, Ph.D.; 301–435–5018; *changke@mail.nih.gov.*

Collaborative Research Opportunity: The NIAID Office of Technology Development is seeking statements of capability or interest from parties interested in collaborative research to further develop, evaluate, or commercialize antimalarial drugs that

target PSAC or other parasite-specific transporters. For collaboration opportunities, please contact Dana Hsu at 301–496–2644.

Dated: February 13, 2012.

Richard U. Rodriguez,

Director, Division of Technology Development and Transfer, Office of Technology Transfer, National Institutes of Health.

[FR Doc. 2012–3824 Filed 2–16–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel; Alzheimer's Prevention.

Date: March 1, 2012.

Time: 5 p.m. to 8 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites, Chevy Chase Pavilion, 4300 Military Road NW., Washington, DC 20015.

Contact Person: William Cruce, Ph.D., Scientific Review Officer, National Institute on Aging, Scientific Review Branch, Gateway Building 2C–212, 7201 Wisconsin Ave., Bethesda, MD 20814, 301–402–7704, *crucew@nia.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: National Institute on Aging Special Emphasis Panel; Contract ABC.

Date: March 9, 2012.

Time: 12 p.m. to 1:30 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Suite 2C212, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Alicja L. Markowska, Ph.D., DSC, Scientific Review Branch, National Institute on Aging, 7201 Wisconsin Avenue, Suite 2C212, Bethesda, MD 20892, 301–496–9666, *markowsa@nia.nih.gov.*

Name of Committee: National Institute on Aging Special Emphasis Panel; Datasets in Aging.

Date: April 2–3, 2012.

Time: 9 a.m. to 2 p.m.

Agenda: To review and evaluate grant applications.

Place: Doubletree Hotel, 8120 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Rebecca J. Ferrell, Ph.D., Scientific Review Officer, National Institute on Aging, Gateway Building Rm. 2C212, 7201 Wisconsin Avenue, Bethesda, MD 20892, 301–402–7703, *ferrellrj@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: February 10, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–3821 Filed 2–16–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel; Novel Technologies for Powering Ventricular Assist Devices.

Date: March 8, 2012.

Time: 9 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda Marriott Suites, 6711 Democracy Boulevard, Bethesda, MD 20817.

Contact Person: Stephanie J Webb, Ph.D., Scientific Review Officer, Review Branch/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7196, Bethesda, MD 20892, 301–435–0291, *stephanie.webb@nih.gov.*

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel; Pulmonary Vascular—Right Ventricular Axis Research Program.

Date: March 9, 2012.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Garden Inn, 7301 Waverly Street, Bethesda, MD 20814.

Contact Person: YingYing Li-Smerin, MD, Ph.D., Scientific Review Officer, Office of Scientific Review/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7184, Bethesda, MD 20892–7924, 301–435–0277, *lismerin@nhlbi.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: February 10, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–3826 Filed 2–16–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; NIDDK UDA Contract Proposal Review.

Date: March 16, 2012.

Time: 2:30 p.m. to 4 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Xiaodu Guo, MD, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 761, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–4719, *guox@extra.niddk.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: February 13, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–3799 Filed 2–16–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting. The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; Liver Tissue and Cell Distribution System.

Date: March 15, 2012.

Time: 10:30 a.m. to 12 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health Two Democracy Plaza 6707 Democracy Boulevard Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Maria E. Davila-Bloom, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 758, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–7637, *davila-bloomm@extra.niddk.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: February 13, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–3804 Filed 2–16–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Mental Health; Notice of Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a conference call of the Interagency Autism Coordinating Committee (IACC).

The IACC Full Committee will be having a conference call on Tuesday, February 28, 2012. The committee will receive an update on the status of the selection process for the new members of the IACC under CARA and will have an opportunity to discuss updates regarding agency and organization activities, as well as emerging issues in the autism community. This conference call will be accessible to the public through a call-in number and access code.

Name of Committee: Interagency Autism Coordinating Committee (IACC).

Type of meeting: Conference Call.

Date: February 28, 2012.

Time: 2 p.m. to 5 p.m. *Eastern Time*—Approximate end time.

Agenda: To discuss updates on the selection process for the new members of the IACC under CARA and current agency and organization activities, as well as emerging issues in the autism community.

Place: No in-person meeting; conference call only.

Conference Call: Dial: 888–831–4301, Access code: 6270429.

Cost: The conference call is free and open to the public.

Contact Person: Ms. Lina Perez, Office of Autism Research Coordination, National Institute of Mental Health, NIH, 6001 Executive Boulevard, NSC, Room 8185a, Rockville, MD 20852, Phone: (301) 443–6040, Email: *IACCPublicInquiries@mail.nih.gov.*

Please Note

The conference call will be accessible to the public through a call-in number and access code. Members of the public who participate using the conference call phone number will be able to listen to the meeting but will not be heard. If you experience any technical problems with the conference call, please email *IACCTechSupport@acclaroresearch.com* or call the IACC Technical Support Help Line at 443–680–0098.

Individuals who participate by using this electronic service and who need special assistance or other reasonable accommodations should submit a request to the Contact Person listed on this notice at least 7 days prior to the meeting.

This meeting is being published less than 15 days prior to the meeting due to the need to update the committee on the status of the IACC member selection process and to discuss emerging issues in the autism community.

Schedule subject to change.

Information about the IACC and a registration link for this meeting are available on the Web site: *www.iacc.hhs.gov.*

Dated: February 10, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–3786 Filed 2–16–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Arthritis and Musculoskeletal and Skin Diseases; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Arthritis and Musculoskeletal and Skin Diseases Special Emphasis Panel; Career Development, Research Training & Pathways to Independence Review.

Date: March 5, 2012.

Time: 4:30 p.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, One Democracy Plaza, 6701 Democracy Boulevard, Room 816, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Charles H Washabaugh, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute of Arthritis, Musculoskeletal and Skin Diseases, National Institutes of Health, 6701 Democracy Blvd., Room 824, MSC 4872, Bethesda, MD 20817, 301–594–4952, *washabac@mail.nih.gov.*

Name of Committee: National Institute of Arthritis and Musculoskeletal and Skin Diseases Special Emphasis Panel; Small Grants Research Review.

Date: March 23, 2012.
Time: 9 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, One Democracy Plaza, 6701 Democracy Boulevard, Bethesda, MD 20892, (Virtual Meeting).
Contact Person: Eric H. Brown, MS, Ph.D., Scientific Review Officer, National Institute of Arthritis, Musculoskeletal and Skin Diseases, National Institutes of Health, 6701 Democracy Blvd., Room 824, MSC 4872, Bethesda, MD 20892–4872, (301) 594–4955, *browneri@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.846, Arthritis, Musculoskeletal and Skin Diseases Research, National Institutes of Health, HHS)

Dated: February 9, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–3784 Filed 2–16–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health & Human Development; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Child Health and Human Development Special Emphasis Panel; ZHD1 DSR–L 53 2.
Date: March 9, 2012.
Time: 2 p.m. to 4 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, 6100 Executive Boulevard, Rockville, MD 20852 (Telephone Conference).
Contact Person: Dennis E. Leszczynski, Ph.D., Scientific Review Officer, Division of Scientific Review, National Institute of Child Health and Human Development, NIH, 6100 Executive Blvd., Room 5b01, Bethesda, MD 20892, 301–435–2717, *leszcyd@mail.nih.gov.*
(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: February 10, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–3782 Filed 2–16–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Mental Health; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Mental Health Special Emphasis Panel; Mechanisms Explaining Differences in Depressive & Anxiety Disorders Across Racial/Ethnic Groups.
Date: March 6, 2012.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Melrose Hotel, 2430 Pennsylvania Ave., NW., Washington, DC 20037.
Contact Person: Aileen Schulte, Ph.D., Scientific Review Officer, Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center, 6001 Executive Blvd., Room 6140, MSC 9608, Bethesda, MD 20892–9608, 301–443–1225, *aschulte@mail.nih.gov.*

Name of Committee: National Institute of Mental Health Special Emphasis Panel; National Cooperative Drug Discovery & Development Groups.
Date: March 13, 2012.
Time: 1 p.m. to 3 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).
Contact Person: Vinod Charles, Ph.D., Scientific Review Officer, Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center, 6001 Executive Blvd., Room 6151, MSC 9606, Bethesda, MD 20892–9606, 301–443–1606, *charlesvi@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.242, Mental Health Research Grants; 93.281, Scientist Development Award, Scientist Development Award for Clinicians, and Research Scientist Award; 93.282, Mental Health National Research Service Awards for Research Training, National Institutes of Health, HHS)

Dated: February 10, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–3780 Filed 2–16–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Fellowship: Chemistry, Biochemistry, Biophysics, and Bioengineering.
Date: March 9–14, 2012.
Time: 11 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892.
Contact Person: Alexander Gubin, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4196, MSC 7812, Bethesda, MD 20892, 301–435–2902, *gubina@csr.nih.gov.*

Name of Committee: AIDS and Related Research Integrated Review Group; Behavioral and Social Science Approaches to Preventing HIV/AIDS Study Section.
Date: March 19–20, 2012.
Time: 8 a.m. to 6 p.m.
Agenda: To review and evaluate grant applications.
Place: Sheraton Delfina Santa Monica Hotel, 530 West Pico Boulevard, Santa Monica, CA 90405.
Contact Person: Jose H Guerrier, Ph.D., Scientific Review Officer, Center for

Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5222, MSC 7852, Bethesda, MD 20892, 301–435–1137, *guerriej@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Fellowships: Physiology and Pathobiology of Cardiovascular and Respiratory Systems.

Date: March 19–20, 2012.

Time: 8 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: The St. Regis Washington DC, 923 16th and K Streets NW., Washington, DC 20006.

Contact Person: Abdelouahab Aitouche, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4222, MSC 7812, Bethesda, MD 20892, 301–435–2365, *aitouchea@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: February 10, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–3779 Filed 2–16–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Minority Health and Health Disparities Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App), notice is hereby given of the following meetings.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable materials, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Minority Health and Health Disparities Special Emphasis Panel; R01.

Date: February 16, 2012.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, One Democracy Plaza, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Maryline Laude-Sharp, Ph.D., Scientific Review Officer, National Institute on Minority Health and Health Disparities, National Institutes of Health, 6707 Democracy Blvd., MSC. 5465, Suite 800, Bethesda, MD 20892, (301) 451–9536, *mlaudesharp@mail.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Dated: February 9, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–3808 Filed 2–16–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Environmental Health Sciences; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the Board of Scientific Counselors, NIEHS.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public as indicated below in accordance with the provisions set forth in section 552b(c)(6), Title 5 U.S.C., as amended for the review, discussion, and evaluation of individual intramural programs and projects conducted by the National Institute of Environmental Health Sciences, including consideration of personnel qualifications and performance, and the competence of individual investigators, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Board of Scientific Counselors, NIEHS.

Date: March 18–20, 2012.

Closed: March 18, 2012, 7 p.m. to 10 p.m.

Agenda: To review and evaluate programmatic and personnel issues

Place: Doubletree Guest Suites, 2515 Meridian Parkway, Research Triangle Park, NC 27713.

Open: March 19, 2012, 8:30 a.m. to 11:50 a.m.

Agenda: An overview of the organization and research in the Laboratory of Neurobiology.

Place: Nat. Inst. of Environmental Health Sciences, Building 101, Rodbell Auditorium, 111 T. W. Alexander Drive, Research Triangle Park, NC 27709.

Closed: March 19, 2012, 11:50 a.m. to 12:35 p.m.

Agenda: To review and evaluate programmatic and personnel issues.

Place: Nat. Inst. of Environmental Health Sciences, Building 101, Rodbell Auditorium, 111 T. W. Alexander Drive, Research Triangle Park, NC 27709.

Open: March 19, 2012, 1:30 p.m. to 5 p.m.

Agenda: Scientific Presentations and Poster Sessions.

Place: Nat. Inst. of Environmental Health Sciences, Building 101, Rodbell Auditorium, 111 T. W. Alexander Drive, Research Triangle Park, NC 27709.

Closed: March 19, 2012, 5 p.m. to 6 p.m.

Agenda: To review and evaluate programmatic and personnel issues

Place: Nat. Inst. of Environmental Health Sciences, Building 101, Rodbell Auditorium, 111 T. W. Alexander Drive, Research Triangle Park, NC 27709.

Closed: March 19, 2012, 8 p.m. to 10 p.m.

Agenda: To review and evaluate programmatic and personnel issues.

Place: Doubletree Guest Suites, 2515 Meridian Parkway, Research Triangle Park, NC 27713.

Open: March 20, 2012, 8:30 a.m. to 9:20 a.m.

Agenda: Tenure Track Review.

Place: Nat. Inst. of Environmental Health Sciences, Building 101, Rodbell Auditorium, 111 T. W. Alexander Drive, Research Triangle Park, NC 27709.

Closed: March 20, 2012, 9:20 a.m. to 1 p.m.

Agenda: To review and evaluate programmatic and personnel issues; Tenure track review.

Place: Nat. Inst. of Environmental Health Sciences, Building 101, Rodbell Auditorium, 111 T. W. Alexander Drive, Research Triangle Park, NC 27709.

Contact Person: Darryl Zeldin, M.D., Scientific Director & Principal Investigator, Division of Intramural Research, National Institute of Environmental Health Sciences, NIH, 111 TW Alexander Drive, Maildrop A2–09, Research Triangle Park, NC 27709, 919–541–1169, *zeldin@niehs.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

(Catalogue of Federal Domestic Assistance Program Nos. 93.115, Biometry and Risk Estimation—Health Risks from Environmental Exposures; 93.142, NIEHS Hazardous Waste Worker Health and Safety Training; 93.143, NIEHS Superfund Hazardous Substances—Basic Research and Education; 93.894, Resources and Manpower Development in the Environmental Health Sciences; 93.113, Biological Response to Environmental Health Hazards; 93.114, Applied Toxicological Research and Testing, National Institutes of Health, HHS)

Dated: February 10, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–3831 Filed 2–16–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health and Human Development; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Child Health and Human Development Special Emphasis Panel; ZHD1 DSR–L 54 2, ''Male Reproduction.''

Date: March 14, 2012.

Time: 2 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6100 Executive Boulevard, Rockville, MD 20852, (Telephone Conference Call).

Contact Person: Dennis E. Leszczynski, Ph.D., Scientific Review Officer, Division of Scientific Review, National Institute of Child Health, and Human Development, NIH, 6100 Executive Blvd., Room 5B01, Bethesda, MD 20892, 301–435–2717, *leszcyd@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: February 13, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–3807 Filed 2–16–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health and Human Development; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Child Health and Human Development Initial Review Group; Pediatrics Subcommittee.

Date: March 14–15, 2012

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Doubletree Hotel Bethesda, (Formerly Holiday Inn Select), 8120 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Rita Anand, Ph.D., Scientific Review Officer, Division Of Scientific Review, Eunice Kennedy Shriver National Institute of Child Health And Human Development, NIH, 6100 Executive Blvd. Room 5b01, Bethesda, MD 20892. 301–496–1487 *anandr@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: February 13, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–3805 Filed 2–16–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health and Human Development; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Child Health and Human Development Special Emphasis Panel; ZHD1 DSR–L 52 2, ''VULVODYNIA''.

Date: March 12, 2012.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6100 Executive Boulevard, Rockville, MD 20852.

Contact Person: Dennis E. Leszczynski, Ph.D., Scientific Review Officer, Division of Scientific Review, National Institute of Child Health, and Human Development, NIH, 6100 Executive Blvd., Room 5b01, Bethesda, MD 20892, 301–435–2717, *leszcyd@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: February 13, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–3802 Filed 2–16–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: AIDS and Related Research Integrated Review Group; AIDS-associated Opportunistic Infections and Cancer Study Section.
Date: March 8, 2012.
Time: 8 a.m. to 6 p.m.
Agenda: To review and evaluate grant applications.
Place: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road NW., Washington, DC 20015.
Contact Person: Eduardo A Montalvo, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5108, MSC 7852, Bethesda, MD 20892, (301) 435–1168, *montalve@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Special Topic: Metabolic Disease and Reproductive Biology.
Date: March 9, 2012.
Time: 10 a.m. to 4 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).
Contact Person: Krish Krishnan, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6164, MSC 7892, Bethesda, MD 20892, (301) 435–1041, *krishnak@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; RFA Panel: Studies in Neonatal Resuscitation.
Date: March 14, 2012.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).
Contact Person: Gary Hunnicutt, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health 6701 Rockledge Drive, Room 6164, MSC 7892, Bethesda, MD 20892, (301) 435–0229, *gary.hunnicutt@nih.gov.*

*Name of Committee:*Center for Scientific Review Special Emphasis Panel; Fellowships: Endocrinology, Metabolism, Nutrition and Reproductive Sciences.
Date: March 14, 2012.
Time: 11 a.m. to 6 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).
Contact Person: Dianne Camp, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6164, Bethesda, MD 20892, (301) 435–1044, *campdm@mail.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Methods for Bioanalytical Investigations.
Date: March 15, 2012.
Time: 1 p.m. to 3 p.m..
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).
Contact Person: Vonda K Smith, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6188, MSC 7892, Bethesda, MD 20892, (301) 435–1789, *smithvo@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: February 10, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–3800 Filed 2–16–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review: Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Cardiovascular Development and Heart Failure.
Date: March 8–9, 2012.
Time: 10 a.m. to 4 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).
Contact Person: Yuanna Cheng, MD, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4138, MSC 7814, Bethesda, MD 20892, (301) 435–1195, *Chengy5@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Stem Cell Therapies 1.
Date: March 8, 2012.
Time: 1 p.m. to 3 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).
Contact Person: Luis Espinoza, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6183, MSC 7804, Bethesda, MD 20892, 301–495–1213, *espinozala@mail.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Stem Cell Therapies—11.
Date: March 8, 2012.
Time: 12 p.m. to 3 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).
Contact Person: Katherine M Malinda, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4140, MSC 7814, Bethesda, MD 20892, 301–435–0912, *Katherine_Malinda@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Allergic Asthma.
Date: March 12, 2012.
Time: 10:15 a.m. to 1 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).
Contact Person: Everett E Sinnett, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2178, MSC 7818, Bethesda, MD 20892, 301–435–1016, *sinnett@nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Fellowships: Physiology and Pathobiology of Musculoskeletal, Oral, and Skin Systems.
Date: March 14, 2012.
Time: 8 a.m. to 6 p.m.
Agenda: To review and evaluate grant applications and/or proposals.
Place: Hyatt Regency Bethesda, 7400 Wisconsin Avenue, Bethesda, MD 20814.
Contact Person: Abdelouahab Aitouche, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4222, MSC 7812, Bethesda, MD 20892, 301–435–2365, *aitouchea@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Regulation of Growth and Epilepsy.
Date: March 14, 2012.
Time: 1 p.m. to 3 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).
Contact Person: Julius Cinque, MS, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5186, MSC 7846, Bethesda, MD 20892, (301) 435–1252, *cinquej@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Cardiovascular Sciences.

Date: March 15–16, 2012.
Time: 8 a.m. to 6:30 p.m.
Agenda: To review and evaluate grant applications.
Place: Doubletree Hotel Bethesda, (Formerly Holiday Inn Select), 8120 Wisconsin Avenue, Bethesda, MD 20814.
Contact Person: Lawrence E Boerboom, Ph.D., Chief, CVRS IRG, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4130, MSC 7814, Bethesda, MD 20892, (301) 435–8367, *boerboom@nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Molecular and Cellular Neuroscience, Development and Aging Biology.
Date: March 15, 2012.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).
Contact Person: Paek-Gyu Lee, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4201, MSC 7812, Bethesda, MD 20892, (301) 613–2064, *leepg@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Respiratory Sciences.
Date: March 15–16, 2012.
Time: 9 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).
Contact Person: Ghenima Dirami, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4122, MSC 7814, Bethesda, MD 20892, 240–498–7546, *diramig@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Biological Chemistry, Biophysics, and Drug Discovery.
Date: March 16, 2012.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: One Washington Circle Hotel, One Washington Circle, Washington, DC 20037.
Contact Person: Dennis Hlasta, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6185, MSC, Bethesda, MD 20892, 301–435–1047, *dennis.hlasta@nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: February 10, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–3796 Filed 2–16–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Minority Health and Health Disparities; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the National Advisory Council on Minority Health and Health Disparities.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and/or contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications and/or contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Advisory Council on Minority Health and Health Disparities.
Date: February 28, 2012.
Closed: 8 a.m. to 9:30 a.m.
Agenda: To review and evaluate grant applications and/or proposals.
Place: National Institutes of Health, Natcher Conference Center, Building 45, Conference Room D, Bethesda, MD 20892.
Open: 9:30 a.m. to 5 p.m.
Agenda: The agenda will include opening remarks, administrative matters, Director's Report, NIH Health Disparities update, and other business of the Council.
Place: National Institutes of Health, Natcher Conference Center, Building 45, Conference Room D, Bethesda, MD 20892.
Contact Person: Donna Brooks, Executive Officer, National Institute on Minority Health and Heath Disparities, National Institutes of Health, 6707 Democracy Blvd. Suite 800, Bethesda, MD 20892, (301) 435–2135, *brooksd@ncmhd.nih.gov*.

This notice is being published less than 15 days prior to the meeting due to the timing limitations Imposed by the review and funding cycle.

Any member of the public interested in presenting oral comments to the committee may notify the Contact Person listed on this notice at least 10 days in advance of the meeting. Interested individuals and representatives of organizations may submit a letter of intent, a brief description of the organization represented, and a short description of the oral presentation. Only one representative of an organization may be allowed to present oral comments and if accepted by the committee, presentations may be limited to five minutes. Both printed and electronic copies are requested for the record. In addition, any interested person may file written comments with the committee by forwarding their statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxis, hotel, and airport shuttles, will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Dated: February 13, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–3806 Filed 2–16–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; RFA–DK11–014 Professional Society Programs to Promote Diversity (R25).
Date: March 14, 2012.
Time: 1 p.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy

Boulevard, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Ann A Jerkins, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 759, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, 301–594–2242, *jerkinsa@niddk.nih.gov.*

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; Member Conflict Telephone SEP.

Date: March 21, 2012.

Time: 10 a.m. to 12 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: XIAODU GUO, MD, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 761, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–4719, *guox@extra.niddk.nih.gov.*

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; Kidney Ancillary Studies.

Date: March 23, 2012.

Time: 8 a.m. to 11:30 a.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Paul A. Rushing, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 747, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–8895, *Rushingp@Extra.Niddk.Nih.Gov.*

Name of Committee: National Institute of Diabetes And Digestive And Kidney Diseases Special Emphasis Panel; Genetic and Metabolic Fingerprints Of Coactivators-P01.

Date: March 27, 2012.

Time: 1 p.m. to 5 p.m.

Agenda: To Review And Evaluate Grant Applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Barbara A Woynarowska, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 754, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 402–7172, *woynarowskab@niddk.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: February 13, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–3803 Filed 2–16–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Musculoskeletal, Oral and Skin Sciences Integrated Review Group; Musculoskeletal Rehabilitation Sciences Study Section.

Date: February 23–24, 2012.

Time: 8 a.m. to 3:30 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Alexandria Old Town, 1767 King Street, Alexandria, VA 22314.

Contact Person: Jo Pelham, BA, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4102, MSC 7814, Bethesda, MD 20892, (301) 435–1786, *pelhamj@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: February 10, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–3823 Filed 2–16–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of General Medical Sciences; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of General Medical Sciences Initial Review Group; Minority Programs Review Subcommittee B.

Date: March 12, 2012.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency-Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Rebecca H. Johnson, Ph.D., Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, Natcher Building, Room 3AN18C, Bethesda, MD 20892, 301–594–2771, *johnsonrh@nigms.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.375, Minority Biomedical Research Support; 93.821, Cell Biology and Biophysics Research; 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.862, Genetics and Developmental Biology Research; 93.88, Minority Access to Research Careers; 93.96, Special Minority Initiatives, National Institutes of Health, HHS)

Dated: February 10, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–3819 Filed 2–16–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Prospective Grant of Exclusive License: Photosensitizing Antibody-Fluorophore Conjugates for Photo-Immunotherapy

AGENCY: National Institutes of Health, Public Health Service, HHS.

ACTION: Notice.

SUMMARY: This is notice, in accordance with 35 U.S.C. 209(c)(1) and 37 CFR 404.7(a)(1)(i), that the National Institutes of Health (NIH), Department of Health and Human Services (HHS), is contemplating the grant of a worldwide exclusive evaluation option license, to practice the inventions embodied in US patent application 13/180,111, filed July 11, 2011 (HHS Reference# E–205–2010/0–US–02), originated from provisional application 61/363,079 filed July 09, 2010, and entitled ''Photosensitizing Antibody Fluorophore Conjugates for Photo-Immunotherapy'' to Aspyrian Therapeutics, Inc., a company incorporated under the laws of the State of Delaware, having its headquarters in San Diego, California. The United States of America is the assignee of the rights of the above inventions.

The field of use may be limited to ''use of photosensitizing antibody-fluorophore conjugate for imaging and photo-immunotherapy of cancer'' and may be further limited to certain types of cancer and/or specific platforms.

Upon the expiration or termination of the exclusive evaluation option license, Aspyrian Therapeutics, Inc. will have the right to execute an exclusive worldwide patent commercialization license which will supersede and replace the exclusive evaluation option license with the same field of use.

DATES: Only written comments and/or applications for a license received by the NIH Office of Technology Transfer on or before March 5, 2012 will be considered.

ADDRESSES: Requests for a copy of the patent application, inquiries, comments and other materials relating to the contemplated license should be directed to: Uri Reichman, Ph.D., M.B.A., Office of Technology Transfer, National Institutes of Health, 6011 Executive Boulevard, Suite 325, Rockville, MD 20852–3804; Telephone: (301) 435–4616; Facsimile: (301) 402–0220; Email: *Reichmau@mail.nih.gov.* A signed confidentiality nondisclosure agreement will be required to receive copies of any patent applications that have not been published or issued by the United States Patent and Trademark Office or the World Intellectual Property Organization.

SUPPLEMENTARY INFORMATION: The present technology provides a novel method for cancer therapy which may offer improved specificity and sensitivity in cancer treatment. The method is based on molecular targeting. More specifically, it is based on photoimmunotherapy (PIT). The therapeutic agent is a targeted photosensitizer composed of a tumor specific antibody conjugated to IR700 dye, where the dye is sensitive to a near infrared light. Upon administration of the conjugated antibody to a subject, it specifically binds to the targeted cancerous tissue. Upon subsequent irradiation with a near infrared light, the dye releases energy that leads to the killing of the targeted cells. The concept was proven by the inventors *in vitro* and *in vivo* with mouse models, using humanized anti-HER1 (Panitumumab, for colon cancer), anti-HER2 (Trastuzumab, for breast cancer) and anti-PSMA antibody (huJ591, for prostate cancer). Targeted cells were completely killed while normal cells were not noticeably affected. The technology provides also for wearable LED systems that can be used to irradiate the photosensitizer.

The prospective exclusive evaluation option license will comply with the terms and conditions of 35 U.S.C. 209 and 37 CFR 404.7. The prospective exclusive evaluation option license may be granted unless, within fifteen (15) days from the date of this published notice, NIH receives written evidence and argument that establishes that the grant of the license would not be consistent with the requirements of 35 U.S.C. 209 and 37 CFR 404.7.

Properly filed competing applications for a license filed in response to this notice will be treated as objections to the contemplated license. Comments and objections submitted in response to this notice will not be made available for public inspection, and, to the extent permitted by law, will not be released under the Freedom of Information Act, 5 U.S.C. 552.

Dated: February 13, 2012.

Richard U. Rodriguez,

Director, Division of Technology Development and Transfer, Office of Technology Transfer, National Institutes of Health.

[FR Doc. 2012–3828 Filed 2–16–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Prospective Grant of Exclusive License: The Development of Human Anti-CD22 Monoclonal Antibodies for the Treatment of Human Cancers and Autoimmune Disease

AGENCY: National Institutes of Health, Public Health Service, HHS.

ACTION: Notice.

SUMMARY: This is notice, in accordance with 35 U.S.C. 209(c)(1) and 37 CFR 404.7(a)(1)(i), that the National Institutes of Health, Department of Health and Human Services, is contemplating the grant of an exclusive evaluation option license to practice the inventions embodied in U.S. Patent Application 61/042,239 entitled ''Human Monoclonal Antibodies Specific for CD22'' [HHS Ref. E–080–2008/0–US–01], PCT Application PCT/US2009/124109 entitled ''Human and Improved Murine Monoclonal Antibodies Against CD22'' [HHS Ref. E–080–2008/0–PCT–02], U.S. patent application 12/934,214 entitled ''Human Monoclonal Antibodies Specific for CD22'' [HHS Ref. E–080–2008/0–US–03], and all related continuing and foreign patents/patent applications for the technology family, to Sanomab, Ltd. The patent rights in these inventions have been assigned to and/or exclusively licensed to the Government of the United States of America.

The prospective exclusive evaluation option license territory may be worldwide, and the field of use may be limited to:

The use of the m971 and m972 (SMB–002) monoclonal antibodies as therapies for the treatment of B cell cancers and autoimmune disease. The Licensed Field of Use includes the use of the antibodies in the form of an immunoconjugate, including immunotoxins.

Upon the expiration or termination of the exclusive evaluation option license, Sanomab, Ltd. will have the exclusive right to execute an exclusive commercialization license which will supersede and replace the exclusive evaluation option license with no greater field of use and territory than granted in the exclusive evaluation option license.

DATES: Only written comments and/or applications for a license which are received by the NIH Office of Technology Transfer on or before March 5, 2012 will be considered.

ADDRESSES: Requests for copies of the patent application, inquiries, comments, and other materials relating to the

contemplated exclusive evaluation option license should be directed to: David A. Lambertson, Ph.D., Senior Licensing and Patenting Manager, Office of Technology Transfer, National Institutes of Health, 6011 Executive Boulevard, Suite 325, Rockville, MD 20852–3804; Telephone: (301) 435–4632; Facsimile: (301) 402–0220; Email: *lambertsond@od.nih.gov.*

SUPPLEMENTARY INFORMATION: This invention concerns monoclonal antibodies against CD22 and methods of using the antibodies for the treatment of CD22-expressing cancers, including hematological malignancies such as hairy cell leukemia, chronic lymphocytic leukemia and pediatric acute lymphoblastic leukemia, and autoimmune disease such as lupus and Sjogren's syndrome. The specific antibodies covered by this technology are designated m971 and m972 (SMB–002; applicant designation).

CD22 is a cell surface antigen that is preferentially expressed on certain types of cancer cells, and is involved in the modulation of the immune system. The m971 and m972 antibodies can selectively bind to diseased cells and induce cell death while leaving healthy, essential cells unharmed. This can result in an effective therapeutic strategy with fewer side effects due to less non-specific killing of cells.

The prospective exclusive evaluation option license is being considered under the small business initiative launched on 1 October 2011, and will comply with the terms and conditions of 35 U.S.C. 209 and 37 CFR 404.7. The prospective exclusive evaluation option license, and a subsequent exclusive commercialization license, may be granted unless the NIH receives written evidence and argument that establishes that the grant of the license would not be consistent with the requirements of 35 U.S.C. 209 and 37 CFR 404.7 within fifteen (15) days from the date of this published notice.

Complete applications for a license in the field of use filed in response to this notice will be treated as objections to the grant of the contemplated exclusive evaluation option license. Comments and objections submitted to this notice will not be made available for public inspection and, to the extent permitted by law, will not be released under the Freedom of Information Act, 5 U.S.C. 552.

Dated: February 13, 2012.

Richard U. Rodriguez,

Director, Division of Technology Development & Transfer, Office of Technology Transfer, National Institutes of Health.

[FR Doc. 2012–3829 Filed 2–16–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Agency Information Collection Activities: Submission for OMB Review; Comment Request

Periodically, the Substance Abuse and Mental Health Services Administration (SAMHSA) will publish a summary of information collection requests under OMB review, in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these documents, call the SAMHSA Reports Clearance Officer on (240) 276–1243.

Proposed Project: Toolkit Protocol for the Crisis Counseling Assistance and Training Program (CCP)—Revision

The Substance Abuse and Mental Health Services Administration's (SAMHSA) Center for Mental Health Services (CMHS) will create a toolkit to be used for the purposes of collecting data on the Crisis Counseling Assistance and Training Program (CCP). The CCP provides supplemental funding to states and territories for individual and community crisis intervention services during a Federal disaster.

The CCP has provided disaster mental health services to millions of disaster survivors since its inception and, as a result of 30 years of accumulated expertise, it has become an important model for Federal response to a variety of catastrophic events. State CCPs, such as the recent 2009 Project A'apa Atu (for the Tsunami in American Samoa), 2010 Tennessee Recovery Project (following devastating flooding), Healing Joplin and Project Rebound (following the 2011 tornadoes in Joplin, Missouri and Alabama), and most recently the multiple CCPs that resulted from 2011 Hurricane Irene, and flooding throughout the summer of 2011 have primarily addressed the short-term mental health needs of communities through (a) Outreach and public education, (b) individual and group counseling, and (c) referral. Outreach and public education serve primarily to normalize reactions and to engage people who might need further care. Crisis counseling assists survivors to cope with current stress and symptoms in order to return to predisaster functioning. Crisis counseling relies largely on ''active listening,'' and crisis counselors also provide psycho-education (especially about the nature of responses to trauma) and help clients build coping skills. Crisis counseling typically continues no more than a few times. Because crisis counseling is time-limited, referral is the third important functions of CCPs. Counselors are expected to refer clients to formal treatment if the person has developed more serious psychiatric problems.

Data about services delivered and users of services will be collected throughout the program period. The data will be collected via the use of a toolkit that relies on standardized forms. At the program level, the data will be entered quickly and easily into a cumulative database to yield summary tables for quarterly and final reports for the program. We have confirmed the feasibility of using scanable forms for most purposes. Because the data will be collected in a consistent way from all programs, they can be uploaded into an ongoing national database that likewise provides CMHS with a way of producing summary reports of services provided across all programs funded.

The components of the tool kit are listed and described below:

- *Encounter Logs.* These forms document all services provided. Completion of these logs is required by the crisis counselors. There are three types of encounter logs: (1) Individual/Family Crisis Counseling Services Encounter Log; (2) Group Encounter Log; and (3) Weekly Tally Sheet.
  - Individual/Family Crisis Counseling Services Encounter Log. Crisis counseling is defined as an interaction that lasts at least 15 minutes and involves participant disclosure. This form is completed by the Crisis Counselor for each service recipient or family, defined as the person or persons who actively participated in the session (e.g., by verbally participating), not someone who is merely present. For families, complete only one form to capture all family members who are actively engaged in the visit. Information collected includes demographics, service characteristics, risk factors, and referral data.
  - Group Encounter Log. This form is used to identify either a group crisis counseling encounter or a group public education encounter. A check at the top identifies the class of activities (i.e., counseling or education). Information collected includes services characteristics, group identity and characteristics, and group activities.

• Weekly Tally Sheet. This form documents brief educational and supportive encounters not captured on any other form. Information collected includes service characteristics, daily tallies and weekly totals for brief educational or supportive contacts, and material distribution with no or minimal interaction.

• *Assessment and Referral Tool.* This tool provides descriptive information about intense users of services, defined as all individuals receiving a third individual crisis counseling visit. This tool will be used beginning three months postdisaster and will be completed by a licensed mental health professional.

• *Participant Feedback.* These surveys are completed by and collected from a sample of service recipients, not every recipient. A time sampling approach (e.g., soliciting participation from all counseling encounters one week per quarter) will be used. Information collected includes satisfaction with services, perceived improvements in self-functioning, types of exposure, and event reactions.

• *CCP Service Provider Feedback.* These surveys are completed by and collected from the CCP service providers anonymously at six months and one year postevent. The survey will be coded on several program-level as well as worker-level variables. However, the program itself will be identified and shared with program management only if the number of individual workers was greater than 20.

Highlights of the Propose Revisions, Based on Public Comments Received From the 60-Day Review

• The previous Individual Crisis Counseling Services Encounter Log is now revised to Individual/Family Crisis Counseling Services Encounter Log. Previously, when encountering a family, crisis counselors would complete a separate Individual Encounter Log for all family members participating in the encounter. It is anticipated that the new form will reduce the burden of completing so many Individual Encounter Forms by 30% or more, by allowing crisis counselors to complete just one form on the family unit. Consequently, the name of the form, many of the fields, and the instructions have been revised to align with this change.

• In response to public comment a new field within the demographics has been added to capture aggregate level information on persons with disabilities or other functional or access needs. This new field is now included on the Individual/Family Crisis Counseling Encounter Log, Group Encounter Log, Adult Assessment and Referral Tool and Child/Youth Assessment and Referral Tool. The forms also provide the statutory definition within the instructions.

• To encourage compliance with program guidelines that Crisis Counselors conduct outreach in pairs, we have added an additional field for a Crisis Counselor to record their employee number.

• In order to better classify services and contacts made by phone, a new field was created on the Weekly Tally Sheet to capture and distinguish the type of telephone contact being recorded. Additionally, under location of service for the remaining forms, a checkbox has been added underneath the Phone Counseling section, for respondents to indicate if the phone counseling session was ''Hotline, helpline, or crisis line.''

• In order to better understand the number of individual or families that were displaced following the disaster, we have separated permanent home and temporary home by adding a ''home (permanent)'' option as a separate selection for location of service on all forms, except the Weekly Tally Sheet, where this field does not apply.

• In order to capture the helpfulness/usefulness of the program and the resources, referrals, and services provided, questions were added to the Participant Feedback Form.

• A new field was added to the Individual/Family Encounter Log and Group Encounter Log to capture the materials distributed as part of an individual, family, or group encounter ''Were materials (flyer, brochure, handouts, etc.) provided to this/these participant(s)?'' This will reduce confusion among crisis counselors and reduce the burden of having to count the materials and complete a second form (the Weekly Tally Sheet) for materials distributed as part of the encounter.

• For the Adult and Child/Youth Assessment and Referral Tools, language and guidance has been provided that *''The Child Assessment Tool and the Adult Assessment Tool must be administered by licensed mental health professionals. Paraprofessionals may not administer these tools''.*

ESTIMATES OF ANNUALIZED HOUR BURDEN

Form	Number of respondents	Responses per respondents	Hours per responses	Total hour burden
Individual Crisis Counseling Services Encounter Log	200	196	.08	3,136
Group Encounter Log	100	33	.07	231
Weekly Tally Sheet	200	33	.2	1,320
Assessment and Referral Tools	200	14	.25	700
Participant Feedback Survey	1,000	1	.25	250
Service Provider Feedback Survey	100	1	.25	25
Total	1,800	.....	.....	5,662

Written comments and recommendations concerning the proposed information collection should be sent by March 19, 2012 to the SAMHSA Desk Officer at the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB). To ensure timely receipt of comments, and to avoid potential delays in OMB's receipt and processing of mail sent through the U.S. Postal Service, commenters are encouraged to submit their comments to OMB via email to: *OIRA_Submission@omb.eop.gov*. Although commenters are encouraged to send their comments via email, commenters may also fax their comments to: 202–395–7285. Commenters may also mail them to: Office of Management and Budget, Office of Information and Regulatory

Affairs, New Executive Office Building, Room 10102, Washington, DC 20503.

Summer King,

Statistician.

[FR Doc. 2012–3681 Filed 2–16–12; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5601–N–07]

Federal Property Suitable as Facilities To Assist the Homeless

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: This Notice identifies unutilized, underutilized, excess, and surplus Federal property reviewed by HUD for suitability for use to assist the homeless.

FOR FURTHER INFORMATION CONTACT: Juanita Perry, Department of Housing and Urban Development, 451 Seventh Street SW., Room 7266, Washington, DC 20410; telephone (202) 708–1234; TTY number for the hearing- and speech-impaired (202) 708–2565 (these telephone numbers are not toll-free), or call the toll-free Title V information line at 800–927–7588.

SUPPLEMENTARY INFORMATION: In accordance with 24 CFR part 581 and section 501 of the Stewart B. McKinney Homeless Assistance Act (42 U.S.C. 11411), as amended, HUD is publishing this Notice to identify Federal buildings and other real property that HUD has reviewed for suitability for use to assist the homeless. The properties were reviewed using information provided to HUD by Federal landholding agencies regarding unutilized and underutilized buildings and real property controlled by such agencies or by GSA regarding its inventory of excess or surplus Federal property. This Notice is also published in order to comply with the December 12, 1988 Court Order in *National Coalition for the Homeless* v. *Veterans Administration,* No. 88–2503–OG (D.D.C.).

Properties reviewed are listed in this Notice according to the following categories: Suitable/available, suitable/unavailable, suitable/to be excess, and unsuitable. The properties listed in the three suitable categories have been reviewed by the landholding agencies, and each agency has transmitted to HUD: (1) Its intention to make the property available for use to assist the homeless, (2) its intention to declare the property excess to the agency's needs, or (3) a statement of the reasons that the property cannot be declared excess or made available for use as facilities to assist the homeless.

Properties listed as suitable/available will be available exclusively for homeless use for a period of 60 days from the date of this Notice. Where property is described as for ''off-site use only'' recipients of the property will be required to relocate the building to their own site at their own expense. Homeless assistance providers interested in any such property should send a written expression of interest to HHS, addressed to Theresa Ritta, Division of Property Management, Program Support Center, HHS, room 5B–17, 5600 Fishers Lane, Rockville, MD 20857; (301) 443–2265. (This is not a toll-free number.) HHS will mail to the interested provider an application packet, which will include instructions for completing the application. In order to maximize the opportunity to utilize a suitable property, providers should submit their written expressions of interest as soon as possible. For complete details concerning the processing of applications, the reader is encouraged to refer to the interim rule governing this program, 24 CFR part 581.

For properties listed as suitable/to be excess, that property may, if subsequently accepted as excess by GSA, be made available for use by the homeless in accordance with applicable law, subject to screening for other Federal use. At the appropriate time, HUD will publish the property in a Notice showing it as either suitable/available or suitable/unavailable.

For properties listed as suitable/unavailable, the landholding agency has decided that the property cannot be declared excess or made available for use to assist the homeless, and the property will not be available.

Properties listed as unsuitable will not be made available for any other purpose for 20 days from the date of this Notice. Homeless assistance providers interested in a review by HUD of the determination of unsuitability should call the toll free information line at 1–800–927–7588 for detailed instructions or write a letter to Mark Johnston at the address listed at the beginning of this Notice. Included in the request for review should be the property address (including zip code), the date of publication in the **Federal Register**, the landholding agency, and the property number.

For more information regarding particular properties identified in this Notice (i.e., acreage, floor plan, existing sanitary facilities, exact street address), providers should contact the appropriate landholding agencies at the following addresses: *Army:* Ms. Veronica Rines, Department of the Army, Office of the Assistant Chief of Staff for Installation Management, +-DAIM–ZS, Room 8536, 2511 Jefferson Davis Hwy., Arlington, VA 22202: (571) 256–8145; *Coast Guard:* Commandant, United States Coast Guard, Attn: Jennifer Stomber, 2100 Second St. SW., Stop 7901, Washington, DC 20593–0001; (202) 475–5609; *Energy:* Mr. Mark Price, Department of Energy, Office of Engineering & Construction Management, MA–50, 1000 Independence Ave. SW., Washington, DC 20585: (202) 586–5422;

Interior: Mr. Michael Wright, Acquisition & Property Management, Department of the Interior, 1801 Pennsylvania Ave. NW., 4th Floor, Washington, DC 20006: 202–254–5522; (These are not toll-free numbers).

Dated: February 9, 2012.

Mark R. Johnston,

Deputy Assistant Secretary for Special Needs.

TITLE V, FEDERAL SURPLUS PROPERTY PROGRAM FEDERAL REGISTER REPORT FOR 02/17/2012

Suitable/Available Properties

Building

Mississippi

Tract 02–168
Nat'l Park Service
Vickerburg MS
Landholding Agency: Interior
Property Number: 61201210006
Status: Unutilized
Comments: Off-site removal only; bldg. need repairs; 1200 sq. ft.; current use: residential

New York

Bldg. 0589
Brookhaven Nat'l Lab
Upton NY 11973
Landholding Agency: Energy
Property Number: 41201210002
Status: Unutilized
Comments: Off-site removal only; 60 sq. ft.; current use: storage; poor conditions—signs of decay; need repairs

Four Multi-Unit Apts.
Fort Wadsworth
Staten Island NY 10305
Landholding Agency: Coast Guard
Property Number: 88201210001
Status: Underutilized
Comments: Off-site removal only; sq. ft. varies; current use: residential; bldgs. are not energy sufficient

Washington

Wahlgren Property-Duk Property
Olympic Nat'l Park
Clallam WA 98326
Landholding Agency: Interior
Property Number: 61201210008
Status: Excess

Comments: Off-site removal only; 624 sq. ft.; current use: residential; extremely poor conditions—need repairs; removal may be difficult due to the condition/ environmental elements

Lake Quinault Lapham
Olympic Nat'l Park
Quinault WA 98575
Landholding Agency: Interior
Property Number: 61201210009
Status: Excess
Comments: Off-site removal only; 393 sq. ft.; current use: residential; extremely poor conditions—need repairs; removal may be difficult due to the condition/ environmental elements

House 574–Ozettee Ranger Resid
Olympic Nat'l Park
Clallam WA 98326
Landholding Agency: Interior
Property Number: 61201210010
Status: Excess
Comments: Off-site removal only; 1,234 sq. ft.; current use: residential; extremely poor conditions—need repairs; removal may be difficult due to the condition/ environmental elements

Ozette Lake Moller
Olympic Nat'l Park
Clallam WA 98326
Landholding Agency: Interior
Property Number: 61201210011
Status: Excess
Comments: Off-site removal only; 712 sq. ft.; current use: residential; extremely poor conditions—need repairs; removal may be difficult due to the condition/ environmental elements

Suitable/Available Properties

Building

Washington

Lake Quinault Irwin
Olympic Nat'l Park
Amanda Park WA 98575
Landholding Agency: Interior
Property Number: 61201210012
Status: Excess
Comments: Off-site removal only; 640 sq. ft.; current use: residential; extremely poor conditions—need repairs; removal may be difficult due to the condition/ environmental elements

Hammer Butler
Olympic Nat'l Park
Quinault WA 98575
Landholding Agency: Interior
Property Number: 61201210014
Status: Excess
Comments: Off-site removal only; 552 sq. ft.; current use: residential; extremely poor conditions—need repairs; removal may be difficult due to the condition/ environmental elements

Heidbreder Property–Duk Point
Olympic Nat'l Park
Clallam WA 98326
Landholding Agency: Interior
Property Number: 61201210015
Status: Excess
Comments: Off-site removal only; 708 sq. ft.; current use: residential; extremely poor conditions—need repairs; removal may be difficult due to the condition/ environmental elements

Ozette/Duk Point Worden
Olympic Nat'l Park
Clallam WA 98326
Landholding Agency: Interior
Property Number: 61201210017
Status: Excess
Comments: Off-site removal only; 300 sq. ft.; current use: residential; extremely poor conditions—need repairs; removal may be difficult due to the condition/ environmental elements

Lake Quinault Cush
Olympic Nat'l Park
Quinault WA 98575
Landholding Agency: Interior
Property Number: 61201210018
Status: Excess
Comments: Off-site removal only; 314 sq. ft.; current use: residential; extremely poor conditions—need repairs; removal may be difficult due to the condition/ environmental elements

Kentucky

Tract # 05–120C
Nat'l Park Service
Ft. Heiman KY 42071
Landholding Agency: Interior
Property Number: 61201210005
Status: Unutilized
Comments: Beyond repair; no criteria to meet or no potential to meet habitation or any other use for homeless
Reasons: Extensive deterioration

Minnesota

Tract 67–120
Voyageurs Nat'l Park
Intern'l Falls MN 56649
Landholding Agency: Interior
Property Number: 61201210004
Status: Excess
Comments: Beyond repair; no potential to meet habitation standards or any other use to assist the homeless
Reasons: Extensive deterioration

New York

Bldg. 01404
U.S. Army Garrison
West Point NY 10996
Landholding Agency: Army
Property Number: 21201210006
Status: Unutilized
Comments: Beyond repair; no potential to meet habitation or any other use to assist the homeless
Reasons: Extensive deterioration

Ohio

Bldg. 00331
Defense Supply Center
Columbus OH 43218
Landholding Agency: Army
Property Number: 21201210004
Status: Underutilized
Comments: National security concerns
Reasons: Secured Area
Bldg. 00048
Defense Supply Center
Columbus OH 43218
Landholding Agency: Army
Property Number: 21201210005
Status: Underutilized
Comments: National security concerns
Reasons: Secured Area

Washington

Lake Crescent Drennan
Olympic Nat'l Park
Port Angeles WA 98363
Landholding Agency: Interior
Property Number: 61201210016
Status: Excess
Comments: Landlocked; located between two privately owned properties where accessibility would be denied
Reasons: Not accessible by road
8.5 Acres
Bureau of Reclamation
Rupert ID 83350
Landholding Agency: Interior
Property Number: 61201210007
Status: Unutilized
Comments: Landlocked; can only be reached by crossing into private property; however, access onto the property will be denied
Reasons: Not accessible by road

Utah

Springville Mapleton Lateral
Reclamation
Mapleton UT 84664
Landholding Agency: Interior
Property Number: 61201210019
Status: Excess
Comments: Landlocked; property between two privately owned properties that access is denied
Reasons: Not accessible by road

[FR Doc. 2012–3380 Filed 2–16–12; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5621–FA–01]

Announcement of Funding Awards for the HUD–Veterans Affairs Supportive Housing (HUD–VASH) Program for Fiscal Years (FY) 2011

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Announcement of Funding Awards.

SUMMARY: In accordance with Section 102(a)(4)(C) of the Department of Housing and Urban Development Reform Act of 1989, this announcement notifies the public of funding decisions made by the Department for funding under the FY 2011 HUD–VASH program. This announcement contains the consolidated names and addresses of those award recipients selected for funding under the Department of Defense and Full-Year Continuing Appropriations Act, 2011 (''2011 Appropriations Act'').

FOR FURTHER INFORMATION CONTACT: Michael S. Dennis, Director, Housing Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 4228, Washington, DC

20410, telephone number 202–402–4059. For the hearing or speech impaired, this number may be accessed via TTY (text telephone) by calling the Federal Relay Service at telephone number 800–877–8339. (Other than the ''800'' TTY number, these telephone numbers are not toll-free.)

SUPPLEMENTARY INFORMATION: The 2011 Appropriations Act made $50 million available for HUD–VASH, an initiative that combines HUD Housing Choice Voucher (HCV) rental assistance for homeless veterans with case management and clinical services provided by the Department of Veterans Affairs (VA) at its medical centers and in the community. The HCV program is authorized under section 8(o)(19) of the United States Housing Act of 1937. The 2011 Appropriations Act requires HUD to distribute assistance without competition, to public housing agencies (PHAs) that partner with eligible Veterans Affairs Medical Centers (VAMCs) or other entities as designated by the VA. As required by statute, selection was based on geographical need for such assistance as identified by the VA, public housing agency performance, and other factors as specified by HUD in consultation with the VA. On May 6, 2008 (73 FR 25026), HUD published in the **Federal Register** a notice that set forth the policies and procedures for the administration of tenant-based Section 8 HCV rental assistance under the HUD–VASH program administered by local PHAs that have partnered with local VA medical centers. On May 19, 2008 (73 FR 28863), HUD corrected the May 6, 2008 notice.

As required by the FY 2011 Appropriations Act, the VA identified VAMCs to participate in the program taking into account the population of homeless veterans needing services in the area, the number of homeless veterans recently served by the homeless programs at each VAMC, geographic distribution, and the VA's case management resources. After considering location and administrative performance of PHAs in the jurisdiction of each VAMC, HUD invited PHAs to apply for HUD–VASH vouchers. Also, with the broad flexibility under the FY 2011 Appropriations Act to address the needs of homeless veterans, the Department decided to fund three additional PHAs under HUD Notice, PIH 2010–40 (*Set-Aside Funding Availability for Project-Basing HUD–VASH Vouchers*). This allowed the Department to fund those PHAs that achieved the same number of points as other selected applications, but that were not originally selected through the lottery process. Those PHAs are: (1) Providence (RI) Housing Authority; (2) Tallahassee (FL) Housing Authority; and (3) Washington (DC) Housing Authority.

In accordance with Section 102(a)(4)(C) of the Department of Housing and Urban Development Reform Act of 1989 (42 U.S.C. 3545), today's **Federal Register** publication lists in Appendix A the names, addresses, number of vouchers and amounts of the 182 PHAs to which awards were made under the FY2011 HUD–VASH initiative. Appendix B lists the names, addresses, number of vouchers and amounts awarded to the 3 additional PHAs that were funded under the HUD–VASH set-aside.

Dated: February 13, 2012.

Sandra B. Henriquez,

Assistant Secretary for Public and Indian Housing.

APPENDIX A

2011 VASH RECIPIENTS

Recipient	Address	City	State	Zip code	Amount	Vouchers
Alaska Housing Finance Corporation	PO Box 101020	Anchorage	AK	99510	$349,470	50
Housing Authority of the Birmingham District.	1826 3rd Avenue S	Birmingham	AL	35233	239,328	50
Housing Authority of the City of Montgomery.	525 South Lawrence	Montgomery	AL	36104	283,470	50
The Housing Authority of the City of Huntsville.	200 Washington Street NE	Huntsville	AL	35804	84,762	25
HA Tuscaloosa	2117 Jack Warner Parkway	Tuscaloosa	AL	35401	96,333	25
North Little Rock Housing Authority	2201 Division	North Little Rock	AR	72114	88,206	25
City of Phoenix Housing Department	251 W Washington Street, Floor 4	Phoenix	AZ	85003	930,060	150
Housing and Community Development Tucson.	310 N. Commerce Park Loop	Tucson	AZ	85745	508,044	100
Arizona Department of Housing	1110 West Washington Street, Suite 310.	Phoenix	AZ	85007	131,085	25
San Francisco Housing Authority	440 Turk Street	San Francisco	CA	94102	349,218	25
Housing Authority of the County of Los Angeles.	2 S Coral Circle	Monterey Park	CA	91755	867,996	100
Oakland Housing Authority	1619 Harrison St.	Oakland	CA	94612	498,696	50
Housing Authority of the City of Los Angeles.	2600 Wilshire Blvd	Los Angeles	CA	90057	1,851,912	200
Housing Authority City of Fresno	1331 Fulton Mall	Fresno	CA	93721	146,127	25
County of Sacramento Housing Authority.	801 12th Street	Sacramento	CA	95814	176,844	25
Housing Authority of the County of Kern.	601–24th Street	Bakersfield	CA	93301	129,879	25
Housing Authority of the County of San Mateo.	264 Harbor Boulevard, Building A	Belmont	CA	94002	668,580	50
Housing Authority of the County of San Bernardino.	715 E. Brier Dr	San Bernardino	CA	92408	168,903	25
Housing Authority of the County of Santa Barbara.	815 W Ocean Avenue	Lompoc	CA	93436	478,194	50
Housing Authority of the County of Riverside.	5555 Arlington Avenue	Riverside	CA	92504	204,507	25
County of Monterey Hsg Auth	123 Rico Street	Salinas	CA	93907	190,161	25

2011 VASH RECIPIENTS—Continued

Recipient	Address	City	State	Zip code	Amount	Vouchers
Housing Authority of the City of San Buenaventura.	995 Riverside Street	Ventura	CA	93001	198,591	25
Housing Authority of the County Santa Clara.	505 W Julian Street	San Jose	CA	95110	1,159,500	100
City of Pittsburg Hsg Auth	916 Cumberland Street	Pittsburg	CA	94565	238,881	25
San Diego Housing Commission	1122 Broadway Suite 300	San Diego	CA	92101	639,468	75
Housing Authority of the City of San Luis Obispo.	487 Leff Street	San Luis Obispo	CA	93401	196,200	25
City of Long Beach Housing Authority	521 East 4th Street	Long Beach	CA	90802	457,788	50
Santa Cruz County Hsg Auth	2931 Mission Street	Santa Cruz	CA	95060	280,395	25
County of Humboldt Hsg Auth	735 West Everding Street	Eureka	CA	95503	142,572	25
City of Santa Rosa	90 Santa Rosa Ave.	Santa Rosa	CA	95402	206,565	25
Orange County Housing Authority	1770 North Broadway	Santa Ana	CA	92706	927,747	75
Housing Authority of the County of San Diego.	3989 Ruffin Road	San Diego	CA	92123	361,104	50
Housing Authority of the City and County of Denver.	777 Grant Street	Denver	CO	80203	334,764	50
Housing Authority of the City of Pueblo.	1414 N. Santa Fe Ave., 10th Floor	Pueblo	CO	81003	119,364	25
Grand Junction Housing Authority	1011 North Tenth Street	Grand Junction	CO	81501	119,187	25
Colorado Department of Human Services.	4020 South Newton St.	Denver	CO	80236	137,637	25
Colorado Division of Housing	1313 Sherman Street, Room 500	Denver	CO	80203	167,187	25
Housing Authority of the City of Hartford.	180 Overlook Terrace	Hartford	CT	06106	417,858	50
Waterbury Housing Authority	2 Lakewood Road	Waterbury	CT	06704	160,866	25
D.C. Housing Authority	1133 N. Capitol Street, NE	Washington	DC	20002	754,353	75
Wilmington Housing Authority	400 N. Walnut Street	Wilmington	DE	19801	86,125	15
Tampa Housing Authority	1529 W Main Street	Tampa	FL	33607	517,329	75
Orlando Housing Authority	390 North Bumby Avenue	Orlando	FL	32803	406,440	50
Miami-Dade Housing Agency	701 NW 1st Court, 16th Floor	Miami	FL	33136	498,528	50
Housing Authority of City of Daytona Beach.	211 N. Ridgewood Avenue, Ste 200	Daytona Beach	FL	32114	129,978	25
Sarasota Housing Authority	40 South Pineapple Ave, Ste 200	Sarasota	FL	34236	141,324	25
West Palm Beach Housing Authority	1715 Division Avenue	West Palm Beach	FL	33407	354,858	50
Housing Authority of the City of Fort Lauderdale.	437 SW 4th Avenue	Fort Lauderdale	FL	33315	248,478	25
Housing Authority of the City of Titusville.	524 S Hopkins Avenue	Titusville	FL	32796	132,783	25
Pinellas County Housing Authority	11479 Ulmerton Road	Largo	FL	33778	522,765	75
Fort Walton Beach Housing Authority	27 Robinwood Drive SW	Fort Walton Beach	FL	32548	284,856	50
Alachua County Housing Authority	703 NE 1st Street	Gainesville	FL	32601	522,768	100
Housing Authority of the City of Augusta.	1435 Walton Way	Augusta	GA	30901	111,837	25
Housing Authority of the City of Decatur.	750 Commerce Drive, Ste 110	Decatur	GA	30030	1,160,802	150
Housing Authority of the City of College Park.	2000 W. Princeton Avenue	College Park	GA	30337	197,346	25
Hawaii Public Housing Authority	1002 North School Street	Honolulu	HI	96817	457,344	50
Des Moines Municipal Housing Agency.	100 East Euclid, Suite 101	Des Moines	IA	50313	118,029	25
Davenport Housing Commission	501 W 3rd Street	Davenport	IA	52801	81,517	15
Boise City Housing Authority	1276 River Street, Ste 300	Boise	ID	83702	101,499	25
Chicago Housing Authority	60 E. Van Buren St	Chicago	IL	60605	612,000	75
Peoria Housing Authority	100 S Richard Pryor Place	Peoria	IL	61605	139,038	25
Grtr Metro. Area Hsng Auth of Rock Island County.	325 2nd Street	Silvis	IL	61282	49,535	10
The Housing Authority of the City of Danville, IL.	1607 Clyman Lane	Danville	IL	61832	86,367	25
Rockford Housing Authority	223 S Winnebago Street	Rockford	IL	61102	126,606	25
Housing Authority of the County of Cook.	175 W. Jackson, Ste 350	Chicago	IL	60604	353,202	50
Fort Wayne Housing Authority	7315 South Hanna Street	Fort Wayne	IN	46816	119,784	25
Indianapolis Housing Agency	1919 North Meridian Street	Indianapolis	IN	46202	122,175	25
Indiana Housing and Community Development Au.	30 S. Meridian St., Ste 1000	Indianapolis	IN	46204	127,419	25
Wichita Housing Authority	332 Riverview Street	Wichita	KS	67203	130,218	25
Manhattan Housing Authority	300 No. 5th Street	Manhattan	KS	66502	114,957	25
Leavenworth Housing Authority	200 Shawnee Street	Leavenworth	KS	66048	99,636	25
Louisville Metro Housing Authority	420 S 8th Street	Louisville	KY	40203	120,282	25
Housing Authority of Lexington	300 West New Circle Road	Lexington	KY	40505	105,585	25

2011 VASH RECIPIENTS—Continued

Recipient	Address	City	State	Zip code	Amount	Vouchers
Kentucky Housing Corporation-State Agency.	1050 US 127 South	Frankfort	KY	40601	123,195	25
Housing Authority of New Orleans	4100 Touro Street	New Orleans	LA	70122	930,792	100
Housing Authority of the City of Kenner.	1013 31st Street	Kenner	LA	70065	608,175	125
Housing Authority of Rapides Parish	119 Boyce Garden Drive	Boyce	LA	71409	198,234	50
Bossier Parish Section 8	3022 Old Minden Road, Suite 206	Bossier City	LA	71112	100,011	25
Boston Housing Authority	52 Chauncy Street	Boston	MA	02111	520,356	50
Cambridge Housing Authority	675 Massachusetts Avenue	Cambridge	MA	02139	350,721	25
Worcester Housing Authority	40 Belmont Street	Worcester	MA	01605	166,269	25
Northampton Housing Authority	49 Old South Street	Northampton	MA	01060	129,069	25
Braintree Housing Authority	25 Roosevelt Street	Braintree	MA	02184	309,462	25
Chelmsford Housing Authority	10 Wilson Street	Chelmsford	MA	01824	211,410	25
Department of Housing & Community Development.	100 Cambridge Street, Suite 300	Boston	MA	02114	486,276	50
Housing Authority of Baltimore City	417 E Fayette Street	Baltimore	MD	21202	767,412	75
Housing Opprty Com of Montgomery Co.	10400 Detrick Avenue	Kensington	MD	20895	229,881	25
Housing Authority of Prince Georges County.	9400 Peppercorn Place, Suite 200	Largo	MD	20774	321,552	25
Baltimore County, MD	Drum Castle Government Center, 6401 York Road.	Baltimore	MD	21212	196,800	25
Maine State Housing Authority	353 Water Street	Augusta	ME	04330	87,620	15
Battle Creek Housing Commission	250 Champion Street	Battle Creek	MI	49037	99,048	25
Ann Arbor Housing Commission	727 Miller Avenue	Ann Arbor	MI	48103	120,420	25
Michigan State Housing Development Authority.	735 E. Michigan Avenue	Lansing	MI	48912	806,700	125
Public Housing Agency of the City of St Paul.	555 N. Wabasha Street, Suite 400	Saint Paul	MN	55102	162,378	25
PHA in and for the City of Minneapolis	1001 Washington Avenue N	Minneapolis	MN	55401	298,128	50
HRA of St. Cloud, Minnesota	1225 W. Saint Germain	Saint Cloud	MN	56301	122,346	25
St. Louis Housing Authority	3520 Page Boulevard	Saint Louis	MO	63106	144,150	25
Housing Authority of Kansas City, Missouri.	301 E. Armour Blvd.—#200	Kansas City	MO	64111	140,577	25
The Housing Authority of the City of Jackson.	2747 Livingston Road	Jackson	MS	39213	357,714	75
Housing Authority of Billings	2415 1st Avenue N	Billings	MT	59101	111,938	25
Montana Department of Commerce	301 South Park Ave.	Helena	MT	59620	105,489	25
Housing Authority of the City of Charlotte.	1301 South Boulevard	Charlotte	NC	28203	368,472	50
Housing Authority of the City of Asheville.	165 S French Broad Ave.	Asheville	NC	28801	257,970	50
Fayetteville Metropolitan Housing Authority.	1000 Ramsey Street	Fayetteville	NC	28302	135,498	25
Housing Authority of the City of Greensboro.	450 N Church Street	Greensboro	NC	27401	118,083	25
The Housing Authority of the City of Durham.	330 E Main Street	Durham	NC	27701	182,406	25
Housing Authority of the County of Wake.	100 Shannon Drive	Zebulon	NC	27597	149,913	25
Fargo Housing and Redevelopment Authority.	325 Broadway	Fargo	ND	58102	52,396	15
Douglas County Housing Authority	5404 N 107th Plaza	Omaha	NE	68134	149,868	25
Manchester Housing & Redevelopment Authority.	198 Hanover Street	Manchester	NH	03104	131,000	15
Housing Authority of the City of Camden.	2021 Watson Street, 2nd Floor	Camden	NJ	08105	150,879	25
State of NJ Dept. of Comm. Affairs	101 South Broad Street	Trenton	NJ	08625	822,684	100
Bernalillo County Housing Department	1900 Bridge Boulevard SW	Albuquerque	NM	87105	161,940	25
City of Reno Housing Authority	1525 E 9th Street	Reno	NV	89512	176,784	25
Southern Nevada Regional Housing Authority.	340 North 11th Street	Las Vegas	NV	89101	567,132	100
Syracuse Housing Authority	516 Burt St.	Syracuse	NY	13202	119,592	25
New York City Housing Authority	250 Broadway, Room 912	New York	NY	10007	2,062,200	200
Albany Housing Authority	200 South Pearl St.	Albany	NY	12202	129,606	25
Poughkeepsie Housing Authority	4 Howard Street	Poughkeepsie	NY	12601	212,520	25
Town of Amherst	1195 Main St., c/o Belmont Shelter Corporation.	Buffalo	NY	14209	118,023	25
NYS Housing Trust Fund Corporation	38–40 State Street, 4th Floor North	Albany	NY	12207	513,156	50
Columbus Metropolitan Housing Authority.	880 East 11th Ave	Columbus	OH	43211	141,375	25

2011 VASH RECIPIENTS—Continued

Recipient	Address	City	State	Zip code	Amount	Vouchers
Cuyahoga Metropolitan Housing Authority.	1441 W 25th Street	Cleveland	OH	44113	145,269	25
Cincinnati Metropolitan Housing Authority.	16 W Central Parkway	Cincinnati	OH	45202	104,823	25
Dayton Metropolitan Housing Authority	400 Wayne Ave	Dayton	OH	45401	105,501	25
Lucas Metropolitan Housing Authority	435 Nebraska Avenue	Toledo	OH	43604	113,988	25
Lorain Metropolitan Housing Authority	1600 Kansas Avenue	Lorain	OH	44052	150,069	25
Portage Metropolitan Housing Authority.	2832 State Route 59	Ravenna	OH	44266	151,716	25
Housing Authority of the City of Oklahoma City.	1700 NE 4th St	Oklahoma City	OK	73117	174,366	50
Oklahoma Housing Finance Agency	Oklahoma Housing Finance Agency	Oklahoma City	OK	73126	191,100	50
Housing Authority of Portland	135 SW Ash Street	Portland	OR	97204	297,186	50
Housing Authority of Douglas County	902 West Stanton Street	Roseburg	OR	97470	70,473	25
Housing Authority & Comm Svcs of Lane Co.	177 Day Island Road	Eugene	OR	97401	106,482	25
Housing Authority of Jackson County	2251 Table Rock Road	Medford	OR	97501	113,298	25
Central Oregon Regional Housing Authority.	405 SW Sixth Street	Redmond	OR	97756	144,600	25
Philadelphia Housing Authority	12 S 23rd Street	Philadelphia	PA	19103	349,392	50
Allegheny County Housing Authority	625 Stanwix Street, 12th Floor	Pittsburgh	PA	15222	100,806	25
Harrisburg Housing Authority	351 Chestnut Street	Harrisburg	PA	17101	113,076	25
Housing Authority of the County of Butler.	114 Woody Drive	Butler	PA	16001	47,939	10
Housing Authority of the City of Erie	606 Holland Street	Erie	PA	16501	59,355	15
Housing Authority of the County of Chester.	30 W Barnard Street	West Chester	PA	19382	165,159	25
Wilkes Barre Housing Authority	50 Lincoln Plaza, S. Wilkes Barre Blvd.	Wilkes Barre	PA	18702	120,780	25
Housing Authority Providence	100 Broad Street	Providence	RI	02903	114,275	15
Housing Authority of the City of Charleston.	550 Meeting St	Charleston	SC	29403	137,487	25
Housing Authority of the City of Columbia.	1917 Harden Street	Columbia	SC	29204	228,012	50
Pennington County Housing and Redevelopment Commission.	1805 W. Fulton St. , Ste 101	Rapid City	SD	57702	111,933	25
Memphis Housing Authority	700 Adams Avenue	Memphis	TN	38105	232,782	50
Johnson City Housing Authority	901 Pardee Street	Johnson City	TN	37601	87,498	25
Knoxville's Community Development Corp..	901 N Broadway Street	Knoxville	TN	37917	102,291	25
Metropolitan Development & Housing Agency.	701 S 6th Street	Nashville	TN	37206	259,038	50
Austin Housing Authority	1124 S Ih 35	Austin	TX	78704	366,540	50
Housing Authority of the City of El Paso, Tx.	5300 E Paisano Drive	El Paso	TX	79905	99,918	25
Housing Authority of Fort Worth	1201 E 13th Street	Fort Worth	TX	76102	150,654	25
San Antonio Housing Authority	818 S Flores Street	San Antonio	TX	78204	528,840	125
Corpus Christi Housing Authority	3701 Ayers Street	Corpus Christi	TX	78415	140,400	25
Housing Authority of the City of Dallas, Texas.	3939 N. Hampton Road	Dallas	TX	75212	619,200	100
Harlingen Housing Authority	219 East Jackson Street	Harlingen	TX	78550	99,057	25
Housing Authority of the City of Abilene.	534 Cypress Street, Suite #200	Abilene	TX	79601	59,160	25
Harris County Housing Authority	8933 Interchange	Houston	TX	77054	666,765	125
San Angelo Housing Authority	420 E. 28th Street	San Angelo	TX	76903	132,528	25
City of Amarillo	PO Box 1971	Amarillo	TX	79101	135,849	25
Panhandle Community Services	1309 West 8th	Amarillo	TX	79101	91,233	25
Central Texas Council of Governments.	2180 North Main	Belton	TX	76513	127,119	25
Athens Housing Authority	805 N. Palestine St.	Athens	TX	75751	104,853	25
Texoma Council of Governments	1117 Gallagher, Suite 320	Sherman	TX	75090	114,564	25
Housing Authority of the County of Salt Lake.	3595 S Main Street	Salt Lake City	UT	84115	56,700	25
Hampton Redevelopment & Housing Authority.	22 Lincoln Street	Hampton	VA	23669	315,330	50
Virginia Housing Development Authority.	601 South Belvidere Street	Richmond	VA	23220	187,458	25
Vermont State Housing Authority	1 Prospect Street	Montpelier	VT	05602	91,903	15
Seattle Housing Authority	120 Sixth Avenue North	Seattle	WA	98109	241,514	37
HA of King County	600 Andover Park West	Seattle	WA	98188	293,746	38
HA City of Tacoma	902 S L Street	Tacoma	WA	98405	145,581	25

2011 VASH RECIPIENTS—Continued

Recipient	Address	City	State	Zip code	Amount	Vouchers
Housing Authority of Snohomish County.	12525 4th Avenue West, Suite 200	Everett	WA	98204	158,496	25
HA City of Walla Walla	501 Cayuse Street	Walla Walla	WA	99362	105,309	25
HA of Chelan County and the City of Wenatchee.	1555 S Methow St	Wenatchee	WA	98801	128,304	25
Madison Community Development Authority.	215 Martin Luther King, Jr. Blvd, Rm 120.	Madison	WI	53703	157,557	25
Tomah Public Housing Authority	720 Williams Street	Tomah	WI	54660	78,918	25
West Allis HA	7525 West Greenfield Avenue	West Allis	WI	53214	287,772	50
Charleston/Kanawha Housing Authority.	PO Box 86	Charleston	WV	25321	48,599	10
Housing Authority of the City of Huntington.	300 7th Avenue West	Huntington	WV	25701	56,209	15
Housing Authority of Raleigh County	PO Box 2618	Beckley	WV	25802	35,742	10
Housing Authority of the City of Casper.	1514 E. 12th Street, Suite 105	Casper	WY	82601	110,685	25

APPENDIX B

2011 VASH SET-ASIDE RECIPIENTS

Recipient	Address	City	State	Zip code	Amount	Vouchers
D.C Housing Authority	1133 N. Capitol Street, NE	Washington	DC	20002	$377,928	29
Tallahassee Housing Authority	2940 Grady Road	Tallahassee	FL	32312	416,400	50
Housing Authority Providence	100 Broad Street	Providence	RI	02903	167,503	20

[FR Doc. 2012–3834 Filed 2–16–12; 8:45 am]
BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R9–IA–2012–N040; FXIA16710900000P5–123–FF09A30000]

Endangered Species; Receipt of Applications for Permit

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of applications for permit.

SUMMARY: We, the U.S. Fish and Wildlife Service, invite the public to comment on the following applications to conduct certain activities with endangered species. With some exceptions, the Endangered Species Act (ESA) prohibits activities with listed species unless Federal authorization is acquired that allows such activities.

DATES: We must receive comments or requests for documents on or before March 19, 2012.

ADDRESSES: Brenda Tapia, Division of Management Authority, U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, Room 212, Arlington, VA 22203; fax (703) 358–2280; or email *DMAFR@fws.gov*.

FOR FURTHER INFORMATION CONTACT: Brenda Tapia, (703) 358–2104 (telephone); (703) 358–2280 (fax); *DMAFR@fws.gov* (email).

SUPPLEMENTARY INFORMATION:

I. Public Comment Procedures

A. How do I request copies of applications or comment on submitted applications?

Send your request for copies of applications or comments and materials concerning any of the applications to the contact listed under **ADDRESSES**. Please include the **Federal Register** notice publication date, the PRT-number, and the name of the applicant in your request or submission. We will not consider requests or comments sent to an email or address not listed under **ADDRESSES**. If you provide an email address in your request for copies of applications, we will attempt to respond to your request electronically.

Please make your requests or comments as specific as possible. Please confine your comments to issues for which we seek comments in this notice, and explain the basis for your comments. Include sufficient information with your comments to allow us to authenticate any scientific or commercial data you include.

The comments and recommendations that will be most useful and likely to influence agency decisions are: (1) Those supported by quantitative information or studies; and (2) Those that include citations to, and analyses of, the applicable laws and regulations. We will not consider or include in our administrative record comments we receive after the close of the comment period (see **DATES**) or comments delivered to an address other than those listed above (see **ADDRESSES**).

B. May I review comments submitted by others?

Comments, including names and street addresses of respondents, will be available for public review at the address listed under **ADDRESSES**. The public may review documents and other information applicants have sent in support of the application unless our allowing viewing would violate the Privacy Act or Freedom of Information Act. 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.

II. Background

To help us carry out our conservation responsibilities for affected species, and in consideration of section 10(a)(1)(A) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), along with Executive Order 13576, ''Delivering an Efficient, Effective, and Accountable Government,'' and the President's Memorandum for the Heads of Executive Departments and Agencies of January 21, 2009—Transparency and Open Government (74 FR 4685; January 26, 2009), which call on all Federal agencies to promote openness and transparency in Government by disclosing information to the public, we invite public comment on these permit applications before final action is taken.

III. Permit Applications

A. Endangered Species

Applicant: Point Defiance Zoo & Aquarium, Tacoma, WA; PRT–58210A

The applicant requests a permit to export red wolf (*Canis lupus rufus*) biological samples to Canada, for the purpose of enhancement of the survival of the species.

Applicant: Double D Ranch, Rosanky, TX; PRT–64029A

The applicant requests a captive-bred wildlife registration under 50 CFR 17.21(g) for the scimitar-horned oryx (*Oryx dammah*), to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Double D Ranch, Rosanky, TX; PRT–64028A

The applicant requests a permit authorizing interstate and foreign commerce, export, and cull of excess scimitar-horned oryx (*Oryx dammah*), from the captive herd maintained at their facility, for the purpose of enhancement of the survival of the species. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: 777 Ranch Inc., Hondo, TX; PRT–017404

The applicant requests amendment of their captive-bred wildlife registration under 50 CFR 17.21(g) to add scimitar-horned oryx (*Oryx dammah*), addax (*Addax nasomaculatus*), and dama gazelle (*Nanger dama*) to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: 777 Ranch Inc., Hondo, TX; PRT–013008

The applicant requests amendment of their permit authorizing interstate and foreign commerce, export, and cull to include scimitar-horned oryx (*Oryx dammah*), addax (*Addax nasomaculatus*), and dama gazelle (*Nanger dama*) from the captive herds maintained at their facility, for the purpose of enhancement of the survival of the species. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Earl Bruno, Eden, TX; PRT–17533A

The applicant requests amendment of their captive-bred wildlife registration under 50 CFR 17.21(g) to add scimitar-horned oryx (*Oryx dammah*) to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Earl Bruno, Eden, TX; PRT–28015A

The applicant requests amendment of their permit authorizing interstate and foreign commerce, export, and cull to include scimitar-horned oryx (*Oryx dammah*) from the captive herd maintained at their facility, for the purpose of enhancement of the survival of the species. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Gregory Cerullo, Derry, NH; PRT–64781A

The applicant requests a captive-bred wildlife registration under 50 CFR 17.21(g) for the golden parakeet (Guarouba guarouba), to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Palfam Ranch Management LLC, Giddings, TX; PRT–64738A

The applicant requests a permit authorizing interstate and foreign commerce, export, and cull of excess barasingha (*Rucervus duvaucelii*), scimitar-horned oryx (*Oryx dammah*), and addax (*Addax nasomaculatus*), from the captive herds maintained at their facility, for the purpose of enhancement of the survival of the species. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Recordbuck Ranch, Utopia, TX; PRT–64797A

The applicant requests a permit authorizing interstate and foreign commerce, export, and cull of excess barasingha (*Rucervus duvaucelii*), scimitar-horned oryx (*Oryx dammah*), addax (*Addax nasomaculatus*), and dama gazelle (*Nanger dama*), from the captive herds maintained at their facility, for the purpose of enhancement of the survival of the species. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: NH&S Holdings, LLC, Valley Mills, TX; PRT–64163A

The applicant requests a permit authorizing interstate and foreign commerce, export, and cull of excess scimitar-horned oryx (*Oryx dammah*), from the captive herd maintained at their facility, for the purpose of enhancement of the survival of the species. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Laguna Vista Ranch, Ltd., San Antonio, TX; PRT–180804

The applicant requests amendment of their captive-bred wildlife registration under 50 CFR 17.21(g) to add scimitar-horned oryx (*Oryx dammah*) to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Laguna Vista Ranch, Ltd., San Antonio, TX; PRT–180803

The applicant requests amendment of their permit authorizing interstate and foreign commerce, export, and cull to include scimitar-horned oryx (*Oryx dammah*) from the captive herd maintained at their facility, for the purpose of enhancement of the survival of the species. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: James Whipple & Nancy Nunke, Romona, CA; PRT–053952

The applicant requests amendment and renewal of his captive-bred wildlife registration under 50 CFR 17.21(g) to include Grevy's zebra (*Equus grevyi*) and Przewalski's horse (*Equus przewalskii*) to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Triple D Game Farm Inc., Kalispell, MT; PRT–812816

The applicant requests amendment of their captive-bred wildlife registration under 50 CFR 17.21(g) to add Amur leopard (*Panthera pardus orientalis*) to enhance the species' propagation or

survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Buck Valley Ranch, LLC, Center Point, TX; PRT–65292A

The applicant requests a captive-bred wildlife registration under 50 CFR 17.21(g) for the scimitar-horned oryx (*Oryx dammah*), to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Buck Valley Ranch, LLC, Center Point, TX; PRT–65368A

The applicant requests a permit authorizing interstate and foreign commerce, export, and cull of excess scimitar-horned oryx (*Oryx dammah*), from the captive herd maintained at their facility, for the purpose of enhancement of the survival of the species. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Flying L Land & Livestock LLC, Bandera, TX; PRT–65330A

The applicant requests a captive-bred wildlife registration under 50 CFR 17.21(g) for the scimitar-horned oryx (*Oryx dammah*) and addax (*Addax nasomaculatus*), to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Guajolote Ranch, Inc., San Antonio, TX; PRT–65320A

The applicant requests a captive-bred wildlife registration under 50 CFR 17.21(g) for the scimitar-horned oryx (*Oryx dammah*), to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Guajolote Ranch, Inc., San Antonio, TX; PRT–65321A

The applicant requests a permit authorizing interstate and foreign commerce, export, and cull of excess scimitar-horned oryx (*Oryx dammah*), from the captive herd maintained at their facility, for the purpose of enhancement of the survival of the species. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: 5F Ranch-Ford Ranch Corp., Zephyr, TX; PRT–65116A

The applicant requests a captive-bred wildlife registration under 50 CFR 17.21(g) for the Eld's deer (*Rucervus eldii*), barasingha (*Rucervus duvaucelii*), Arabian oryx (*Oryx leucoryx*), scimitar-horned oryx (*Oryx dammah*), addax (*Addax nasomaculatus*), and dama gazelle (*Nanger dama*), to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: William Montgomery, Elgin, TX; PRT–65009A

The applicant requests a captive-bred wildlife registration under 50 CFR 17.21(g) for the radiated tortoise (*Astrochelys radiata*), to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Ronald Grant, Brackettville, TX; PRT–65096A

The applicant requests a captive-bred wildlife registration under 50 CFR 17.21(g) for the scimitar-horned oryx (*Oryx dammah*), addax (*Addax nasomaculatus*), and dama gazelle (*Nanger dama*), to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Ronald Grant, Brackettville, TX; PRT–65097A

The applicant requests a permit authorizing interstate and foreign commerce, export, and cull of excess scimitar-horned oryx (*Oryx dammah*), addax (*Addax nasomaculatus*), and dama gazelle (*Nanger dama*) from the captive herds maintained at their facility, for the purpose of enhancement of the survival of the species. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Eslabon Ranch, Ltd., George West, TX; PRT–65091A

The applicant requests a captive-bred wildlife registration under 50 CFR 17.21(g) for the scimitar-horned oryx (*Oryx dammah*), to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Eslabon Ranch, Ltd., George West, TX; PRT–65090A

The applicant requests a permit authorizing interstate and foreign commerce, export, and cull of excess scimitar-horned oryx (*Oryx dammah*), from the captive herd maintained at their facility, for the purpose of enhancement of the survival of the species. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Turkey Creek Ranch, Ltd., Houston, TX; PRT–65092A

The applicant requests a captive-bred wildlife registration under 50 CFR 17.21(g) for the scimitar-horned oryx (*Oryx dammah*), to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Turkey Creek Ranch, Ltd., Houston, TX; PRT–65093A

The applicant requests a permit authorizing interstate and foreign commerce, export, and cull of excess scimitar-horned oryx (*Oryx dammah*), from the captive herd maintained at their facility, for the purpose of enhancement of the survival of the species. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Kothman Ranch Company, Sanderson, TX; PRT–65017A

The applicant requests a captive-bred wildlife registration under 50 CFR 17.21(g) for the scimitar-horned oryx (*Oryx dammah*) and Addax (*Addax nasomaculatus*), to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Kothman Ranch Company, Sanderson, TX; PRT–65019A

The applicant requests a permit authorizing interstate and foreign commerce, export, and cull of excess scimitar-horned oryx (*Oryx dammah*) and addax (*Addax nasomaculatus*), from the captive herds maintained at their facility, for the purpose of enhancement of the survival of the species. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Rancho Vedado, Inc., Mertzon, TX; PRT–64986A

The applicant requests a captive-bred wildlife registration under 50 CFR 17.21(g) for the scimitar-horned oryx (*Oryx dammah*), to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Rancho Vedado, Inc., Mertzon, TX; PRT–64987A

The applicant requests a permit authorizing interstate and foreign

commerce, export, and cull of excess scimitar-horned oryx (*Oryx dammah*), from the captive herd maintained at their facility, for the purpose of enhancement of the survival of the species. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: KJC Holdings, Lohn, TX; PRT–200207

The applicant requests amendment of their captive-bred wildlife registration under 50 CFR 17.21(g) to add scimitar-horned oryx (*Oryx dammah*), to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: KJC Holdings, Lohn, TX; PRT–200211

The applicant requests amendment of their permit authorizing interstate and foreign commerce, export, and cull to include scimitar-horned oryx (*Oryx dammah*) from the captive herd maintained at their facility, for the purpose of enhancement of the survival of the species. This notification covers activities to be conducted by the applicant over a 5-year period.

Multiple Applicants

The following applicants each request a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus pygargus*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

Applicant: John Jackman, Lancaster, CA; PRT–62465A

Applicant: Scott Jennings, San Angelo, TX; PRT–60964A

Brenda Tapia,

Program Analyst/Data Administrator, Branch of Permits, Division of Management Authority.

[FR Doc. 2012–3771 Filed 2–16–12; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R2–R–2011–N198; 1265–0000–10137–S3]

Willamette Valley National Wildlife Refuge Complex, Corvallis, OR; Final Comprehensive Conservation Plan and Finding of No Significant Impact for Environmental Assessment

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce the availability of our final comprehensive conservation plan (CCP) and a finding of no significant impact (FONSI) for the environmental assessment (EA) for the Willamette Valley National Wildlife Refuges (NWRs/refuges). In this final CCP, we describe how we will manage these refuges for the next 15 years. Implementing the CCP is subject to the availability of funding and any additional compliance requirements.

ADDRESSES: You may view or obtain copies of the final CCP and FONSI/EA by any of the following methods. You may request a hard copy or CD–ROM.

Agency Web Site: Download a copy of the document at *http://www.fws.gov/pacific/planning.*

Email: *FW1PlanningComments@fws.gov.* Include ''Willamette Valley NWR FCCP/EA'' in the subject line.

Fax: Attn: Doug Spencer, Project Leader, (541) 757–4450.

U.S. Mail: Doug Spencer, Project Leader, Willamette Valley National Wildlife Refuge Complex, 26208 Finley Refuge Road, Corvallis, Oregon 97333–9533.

In-Person Viewing or Pickup: Call (541) 757–7236 to make an appointment during regular business hours at W.L. Finley National Wildlife Refuge, 26208 Finley Refuge Road, Corvallis, Oregon 97333–9533.

FOR FURTHER INFORMATION CONTACT: Doug Spencer, Project Leader, (541) 757–7236.

SUPPLEMENTARY INFORMATION:

Introduction

With this notice, we announce the completion of the CCP process for the Willamette Valley National Wildlife Refuges. The Service started this process through a notice of intent in the **Federal Register** (73 FR 11137; February 29, 2008). We released the draft CCP/EA to the public, announcing and requesting comments in a notice of availability in the **Federal Register** (76 FR 30382; May 25, 2011).

The Willamette Valley National Wildlife Refuge Complex includes three refuges: William L. Finley, Baskett Slough, and Ankeny. Together, the three refuges encompass approximately 11,110 acres in western Oregon. Habitats on the refuges include seasonal, semipermanent, and permanent wetlands; wet prairies, upland prairie/oak savannas, oak woodlands, mixed deciduous-coniferous forests, riparian, riverine, and stream habitats. Agricultural lands, the majority managed as grass fields, are also present on the refuges. The refuges were established under the Migratory Bird Conservation Act ''for use as an inviolate sanctuary or for any other management purpose, for migratory birds * * * to conserve and protect migratory birds * * * and to restore or develop adequate wildlife habitat,'' with emphasis on protecting dusky Canada geese. In the last four decades, these refuges have provided not only an important wintering grounds for the dusky Canada goose and thousands of other wintering geese and ducks, but also have been recognized more recently as increasingly important areas for conservation of the remaining fragments of the native Willamette Valley habitats and biota. The refuges support key populations of federally listed species, including Oregon chub, Fender's blue butterfly, Bradshaw's desert-parsley, Kincaid's lupine, Nelson's checker-mallow, and Willamette daisy, and provide migration habitat for listed Chinook salmon and steelhead. Several other rare species are also found on the refuges.

We announce our CCP decision and the availability of a FONSI for the final EA for Willamette Valley NWRs in accordance with the National Wildlife Refuge System Administration Act of 1966 (16 U.S.C. 668dd–668ee) (Refuge Administration Act) and National Environmental Policy Act (NEPA) (40 CFR 1506.6(b)) requirements. We prepared an analysis of environmental impacts, which we included in an EA that accompanied the draft CCP.

The CCP will guide us in managing and administering the refuges for the next 15 years. Alternative 2, as described in the draft CCP, is the basis of the final CCP.

Background

The Refuge Administration Act, as amended by the National Wildlife Refuge System Improvement Act of 1997, requires us to develop a CCP for each national wildlife refuge. The purpose for developing a CCP is to

provide refuge managers with a 15-year plan for achieving refuge purposes and contributing toward the mission of the National Wildlife Refuge System, consistent with sound principles of fish and wildlife management, conservation, legal mandates, and our policies. In addition to outlining broad management direction on conserving wildlife and their habitats, CCPs identify compatible wildlife-dependent recreational opportunities available to the public, including opportunities for compatible hunting, fishing, wildlife observation and photography, and environmental education and interpretation. We will review and update the CCP at least every 15 years in accordance with the Refuge Administration Act.

CCP Alternatives, Including Selected Alternative

Our draft CCP/EA (76 FR 30382; May 25, 2011) discussed several issues. To address these, we developed and evaluated the following alternatives.

Alternative 1 (No Action)

Under Alternative 1, we analyzed the following ongoing actions:

- Maintaining cultivated grass fields under a cooperative farming program to provide forage for wintering Canada geese;
- Managing wetland habitats and providing sanctuary for geese;
- Managing and enhancing the existing areas of native habitats;
- Continuing habitat and population management for endangered and threatened species;
- Providing wildlife observation, interpretation, environmental education, fishing, and hunting with current facilities and programs; and
- Maintaining the current area closed to wintertime public access to provide sanctuary during the wintering waterfowl season.

Alternative 2 (Selected Action)

Alternative 2, our preferred alternative, represents a balanced approach among the many competing needs at the refuges. Overall, habitat and compatible public use programs will continue as currently managed but with many targeted improvements and additions. Implementing these actions is subject to the availability of funding and any additional compliance requirements.

An emphasis on providing habitat for wintering geese will remain. Green forage for geese will continue to be provided primarily through cooperative farming agreements with local farmers. The Service will pursue measures to help retain the services of cooperative farmers, such as:

- Providing enhanced irrigation capabilities (these will help the farmers to better establish green forage crops and perhaps grow other cash crops);
- Providing additional lure crops such as corn or other grains;
- Taking over farming on certain high goose use fields; and/or
- Offsetting a portion of the costs to cooperative farmers; etc.
- Goose use should be no less than under Alternative 1 and could increase if specific goose management strategies are implemented. Wetland habitat management and restoration activities will also be intensified to improve habitat for geese and other wildlife.

Management and enhancement will continue in remnant native habitats and recently restored areas. In addition, approximately 845 additional acres on the three refuges will be restored to wetland, wet prairie, riparian, oak woodland, or upland prairie/oak savanna habitats over the next 15 years.

Threatened and endangered species management will continue to be a priority, guided by recovery plans where applicable. Existing populations of several threatened and endangered species will be strengthened through habitat management activities, and several new populations will be established on the refuges.

Wildlife observation and interpretation will continue to be emphasized as the cornerstone of the public use program. Several new trails and viewing facilities are planned, as well as interpretive signs and materials, including online materials. In addition, major special events are planned at a frequency of about 3–4/year, with monthly weekend interpretive programs.

This alternative includes expansion of environmental education efforts, with an objective of reaching more students and schools, particularly at W.L. Finley Refuge. Outdoor classroom shelters are part of the alternative. In addition, a goal of this alternative is a new Environmental Education Center, indoor classroom facilities, and an interpretive exhibit area on W.L. Finley Refuge. This will depend on available funding.

A new option to hunt deer of either sex will be added on W.L. Finley Refuge. In addition, new upland locations will be available for deer hunting during a portion of the restricted firearms season; this will require closure of two hiking trails for a week in November. The restricted firearms season will be shortened and shifted to later in the State season. A youth waterfowl hunt and a September goose hunt will be provided at Baskett Slough Refuge. Fishing will be promoted at the Willamette River by developing safe fishing access and a canoe launch at Snag Boat Bend Unit.

The current area closed to public access will remain closed, in order to provide sanctuary during the wintering waterfowl season on the three refuges. However, the major portions of the Snag Boat Bend Unit will be open year-round.

The refuges will develop an elk management plan cooperatively with the Oregon Department of Fish and Wildlife after completion of the CCP (within 1–2 years of CCP implementation). The refuges will continue to expand conservation partnerships, volunteer programs, and outreach to local communities. Proactive cultural resource management will occur by repairing/maintaining the historic structures on W.L. Finley Refuge and by adding associated interpretive facilities.

Under the selected action, the Service also proposes protection, conservation, and management of additional lands within the Willamette Valley that could contribute to refuge purposes and goals by providing wintering habitat and forage for Canada geese; providing protection, enhancement, and restoration of native habitats and rare Willamette Valley species; and providing opportunity for additional wildlife-dependent public use. The refuges will undertake a subsequent land protection planning process to identify specific tracts of lands for these purposes.

Alternative 3

This alternative was analyzed but not selected. Alternative 3 included a major shift in management for wintering Canada geese. Forage would have been provided either through contract farming (paying farmers to grow crops on the refuges) and/or force account farming (refuge staff doing the farming). The refuges would have farmed only fields that were receiving moderate-to-high goose use. Refuge farming program costs would have increased and goose use would have likely decreased.

This alternative would have created the opportunity to restore approximately 1,564 acres of cropland to native habitat over the next 15 years, since the amount of farmland would be reduced. However, the fields to be restored would have likely lain fallow, open to nonnative plant introduction, while awaiting staff time and funding for restoration.

Wildlife observation and interpretation would have continued to be emphasized as the cornerstone of the

public use program. About a third to half as many new observation facilities (trails, viewing overlooks, etc.) would have been added as under Alternative 2, due to staffing and funding resources being directed toward refuge farming activity. The current area closed to public access on all three refuges would have remained closed, in order to provide sanctuary during the wintering waterfowl season, except for the proposed change at Snag Boat Bend as described in Alternative 2 above. Fishing access to the Willamette River would have been provided through a canoe launch at Snag Boat Bend Unit; however, bank fishing access would not have been provided.

Deer hunting, threatened and endangered species management, environmental education, elk management, cultural resources, subsequent land protection planning, and conservation partnership activity would have occurred as under Alternative 2.

Comments

We solicited comments on the draft CCP/EA from May 25, 2011, to June 24, 2011 (76 FR 30382; May 25, 2011). A total of 27 separate communications from 25 different commenters (two commenters submitted two letters each) were received regarding the draft CCP/EA. To address public comments, responsive changes and clarifications were made to the final CCP where appropriate. These changes are summarized in the FONSI.

Selected Alternative

After considering the comments received, we have selected Alternative 2 for implementation. The goals, objectives, and strategies under Alternative 2 best achieve the purpose and need for the CCP while maintaining balance among the varied management needs and programs. Alternative 2 addresses the refuge purposes, issues, and relevant mandates, and is consistent with principles of sound fish and wildlife management.

Dated: October 20, 2011.

Robyn Thorson,

Regional Director, Pacific Region, Portland, Oregon.

[FR Doc. 2012–3759 Filed 2–16–12; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R1–R–2011–N228;1265–0000–10137–S3]

Keālia Pond National Wildlife Refuge and Kakahaiʻa National Wildlife Refuge, Maui County, HI; Final Comprehensive Conservation Plans and Findings of No Significant Impact for the Environmental Assessments

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce the availability of our final comprehensive conservation plans (CCPs) and findings of no significant impacts for the environmental assessments for the Keālia Pond National Wildlife Refuge (refuge or NWR) and Kakahaiʻa National Wildlife Refuge. In the final CCPs, we describe how we plan to manage these refuges for the next 15 years.

ADDRESSES: You may view or obtain copies of the final CCPs and findings of no significant impacts (FONSIs) and environmental assessments (EAs) by any of the following methods. You may request a hard copy or CD–ROM.

Agency Web Site: Download the documents at *www.fws.gov/pacific/planning*.

Email: *FW1PlanningComments@fws.gov.* Include ''Keālia Pond NWR final CCP'' or ''Kakahaiʻa NWR final CCP'' in the subject line of the message.

Mail: Glynnis Nakai, Project Leader, Maui National Wildlife Refuge Complex, P.O. Box 1042, Kīhei, Hawaiʻi 96753.

In-Person Viewing or Pickup: Call (808) 875–1582 to make an appointment during regular business hours at Maui NWR Complex, Milepost 6, Mokulele Highway (Hwy. 311), Kīhei, Hawaiʻi 96753.

FOR FURTHER INFORMATION CONTACT: Glynnis Nakai, Project Leader, Maui NWR Complex, phone number (808) 875–1582.

SUPPLEMENTARY INFORMATION:

Introduction

With this notice, we announce the completion of the CCP processes for Keālia Pond NWR and Kakahaiʻa NWR. The Service started this process through a notice of intent in the **Federal Register** on October 20, 2009 (74 FR 53755). We released the draft CCPs/EAs to the public, announcing and requesting comments in a notice of availability in the **Federal Register** (76 FR 52008; August 19, 2011).

We announce our CCP decisions and the availability of the FONSIs for the EAs in accordance with the National Wildlife Refuge System Administration Act of 1966 (16 U.S.C. 668dd–668ee) (Refuge Administration Act) and National Environmental Policy Act (NEPA) (40 CFR 1506.6(b)) requirements. We prepared a thorough analysis of impacts, which we included in the EAs that accompanied the draft CCPs.

The CCPs will guide us in managing and administering the refuges for the next 15 years. Alternative C, as described in the draft CCPs for each refuge, is the basis for the CCPs.

Background

The Refuge Administration Act, as amended by the National Wildlife Refuge System Improvement Act of 1997, requires us to develop a CCP for each refuge. The purpose for developing a CCP is to provide refuge managers with a 15-year plan for achieving refuge purposes and contributing toward the mission of the National Wildlife Refuge System, consistent with sound principles of fish and wildlife management, conservation, legal mandates, and our policies. In addition to outlining broad management direction on conserving wildlife and their habitats, CCPs identify compatible wildlife-dependent recreational opportunities available to the public, including opportunities for hunting, fishing, wildlife observation and photography, and environmental education and interpretation. We will review and update the CCP at least every 15 years in accordance with the Refuge Administration Act.

The Keālia Pond and Kakahaiʻa NWRs are part of the Maui NWR Complex. Keālia Pond Refuge, located along the southern shore of the island of Maui, was established in 1992 for the purpose of providing habitat for endangered Hawaiian waterbirds, specifically the endangered Hawaiian stilt (aeʻo) and endangered Hawaiian coot (ʻalae keʻokeʻo). The refuge is administered under a perpetual conservation easement provided by Alexander and Baldwin, Inc., and encompasses open water, marsh, mudflat, upland shrub, and coastal beach strand habitats. The refuge has one of the largest concentrations of wetland birds in Hawaiʻi, and is an important breeding, foraging, and resting area for the aeʻo and ʻalae keʻokeʻo. In addition, Keālia Pond NWR provides a strategic landfall for migratory birds coming from Alaska, Siberia, and Asia, including Northern

pintail (koloa māpu), Northern shoveler (koloa mohā), lesser scaup, Pacific golden-plover (kōlea) and ruddy turnstone ('akekeke). A majority of the refuge is closed to general public access; however, trails, overlooks, and educational programs provide the public with opportunities to view some of Hawai'i's endangered and migratory wildlife.

Kakahai'a NWR, located on the southeastern coast of the island of Moloka'i, was established in 1976 to protect and provide habitat for endangered species. Habitats found on this refuge include freshwater marsh, grassland, dry forest, and coastal strand. The refuge has the potential to provide breeding, foraging, and resting areas for endangered waterbirds, a variety of migratory waterfowl, shorebirds, and other wetland birds. Some of the more common migrants are koloa māpu and kōlea. Kakahai'a NWR is closed to the general public; however, nongovernmental organizations occasionally conduct wetland education programs.

During the CCP planning process, many elements were considered, including wildlife management and habitat protection, compatible wildlife-dependent recreational opportunities, on- and off-site environmental educational opportunities, and coordination with State and Federal agencies and other interested groups.

The draft CCPs and EAs identified and evaluated three alternatives for managing each refuge. These were available for a 30-day public review and comment period, which included two open house public meetings. The Service incorporated or responded to the comments on the Keālia Pond NWR draft CCP and Kakahai'a NWR draft CCP in the final CCPs.

Selected Alternative for Each Refuge

All actions in the selected alternative for each refuge are subject to funding and any other compliance requirements. After considering the comments we received, we have selected each refuge's Alternative C for implementation. Implementing Alternative C for the CCPs will encompass the following key actions:

Keālia Pond NWR

The Service will remove the most aggressive invasive plants and control pickleweed on the flats. Planned projects include constructing a water control structure, developing new wells to deliver water to target areas, and recontouring topography to maintain water on the flats. We expect an increased capability to dewater and flood the Main Pond will enhance our dust, midge, and tilapia control efforts. New vegetated blinds will provide better wildlife viewing opportunities, and public interpretation and environmental education programs will be expanded. Internships will be provided for up to five students. Wildlife monitoring on the proposed Molokini Unit will include up to six visits during the period running March through November, and we will initiate a native plant restoration plan.

Kakahai'a NWR

If funded, we will restore the 15-acre Old Pond and 5.5 acres of New Pond by removing California bulrush and other aggressive nonnative species, dredging accumulated sediment, recontouring topography, removing radial levees, reconstructing perimeter levees, replacing the water control structure, and replacing the pump between the two ponds. A well, pump, water distribution line, and control outlet for New Pond will be constructed, and levees will be rebuilt. All monitoring activities will resume as part of the wetland restoration. A predator-proof fence will be installed to protect wetland habitat and species. The coastal strand will be restored and protected from further erosion to provide a protective barrier to the refuge wetlands and highway. A cultural resources survey will be completed for the entire refuge. Opportunities for visitors to engage in compatible wildlife-dependent recreation may expand with new staffing. At a minimum, a kiosk will be constructed along the refuge entrance road and volunteer groups will be developed to assist refuge staff with restoration and maintenance activities.

Dated: November 9, 2011.

Robyn Thorson,

Regional Director, Pacific Region, Portland, Oregon.

[FR Doc. 2012–3648 Filed 2–16–12; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R6–R–2011–N212; FF06R06000–FXRS1265066CCP0S2–123]

Establishment of Flint Hills Legacy Conservation Area, Kansas

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice.

SUMMARY: This notice advises the public that the U.S. Fish and Wildlife Service (Service) has established the Flint Hills Legacy Conservation Area, the 555th unit of the National Wildlife Refuge System. The Service established the Flint Hills Legacy Conservation Area on September 28, 2011, with the donation of a conservation easement in Chautauqua County, Kansas.

ADDRESSES: A map depicting the approved Refuge boundary and other information regarding the Refuge is available on the Internet at *http://www.fws.gov/mountain-prairie/planning/.*

FOR FURTHER INFORMATION CONTACT: Amy Thornburg, Planning Team Leader, USFWS, Division of Refuge Planning, P.O. Box 25486, DFC, Denver, CO 80225.

SUPPLEMENTARY INFORMATION: The Service established the Flint Hills Legacy Conservation Area, which covers all or part of 21 counties in eastern Kansas. Today, less than 4 percent of the once-vast tallgrass prairie remains, most (80 percent) of which lies within the Flint Hills of eastern Kansas and northeastern Oklahoma. The Service will work to conserve tallgrass prairie and the wildlife resources in the conservation area primarily through the purchase of perpetual easements from willing sellers in Kansas. These conservation easements will protect native grassland birds, as well as over 80 species of native fish, and native mollusks that depend on the pristine streams that are found in the Flint Hills region.

The Service recognizes the importance of protecting and fostering traditional cultural values, including ranching lifestyles and economies, in concert with habitat conservation interests. Ranching has historically played a major role in preserving the tallgrass ecoregion—and by extension, conserving valuable fish and wildlife habitat. Based on anticipated levels of landowner participation, objectives for the conservation area are to protect up to 1.1 million acres of tallgrass prairie habitat. The conservation area is a landscape-scale effort to conserve populations of native grassland birds, which are among the most consistently declining species in the United States. Therefore, it is important to incorporate the elements of strategic habitat conservation (SHC) to ensure effective conservation. SHC entails strategic biological planning and conservation design, and integrated conservation delivery, monitoring, and research at ecoregional scales.

This conservation area allows the Service to purchase perpetual conservation easements, using the acquisition authority of the Fish and

Wildlife Act of 1956 (16 U.S.C. 742a–j). The Federal money used to acquire conservation easements is primarily from the Land and Water Conservation Fund Act of 1965, as amended (16 U.S.C. 460l–4 through 11) (derived primarily from oil and gas leases on the Outer Continental Shelf, motorboat fuel taxes, and the sale of surplus Federal property). Additional funding to acquire lands, water, or interests for fish and wildlife conservation purposes could be identified by Congress or donated by nonprofit organizations. The purchase of easements from willing sellers will be subject to available money.

The Service has involved the public, agencies, partners, and legislators throughout the planning process for the easement program. At the beginning of the planning process, the Service initiated public involvement for the proposal to protect habitats primarily through acquisition of conservation easements for management as part of the Refuge System. The Service spent time discussing the proposed project with landowners; conservation organizations; Federal, State and county governments; tribes; and other interested groups and individuals. For initial public scoping, the Service held three open-house meetings, on November 30, December 1, and December 2, 2009, in Alma, Wichita, and Cottonwood Falls, Kansas, respectively. These open houses were announced in local media.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), the Service prepared an environmental assessment (EA) that evaluated two alternatives and their potential impacts on the project area. The Service released the draft EA and land protection plan (LPP), on April 14, 2010, for a 30-day public review period. The draft documents were made available to Federal elected officials and agencies, State elected officials and agencies, Native American tribes with aboriginal or tribal interests, and other members of the public that were identified during the scoping process. The Service held three additional open-house public meetings to discuss the draft EA and land protection plan LPP, on April 21, 22, and 23, 2010—at El Dorado, Cottonwood Falls, and Alma, Kansas, respectively. These meetings were announced in advance in local media. Approximately 148 landowners, citizens, and elected representatives attended the meetings. The Service received 7 letters from agencies, organizations, and other entities, and 24 general public comments. After all comments were received, they were reviewed and incorporated into the EA and administrative record.

Based on the documentation contained in the EA, a Finding of No Significant Impact was signed on July 30, 2010, for the establishment of the Flint Hills Legacy Conservation Area.

Dated: December 23, 2011.

Noreen E. Walsh,

Deputy Regional Director, Mountain-Prairie Region, U.S. Fish and Wildlife Service.

[FR Doc. 2012–3756 Filed 2–16–12; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLAZ910000.L14300000.DB0000. LXSS058A0000]

Notice of Availability of the Draft Environmental Impact Statement for the Restoration Design Energy Project and Land Use Plan Amendments

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Availability.

SUMMARY: In compliance with the National Environmental Policy Act of 1969, as amended (NEPA); the Council on Environmental Quality and the Department of the Interior regulations implementing NEPA; and the Federal Land Policy and Management Act of 1976, as amended, the Bureau of Land Management (BLM) Arizona State Office has prepared a Draft Environmental Impact Statement (EIS) for the Restoration Design Energy Project (RDEP) to evaluate proposed amendments to several Resource Management Plans (RMPs) to identify lands across Arizona that may be suitable for developing renewable solar and wind energy, and to establish a baseline set of environmental protection measures for such projects. By this notice, the BLM is announcing the beginning of a 90-day public review and comment period on the Draft EIS.

DATES: To ensure comments will be considered, the BLM must receive written comments on the RDEP Draft EIS within 90 days following the date the Environmental Protection Agency publishes its Notice of Availability in the **Federal Register**. The BLM will announce future meetings or hearings and any other public involvement activities at least 15 days in advance through local media, newspapers, mailings, and the BLM Web site at: *http://www.blm.gov/az/st/en.html.*

ADDRESSES: You may submit comments on the RDEP Draft EIS by any of the following methods.

- *Email: az_arra_rdep@blm.gov.*
- *Fax:* Attn: Lane Cowger, (602) 417–9454; and
- *Mail or other delivery service:* BLM–Arizona State Office, Attn: Restoration Design Energy Project, One North Central Avenue, Suite 800, Phoenix, AZ 85004–4427.

Please be sure to include your name, any organization you represent, and return address with your comment.

Copies of the Draft EIS are available at the BLM–Arizona State Office, One North Central Avenue, Suite 800, Phoenix, Arizona 85004, or it can be downloaded from the project Web site: *http://www.blm.gov/az/st/en/prog/energy/arra_solar.htm.*

FOR FURTHER INFORMATION CONTACT: Kathy Pedrick, BLM Project Manager; Telephone: 602–417–9235; Mail: One North Central Avenue, Suite 800, Phoenix, Arizona 85004–4427; or email: *az_arra_rdep@blm.gov.* Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The RDEP supports the Secretary of the Interior's goals to build America's new energy future and to protect and restore treasured landscapes. The purpose of the RDEP is to conduct statewide planning that fosters environmentally responsible production of solar and wind energy and allows the permitting of future solar and wind energy development projects to proceed in a more efficient and standardized manner. The RDEP would amend BLM land use plans to identify geographic areas in Arizona best suited for solar and wind energy development, including solar and wind technologies, and to establish a baseline set of environmental protection measures for such projects.

The BLM is proposing to identify Renewable Energy Development Areas (REDAs), BLM-administered lands that may be suitable for the development of solar and wind facilities, and a Solar Energy Zone (SEZ) with a priority for utility-scale (greater than 20 megawatts) solar development. These areas include disturbed sites and lands with low resource sensitivity and few environmental conflicts. Through scoping and outreach activities, disturbed sites have been identified throughout Arizona, including former landfills, brownfields, mines, isolated BLM parcels, and Central Arizona

Project canal rights-of-way areas. Additionally, the BLM proposes to establish unified management actions, design features, and best management practices applicable to solar and wind energy development on BLM-administered lands in Arizona. The REDAs would identify where solar and wind energy development is likely to be compatible with resource objectives and would be suitable for the development of utility- or distributed-scale solar and wind facilities. The SEZ would be prioritized for utility-scale (greater than 20 megawatts) solar development.

The Draft EIS evaluates six action alternatives and the No Action Alternative. Identifying lands as REDAs was an iterative process that provides a wide range of alternatives. Alternative 1 identifies about 321,500 acres of REDAs on BLM-administered land that are formerly disturbed sites or lands with low resource sensitivity. It seeks to provide maximum flexibility for locating small- to large-scale projects without consideration of other physical constraints, such as distance to transmission or load. Alternative 2 seeks to reduce environmental impacts by only including the REDAs identified in Alternative 1 that are within 5 miles of designated utility corridors and existing or proposed transmission lines. Under Alternative 2, about 218,600 acres of BLM-administered land are identified as REDAs. Alternative 3 seeks to reduce disturbance and environmental impacts by identifying about 129,800 acres of REDAs that are near the point of demand, such as cities, towns, or industrial centers. Alternative 4 seeks to address potential water issues by instituting specific design features for 321,500 acres of REDAs to avoid impacts on sensitive watersheds, groundwater supply, and water quality. Alternative 5 focuses on opportunities to facilitate solar and wind energy development through land tenure adjustments by identifying about 43,700 acres of REDAs on BLM-administered land that have been identified through prior planning processes to be suitable for disposal. Alternative 6 was developed through a collaborative process and identifies about 237,100 acres of REDAs within 5 miles of designated utility corridors and existing transmission lines or near a point of demand, includes design features to protect water resources, and provides for land tenure adjustment of lands previously identified for disposal.

In addition to identifying REDAs, the RDEP is serving as a step-down process to the Solar Energy Development Programmatic EIS (Solar Programmatic EIS) for utility-scale solar development. In this regard, the BLM is also proposing to identify the Agua Caliente SEZ in eastern Yuma County to facilitate the development of utility-scale solar projects. The proposed SEZ was developed based on a screening process that included the following criteria: available large contiguous parcels of BLM land (greater than 2,500 acres); proximity to transmission; limited known environmental or cultural constraints; proximity to roads and infrastructure; and proximity to existing solar developments. Based on input from cooperating agencies and the public, the Draft EIS analyzes three footprints for the proposed Agua Caliente SEZ: 2,760 acres, 6,770 acres, and 20,600 acres.

Alternative 6 with 237,100 acres of REDAs and a 6,770-acre SEZ is the agency's preferred alternative because it is the result of extensive input from cooperating agencies and the public and best meets the stated purpose of the RDEP. The preferred alternative is the BLM's preliminary preference but does not represent a final BLM decision. The preferred alternative could change between publication of the Draft EIS and Final EIS based on public comments; new information; or changes in laws, regulations, or BLM policies.

The following BLM RMPs are proposed for amendment to incorporate the identification of REDAs and environmental protection measures, as appropriate: Bradshaw-Harquahala RMP (2010); Arizona Strip Field Office RMP (2008); Kingman Resource Area RMP (1995); Lake Havasu Field Office RMP (2007); Lower Gila South RMP (1988, as amended 2005); Lower Gila North Management Framework Plan (1983, as amended 2005); Phoenix RMP (1988); Safford District RMP (1991); and Yuma Field Office RMP (2010). Additionally, the Yuma Field Office RMP would be amended to identify the Agua Caliente SEZ and to change the Visual Resource Management class for portions of lands within the SEZ.

This EIS will not eliminate the need for site-specific environmental review for future individual solar and wind energy development proposals; the BLM will make decisions on a case-by-case basis whether to authorize individual solar and wind energy development projects in conformance with the amended RMP on the basis of this EIS. The BLM retains the discretion to deny solar and wind right-of-way applications based on site-specific issues and concerns, even in those areas available or open for application in the existing land use plan. The RDEP is not proposing any new exclusion or avoidance areas. Solar and wind energy developments proposed outside of REDAs or a SEZ would be considered on a case-by-case basis using applicable State and national policy direction and guidance from existing land use plan decisions.

The Draft EIS analyzes impacts of the alternatives on land use authorizations; military airspace; air quality; minerals/geology and soils; farm lands (prime or unique); water quality and quantity; floodplains, wetlands, and riparian zones; vegetation (including invasive, nonnative species); wildlife; migratory birds; BLM-designated sensitive animal and plant species; cultural resources; Native American religious concerns; paleontological resources; visual resources; livestock grazing; recreation; special designations (including areas of critical environmental concern and wilderness); lands with wilderness characteristics; national scenic and historic trails; noise; public health and safety and fire management; hazardous or solid waste; social and economic values; and environmental justice.

The Draft EIS is in conformance with other Federal, State, and local plans, including the ongoing Solar Programmatic EIS that is currently being prepared by the U.S. Department of Energy and the BLM. The Solar Programmatic EIS proposes to amend land use plans to identify SEZs for utility-scale production of solar energy and to establish national program guidance, mitigation measures, and management practices for utility-scale solar energy development on BLM-administered lands. Throughout development of the RDEP, the BLM has engaged eight cooperating agencies, State and local governments, tribes, the Arizona Resource Advisory Council, and stakeholders in order to obtain input on defining the REDAs and the future solar and wind energy footprint in Arizona.

Please note that public comments and information submitted, including names, street addresses, and email addresses of persons who submit comments, will be available for public review and disclosure at the Bureau of Land Management Arizona State Office, One North Central Avenue Suite 800, Phoenix, Arizona, during regular business hours (8 a.m. to 4 p.m.), Monday through Friday, except holidays.

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 1503.1, 1506.6, 1506.10, and 43 CFR 1610.2.

Raymond Suazo,

State Director.

[FR Doc. 2012–3630 Filed 2–16–12; 8:45 am]

BILLING CODE 4310–$$–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 March 6 and 7, 2012. The March 6 meeting will begin at 10 a.m. with a 30-minute public comment period and will adjourn at 5:30 p.m. The March 7 meeting will begin at 8 a.m. with a 30-minute public comment period at 10 a.m. and will adjourn at 12:30 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: Round-table discussion among council members, district managers' updates, recent weed control efforts/accomplishments, one-time permits on the Upper Missouri River, Northern Continental Divide Grizzly Bear Conservation Strategy, Judith Moccasin Travel Plan, amenity fee proposal, oil and gas fracking, presentation led by the council's Category 2, reserved water rights compact commission process, 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 INFORMATION 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.

Gary L. ''Stan'' Benes,

Lewistown District Manager.

[FR Doc. 2012–3757 Filed 2–16–12; 8:45 am]

BILLING CODE 4310–DN–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLCO922000–L13100000–FI0000; COC30486]

Notice of Proposed Reinstatement of Terminated Oil and Gas Lease COC30486

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Proposed Reinstatement of Terminated Oil and Gas Lease.

SUMMARY: Under the provisions of 30 U.S.C. 188(d) and (e), and 43 CFR 3108.2–3(a) and (b)(1), the Bureau of Land Management (BLM) received a petition for reinstatement of oil and gas lease COC30486 from Encana Oil & Gas (USA) Inc., for lands in Mesa County, Colorado. The petition was filed on time and was accompanied by all the rentals due since the date the lease terminated under the law.

FOR FURTHER INFORMATION CONTACT: Milada Krasilinec, BLM Land Law Examiner, Fluid Minerals Adjudication, at (303) 239–3767.

Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The lessee has agreed to the amended lease terms for rentals and royalties at rates of $5 per acre or fraction thereof, per year and 16⅔ percent, respectively. The lessee has paid the required $500 administrative fee and $163 to reimburse the Department for the cost of this **Federal Register** notice. The lessee has met all the requirements for reinstatement of the lease as set out in Section 31(d) and (e) of the Mineral Lands Leasing Act of 1920 (30 U.S.C. 188), and the BLM is proposing to reinstate lease COC30486 effective June 1, 2011, under the original terms and conditions of the lease and the increased rental and royalty rates cited above.

Helen M. Hankins,

State Director.

[FR Doc. 2012–3763 Filed 2–16–12; 8:45 am]

BILLING CODE 4310–JB–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLCO922000–L13100000–FI0000; COC68134]

Notice of Proposed Reinstatement of Terminated Oil and Gas Lease COC68134

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Proposed Reinstatement of Terminated Oil and Gas Lease.

SUMMARY: Under the provisions of 30 U.S.C. 188(d) and (e), and 43 CFR 3108.2–3(a) and (b)(1), the Bureau of Land Management (BLM) received a petition for reinstatement of oil and gas lease COC68134 from Western Operation Company, for lands in Morgan County, Colorado. The petition was filed on time and was accompanied by all the rentals due since the date the lease terminated under the law.

FOR FURTHER INFORMATION CONTACT: Milada Krasilinec, BLM Land Law Examiner, Fluid Minerals Adjudication, at (303) 239–3767.

Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The lessee has agreed to the amended lease terms for rentals and royalties at rates of $10 per acre or fraction thereof, per year and

16⅔ percent, respectively. The lessee has paid the required $500 administrative fee and $163 to reimburse the Department for the cost of this **Federal Register** notice. The lessee has met all the requirements for reinstatement of the lease as set out in Section 31(d) and (e) of the Mineral Lands Leasing Act of 1920 (30 U.S.C. 188), and the BLM is proposing to reinstate lease COC68134 effective April 1, 2011, under the original terms and conditions of the lease and the increased rental and royalty rates cited above.

Helen M. Hankins,

State Director.

[FR Doc. 2012–3761 Filed 2–16–12; 8:45 am]

BILLING CODE 4310–JB–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WY–923–1310–FI; WYW151749]

Notice of Proposed Reinstatement of Terminated Oil and Gas Lease WYW151749, Wyoming

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: Under the provisions of the Mineral Leasing Act of 1920, as amended, the Bureau of Land Management (BLM) received a petition for reinstatement from Redwine Resources, Inc. for competitive oil and gas lease WYW151749 for land in Carbon County, Wyoming. The petition was filed on time and was accompanied by all the rentals due since the date the lease terminated under the law.

FOR FURTHER INFORMATION CONTACT: Bureau of Land Management, Julie L. Weaver, Chief, Fluid Minerals Adjudication, at 307–775–6176. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The lessee has agreed to the amended lease terms for rentals and royalties at rates of $10 per acre or fraction thereof, per year and 16⅔ percent, respectively. The lessee has paid the required $500 administrative fee and $159 to reimburse the Department for the cost of this **Federal Register** notice. The lessee has met all the requirements for reinstatement of the lease as set out in Sections 31(d) and (e) of the Mineral Lands Leasing Act of 1920 (30 U.S.C. 188), and the BLM is proposing to reinstate lease WYW151749 effective December 1, 2010, under the original terms and conditions of the lease and the increased rental and royalty rates cited above. The BLM has not issued a valid lease to any other interest affecting the lands.

Julie L. Weaver,

Chief, Branch of Fluid Minerals Adjudication.

[FR Doc. 2012–3764 Filed 2–16–12; 8:45 am]

BILLING CODE 4310–22–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–NCR–CATO–0911–8221; 3201–241a–726]

Notification of Boundary Revision

AGENCY: National Park Service, Department of the Interior.

ACTION: Notification of boundary revision.

SUMMARY: Notice is hereby given that the boundary of Catoctin Mountain Park in Frederick County, Maryland is modified to include one (1) tract of land located along the southeastern border of the park. This revision is made to include privately-owned property that the National Park Service (NPS) wishes to acquire from a willing seller. The NPS has determined that inclusion of the tract within the park's boundary will make significant contributions to the purposes for which the park was established. After the United States' acquisition of the tract, the NPS will manage the property in accordance with applicable law.

FOR FURTHER INFORMATION CONTACT: Mel Poole, Superintendent, Catoctin Mountain Park, 6602 Foxville Road, Thurmont, Maryland 21788–1598.

DATES: The effective date of this boundary revision is the date of publication in the **Federal Register**.

SUPPLEMENTARY INFORMATION: Executive Order 7496, dated November 14, 1936, transferred all the real property acquired by the former Resettlement Administration, which included the former Catoctin Recreational Demonstration Area, to the Secretary of the Interior (Secretary), and authorized the Secretary, through the NPS, to administer the projects transferred by the aforementioned Executive Order. Section 7(c) of the Land and Water Conservation Fund Act, as amended, authorizes minor boundary revisions to areas within the National Park System after advising the House Committee on Natural Resources and the Senate Committee on Energy and Natural Resources of the proposed boundary revision. The Secretary advised the Committees of this proposed boundary revisions by letters dated July 29, 2011. This action will add one tract comprising 17.0917 acres of improved land, more or less, to Catoctin Mountain Park. The acquisition of this tract is intended to enhance the park's natural and ecological integrity and provide for greater recreational opportunities. The tract is identified as Parcel 2276 on Frederick County, Maryland, Tax Map 752.

Notice is hereby given that the exterior boundary of the park is hereby revised to include one (1) tract of land identified as Tract 01–1 17. The parcel is a portion of the same land acquired by Mr. Donald L. Lewis by deed dated December 16, 1963, and recorded among the Land Records of Frederick County, Maryland, in Liber 697, Folio 51, subject to existing easements for public roads and highways, public utilities, railroads, and pipelines.

The referenced tract is depicted on Catoctin Mountain Park Land Acquisition Status Map Segment 01, having Drawing Number 841/80476. This map is on file at the National Park Service, Land Resources Program Center, National Capital Region, and at the Office of the Superintendent, Catoctin Mountain Park.

Dated: September 12, 2011.

Stephen E. Whitesell,

Regional Director, National Capital Region.

[FR Doc. 2012–3727 Filed 2–16–12; 8:45 am]

BILLING CODE 4312–59–P

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Continuation of Concession Contract

AGENCY: National Park Service, Interior.

ACTION: Public notice.

SUMMARY: The National Park Service hereby gives public notice that it proposes to continue the concession contract (CC–LAKE007–84) at Lake Mead National Recreation Area until December 31, 2013, a period of 1 year and 8 months.

DATES: *Effective Date:* April 1, 2012.

SUPPLEMENTARY INFORMATION: The concession contract CC–LAKE007–84 will expire on March 31, 2012. Pursuant to 36 CFR 51.23, the National Park

Service has determined that the proposed short-term continuation is necessary to avoid interruption of visitor services and has taken all reasonable and appropriate steps to consider alternatives to avoid such interruption.

FOR FURTHER INFORMATION CONTACT: Jo A. Pendry, Chief, Commercial Services Program, National Park Service, 1201 Eye Street NW., 11th Floor, Washington, DC 20005, Telephone (202) 513–7156.

Dated: January 20, 2012.

Jo A. Pendry,

Acting Associate Director, Business Services.

[FR Doc. 2012–3721 Filed 2–16–12; 8:45 am]

BILLING CODE 4312–53–P

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Continuation of Visitor Services

AGENCY: National Park Service, Interior.

ACTION: Public notice.

SUMMARY: Pursuant to the terms of existing concession contracts, the National Park Service hereby gives notice that it has continued visitor services for a period not-to-exceed 1 year from the date of contract expiration with respect to the listed contracts.

DATES: *Effective Date:* January 1, 2012.

SUPPLEMENTARY INFORMATION: The contracts listed below have been extended to the maximum allowable under 36 CFR 51.23. Under the provisions of current concession contracts and pending the completion of the public solicitation of a prospectus for a new concession contract, the National Park Service authorizes continuation of visitor services for a period not-to-exceed 1 year under the terms and conditions of the current contract as amended. The continuation of operations does not affect any rights with respect to selection for award of a new concession contract.

Conc ID No.	Concessioner name	Park
NACC001–89	Golf Course Specialists, Inc	National Mall and Memorial Parks.
NACC006–98	Thanh Van Vo	National Mall and Memorial Parks.
NACC009–98	Hung Thi Nguyen	National Mall and Memorial Parks.
GATE003–98	Marinas of the Future, Inc	Gateway National Recreation Area.
SHEN001–85	ARAMARK Sports and Entertainment Services, Inc	Shenandoah National Park.
LAKE001–73	Rex G. Maughan & Ruth G. Maughan	Lake Mead National Recreation Area.
LAKE002–82	Lake Mead RV Village, LLC	Lake Mead National Recreation Area.
LAKE005–97	Rex G. Maughan	Lake Mead National Recreation Area.
LAKE006–74	Las Vegas Boat Harbor, Inc	Lake Mead National Recreation Area.
LAKE009–88	Temple Bar Marina, LLC	Lake Mead National Recreation Area.
LARO001–92	Dakota Columbia Rentals, LLC	Lake Roosevelt National Recreation Area.
OLYM001–78	ARAMARK Sports and Entertainment Services, Inc	Olympic National Park.
OLYM002–89	Log Cabin Resort, Inc	Olympic National Park.
ROLA003–87	Ross Lake Resort, Inc	North Cascades National Park Service Complex.
SEKI001–97	Timothy B. Loverin and Patty Loverin	Sequoia and Kings Canyon National Parks.
AMIS002–89	Lake Amistad Resort and Marina, LLC	Amistad National Recreation Area.
AMIS003–87	Rough Canyon Marina, LLC	Amistad National Recreation Area.
CACH001–84	White Dove, Inc., dba Thunderbird Lodge	Canyon de Chelly National Monument.
GLAC002–81	Glacier Park, Inc	Glacier National Park.
GLCA002–88	ARAMARK Bullfrog Marina Inc. and Halls Crossing Resort	Glen Canyon National Recreation Area.
GLCA003–69	ARAMARK Wahweap Lodge and Marina, Inc	Glen Canyon National Recreation Area.
GRTE003–97	Signal Mountain Lodge, LLC	Grand Teton National Park.
GRTE004–98	Harold M. Turner, John F. Turner, and Donald M. Turner	Grand Teton National Park.
MEVE001–82	ARAMARK Mesa Verde Company, Inc	Mesa Verde National Park.
PEFO001–85	Xanterra Parks and Resorts, LLC	Petrified Forest National Park.
OZAR012–88	Akers Ferry Canoe Rental, Inc	Ozark National Scenic Riverways.
BLRI001–93	Southern Highland Handicraft Guild	Blue Ridge Parkway.
BLRI002–83	Northwest Trading Post, Inc	Blue Ridge Parkway.
CAHA001–98	Avon-Thornton Limited Partnership	Cape Hatteras National Seashore.
CAHA004–98	Oregon Inlet Fishing Center, Inc	Cape Hatteras National Seashore.
MACA002–82	Forever Resorts	Mammoth Cave National Park.
VIIS001–71	Caneel Bay, Inc	Virgin Islands National Park.

FOR FURTHER INFORMATION CONTACT: Jo A. Pendry, Chief, Commercial Services Program, National Park Service, 1201 Eye Street NW., 11th Floor, Washington, DC 20005, Telephone (202) 513–7156.

Dated: January 6, 2012.

Robert Gordon,

Acting Associate Director, Business Services.

[FR Doc. 2012–3718 Filed 2–16–12; 8:45 am]

BILLING CODE 4312–53–P

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Extension of Concession Contracts

AGENCY: National Park Service, Interior.

ACTION: Public notice.

SUMMARY: The National Park Service hereby gives public notice that it has extended the following expiring concession contracts for a period of up to 1 year, or until a new contract is executed, whichever occurs sooner.

DATES: *Effective Date:* January 1, 2012.

SUPPLEMENTARY INFORMATION: All of the listed concession authorizations will expire by their terms on or before December 31, 2011. Pursuant to 36 CFR 51.23, the National Park Service has determined that the proposed short-term extensions are necessary to avoid interruption of visitor services and has taken all reasonable and appropriate steps to consider alternatives to avoid such interruption.

Conc ID No.	Concessioner name	Park
NACC003–86	Guest Services, Inc.	National Mall and Memorial Parks.
NACE003–07	Buzzard Point Boatyard Corporation	National Mall and Memorial Parks.
BOST002–07	Boston Concessions Group, Inc.	Boston National Historical Park.
CACO003–02	Town of Truro	Cape Cod National Seashore.
COLO001–02	Yorktowne Shoppe	Colonial National Historic Site.
GATE001–02	Jamaica Bay Riding Academy, Inc.	Gateway National Recreation Area.
LAKE017–05	Black Canyon/Willow Beach River Adventures, LLC	Lake Mead National Recreation Area.
GRCA001–02	Xanterra Parks and Resorts, LLC	Grand Canyon National Park.
ROMO009–02	Meeker Park Lodge, Inc.	Rocky Mountain National Park.
ROMO010–02	Silver Line Stables	Rocky Mountain National Park.
ROMO011–02	YMCA of the Rockies	Rocky Mountain National Park.
ROMO012–02	Stanger-Aspen Ltd.	Rocky Mountain National Park.
ROMO013–02	Ford Investment Company, LLC	Rocky Mountain National Park.
ROMO016–02	SK Horses, Ltd.	Rocky Mountain National Park.
ROMO017–02	Sombrero Ranch, Inc.	Rocky Mountain National Park.
ROMO018–02	Wes House	Rocky Mountain National Park.
ROMO019–02	Cheley Colorado Camps	Rocky Mountain National Park.
ROMO021–02	Lloyd C. Lane	Rocky Mountain National Park.
ROMO022–02	Girl Scouts—Mountain Prairie Council	Rocky Mountain National Park.
ROMO028–02	SK Horses, Ltd.	Rocky Mountain National Park.
ROMO030–02	Wild Basin Properties, LLC	Rocky Mountain National Park.
TICA001–06	Carl Wagner, Betsy Wagner and Shannon Oswald	Timpanogos Cave National Monument.
OZAR015–04	Big Spring Lodge	Ozark National Scenic Riverways.
JEFF001–05	Compass Group USA	Jefferson National Expansion Memorial.
BISO003–06	Bobby Gene and Gretta York	Big South Fork National River Recreation Area.
BUIS001–06	Southern Seas, Inc.	Buck Island Reef National Monument.
GUIS001–03	Dudley Food and Beverage, Inc.	Gulf Islands National Seashore.

FOR FURTHER INFORMATION CONTACT: Jo A. Pendry, Chief, Commercial Services Program, National Park Service, 1201 Eye Street NW., 11th Floor, Washington, DC 20005, Telephone (202) 513–7156.

Dated: January 6, 2012.

Jo A. Pendry,

Acting Associate Director, Business Services.

[FR Doc. 2012–3728 Filed 2–16–12; 8:45 am]

BILLING CODE 4310–53–P

DEPARTMENT OF THE INTERIOR

National Park Service

[1730–SZM]

Cape Cod National Seashore Advisory Commission; Cape Cod National Seashore, South Wellfleet, MA

AGENCY: National Park Service, Interior.

ACTION: Two hundred eighty-third notice of meeting.

SUMMARY: Notice is hereby given in accordance with the Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770, 5 U.S.C. App 1, Section 10) of a meeting of the Cape Cod National Seashore Advisory Commission.

DATES: The meeting of the Cape Cod National Seashore Advisory Commission will be held on March 12, 2012, at 1 pm.

ADDRESSES: The Commission members will meet in the meeting Room at Headquarters, 99 Marconi Station, Wellfleet, Massachusetts.

SUPPLEMENTARY INFORMATION: The Commission was reestablished pursuant to Public Law 87–126 as amended by Public Law 105–280. The purpose of the Commission is to consult with the Secretary of the Interior, or his designee, with respect to matters relating to the development of Cape Cod National Seashore, and with respect to carrying out the provisions of sections 4 and 5 of the Act establishing the Seashore.

The regular business meeting is being held to discuss the following:

1. Adoption of Agenda
2. Approval of Minutes of Previous Meeting (January 9, 2012)
3. Reports of Officers
4. Reports of Subcommittees
5. Superintendent's Report
   - Update on Dune Shacks
   - Improved Properties/Town Bylaws
   - Herring River Wetland Restoration
   - Wind Turbines/Cell Towers
   - Shorebird Management Planning
   - Highlands Center Update
   - Alternate Transportation funding
   - Ocean stewardship topics—shoreline change
   - Pilgrim Power Station and Disaster Response Planning
   - North Beach Cottages, Chatham
6. Old Business
7. New Business
8. Date and agenda for next meeting
9. Public comment and
10. Adjournment

The meeting is open to the public. It is expected that 15 persons will be able to attend the meeting in addition to Commission members.

Interested persons may make oral/written presentations to the Commission during the business meeting or file written statements. Such requests should be made to the park superintendent prior to the meeting. 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.

FOR FURTHER INFORMATION CONTACT: Further information concerning the meeting may be obtained from the Superintendent, Cape Cod National Seashore, 99 Marconi Site Road, Wellfleet, MA 02667.

Date: February 7, 2012.

George E. Price, Jr.,

Superintendent.

[FR Doc. 2012–3726 Filed 2–16–12; 8:45 am]

BILLING CODE 4310–WV–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–486 and 731–TA–1195–1196 (Preliminary)]

Utility Scale Wind Towers From China and Vietnam

Determinations

On the basis of the record [1] developed in the subject investigations, the United States International Trade Commission (Commission) determines,[2] pursuant to sections 703(a) and 733(a) of the Tariff Act of 1930 (19 U.S.C. 1671b(a) and 1673b(a)) (the Act), that there is a reasonable indication that an industry in the United States is threatened with material injury by reason of imports from China of utility scale wind towers, provided for in subheading 7308.20.00 of the Harmonized Tariff Schedule of the United States, that are alleged to be sold in the United States at less than fair value (LTFV) and that are alleged to be subsidized by the Government of China. The Commission further determines,[2] pursuant to sections 733(a) of the Act (19 U.S.C. 1673b(a)), that there is a reasonable indication that an industry in the United States is threatened with material injury by reason of imports from Vietnam of utility scale wind towers, provided for in subheading 7308.20.00 of the Harmonized Tariff Schedule of the United States, that are alleged to be sold in the United States at LTFV.

Commencement of Final Phase Investigations

Pursuant to section 207.18 of the Commission's rules, the Commission also gives notice of the commencement of the final phase of its investigations. The Commission will issue a final phase notice of scheduling, which will be published in the **Federal Register** as provided in section 207.21 of the Commission's rules, upon notice from the Department of Commerce (Commerce) of affirmative preliminary determinations in the investigations under sections 703(b) or 733(b) of the Act, or, if the preliminary determinations are negative, upon notice of affirmative final determinations in those investigations under section 705(a) or 735(a) of the Act. Parties that filed entries of appearance in the preliminary phase of the investigations need not enter a separate appearance for the final phase of the investigations. Industrial users, and, if the merchandise under investigation is sold at the retail level, representative consumer organizations have the right to appear as parties in Commission antidumping and countervailing duty investigations. The Secretary will prepare a public service list containing the names and addresses of all persons, or their representatives, who are parties to the investigations.

Background

On December 29, 2011, a petition was filed with the Commission and Commerce by Broadwind Towers, Inc., Manitowoc, WI; DMI Industries, Fargo, ND; Katana Summit LLC, Columbus, NE; and Trinity Structural Towers, Inc., Dallas, TX, alleging that an industry in the United States is materially injured or threatened with material injury by reason of LTFV imports of utility scale wind towers from China and Vietnam. Accordingly, effective December 29, 2011, the Commission instituted antidumping duty investigation Nos. 701–TA–486 and 731–TA–1195–1196 (Preliminary).

Notice of the institution of the Commission's investigations and of a public conference to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** of January 6, 2012 (77 FR 805). The conference was held in Washington, DC, on January 19, 2012, and all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission transmitted its determinations in these investigations to the Secretary of Commerce on February 13, 2012. The views of the Commission are contained in USITC Publication 4304 (February 2012), entitled *Utility Scale Wind Towers from China and Vietnam: Investigation Nos. 701–TA–486 and 731–TA–1195–1196 (Preliminary).*

By order of the Commission.

Issued: February 13, 2012

James R. Holbein,

Secretary to the Commission.

[FR Doc. 2012–3730 Filed 2–16–12; 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] Chairman Deanna Tanner Okun not participating.

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–488 and 731–TA–1199–1200 (Preliminary)]

Large Residential Washers From Korea and Mexico

Determinations

On the basis of the record [1] developed in the subject investigations, the United States International Trade Commission (Commission) determines,[2 3] pursuant to sections 703(a) and 733(a) of the Tariff Act of 1930 (19 U.S.C. 1671b(a) and 1673b(a)) (the Act), that there is a reasonable indication that an industry in the United States is materially injured by reason of imports from Korea of large residential washers that are alleged to be sold in the United States at less than fair value (LTFV) and subsidized by the Government of Korea. The Commission further determines, pursuant to section 733(a) of the Act (19 U.S.C. 1673b(a)), that there is a reasonable indication that an industry is materially injured by reason of imports from Mexico of large residential washers that are alleged to be sold in the United States at LTFV. The products subject to these investigations are provided for in subheading 8450.20.00 of the Harmonized Tariff Schedule of the United States, and imported under statistical reporting number 8450.20.0090. Products subject to these investigations may also be imported under HTS subheadings 8450.11.00, 8450.90.20 or 8450.90.60.

Pursuant to section 207.18 of the Commission's rules, the Commission also gives notice of the commencement of the final phase of its investigations. The Commission will issue a final phase notice of scheduling, which will be published in the **Federal Register** as provided in section 207.21 of the Commission's rules, upon notice from the Department of Commerce (Commerce) of affirmative preliminary determinations in the investigations under sections 703(b) or 733(b) of the Act, or, if the preliminary determinations are negative, upon notice of affirmative final determinations in those investigations under sections 705(a) or 735(a) of the Act. Parties that filed entries of appearance in the preliminary phase of the investigations need not enter a separate appearance for the final phase

[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] Chairman Deanna Tanner Okun not participating.

[3] Commissioner Daniel R. Pearson dissenting.

of the investigations. Industrial users, and, if the merchandise under investigation is sold at the retail level, representative consumer organizations have the right to appear as parties in Commission antidumping and countervailing duty investigations. The Secretary will prepare a public service list containing the names and addresses of all persons, or their representatives, who are parties to the investigations.

Background

On December 30, 2011, a petition was filed with the Commission and Commerce by Whirlpool Corporation, Benton Harbor, MI, alleging that an industry in the United States is materially injured or threatened with material injury by reason of LTFV and subsidized imports of large residential washers from Korea and LTFV imports of large residential washers from Mexico. Accordingly, effective December 30, 2011, the Commission instituted countervailing duty investigation No. 701–TA–488 and antidumping duty investigation Nos. 731–TA–1199–1200 (Preliminary).

Notice of the institution of the Commission's investigations and of a public conference to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** of January 9, 2012 (77 FR 1082). The conference was held in Washington, DC, on January, 20, 2012, and all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission transmitted its determination in this investigation to the Secretary of Commerce on February 13, 2012. The views of the Commission are contained in USITC Publication 4306 (February 2012), entitled *Large Residential Washers from Korea and Mexico: Investigation Nos. 701–TA–488 and 731–TA–1199–1200 (Preliminary).*

Issued: February 13, 2012.

By order of the Commission.

James R. Holbein,

Secretary to the Commission.

[FR Doc. 2012–3732 Filed 2–16–12; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–487 and 731–TA–1197–1198 (Preliminary)]

Steel Wire Garment Hangers From Taiwan And Vietnam

Determinations

On the basis of the record [1] developed in the subject investigations, the United States International Trade Commission (Commission) determines, pursuant to sections 703(a) and 733(a) of the Tariff Act of 1930 (19 U.S.C. 1671b(a) and 1673b(a)) (the Act), that there is a reasonable indication that an industry in the United States is materially injured by reason of imports from Taiwan and Vietnam of steel wire garment hangers, provided for in subheading 7326.20.00 of the Harmonized Tariff Schedule of the United States, that are alleged to be sold in the United States at less than fair value (LTFV) and steel wire garment hangers from Vietnam that are allegedly subsidized by the Government of Vietnam.

Pursuant to section 207.18 of the Commission's rules, the Commission also gives notice of the commencement of the final phase of its investigations. The Commission will issue a final phase notice of scheduling, which will be published in the **Federal Register** as provided in section 207.21 of the Commission's rules, upon notice from the Department of Commerce (Commerce) of affirmative preliminary determinations in the investigations under sections 703(b) or 733(b) of the Act, or, if the preliminary determinations are negative, upon notice of affirmative final determinations in those investigations under sections 705(a) or 735(a) of the Act. Parties that filed entries of appearance in the preliminary phase of the investigations need not enter a separate appearance for the final phase of the investigations. Industrial users, and, if the merchandise under investigation is sold at the retail level, representative consumer organizations have the right to appear as parties in Commission antidumping and countervailing duty investigations. The Secretary will prepare a public service list containing the names and addresses of all persons, or their representatives, who are parties to the investigations.

[1] The record is defined in sec. 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

Background

On December 29, 2011, a petition was filed with the Commission and Commerce by M&B Metal Products Company, Inc., Leeds, AL; Innovation Fabrication LLC/Indy Hanger, Indianapolis, IN; and US Hanger Company, LLC, Gardena, CA, alleging that an industry in the United States is materially injured or threatened with material injury by reason of LTFV imports of steel wire garment hangers from Taiwan and Vietnam and subsidized imports of steel wire garment hangers from Vietnam. Accordingly, effective December 29, 2011, the Commission instituted countervailing duty investigation No. 701–TA–487 and antidumping duty investigation Nos. 731–TA–1197–1198 (Preliminary).

Notice of the institution of the Commission's investigations and of a public conference to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** of January 6, 2012 (77 FR 806). The conference was held in Washington, DC, on January 20, 2012, and all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission transmitted its determinations in these investigations to the Secretary of Commerce on February 13, 2012. The views of the Commission are contained in USITC Publication 4305 (February 2012), entitled *Steel Wire Garment Hangers from Taiwan and Vietnam: Investigation Nos. 701–TA–487 and 731–TA–1197–1198 (Preliminary).*

Issued: February 13, 2012.

By order of the Commission.

James R. Holbein,

Secretary to the Commission.

[FR Doc. 2012–3731 Filed 2–16–12; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Emergency Review: Comment Request; Unemployment Insurance Trust Fund Activity

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) has submitted the Employment and Training Administration (ETA) sponsored information collection

request (ICR) revision titled, ''Unemployment Insurance Trust Fund Activity,'' to the Office of Management and Budget (OMB) for review and clearance utilizing emergency processing procedures in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. Chapter 35) and regulations 5 CFR 1320.13.

DATES: OMB approval has been requested by March 2, 2012. Submit comments on or before February 29, 2012.

ADDRESSES: A copy of this ICR, with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained from the RegInfo.gov Web site, *http://www.reginfo.gov/public/do/PRAMain* or by contacting Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or sending an email to *DOL_PRA_PUBLIC@dol.gov*.

Submit comments about this request to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for the Department of Labor, Employment and Training Administration (ETA), Office of Management and Budget, Room 10235, Washington, DC 20503, Telephone: 202–395–6929/Fax: 202–395–6881 (these are not toll-free numbers), email: *OIRA_submission@omb.eop.gov*.

FOR FURTHER INFORMATION: Contact Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or by email at *DOL_PRA_PUBLIC@dol.gov*.

SUPPLEMENTARY INFORMATION: The American Recovery and Reinvestment Act of 2009, Public Law 111–5, provided incentive funds for states to modernize their unemployment compensation laws. Additionally it provided for a special transfer of $500 million to the states' accounts in the Unemployment Trust Fund (UTF) to be used for certain administrative purposes (including implementing and administering the modernization provisions).

Based on the permitted uses of these funds, it is clear Congress, recognizing the increased workload on the unemployment compensation system resulting from the recent economic recession, intended these funds be used during the recession to expedite the delivery of services, reduce improper payments, and improve tax operations. These funds were transferred to states' accounts in the UTF on February 27, 2009. Based on a subsequent audit of these funds (Audit Report No. 18–10–012–03–315), the DOL Inspector General (OIG) determined:

At least $399 million of the states' funds remains unexpended, with a significant number of states planning multi-year systems improvements. Some states did not have plans in place for spending these funds.

The OIG report recommended the ETA obtain more information from states on their plans to expend their share of the administrative grant and provide technical assistance to states in developing spending plans. The OMB echoed this sentiment in Memorandum M–11–34: Accelerating Spending of Remaining Funds from the American Recovery and Reinvestment Act for Discretionary Grant Programs.

To ensure compliance with Congressional intent and OMB guidance, the ETA is asking states to review the amount of unexpended special administrative funds, develop spending plans outlining their anticipated use of these funds, and provide the spending plans to the ETA.

The ETA currently collects data on administrative activity involving Title IX funds from the state's Unemployment Trust Fund on Form ETA–8403. This report is one of many within a large container collection of financial reports approved under OMB Control Number 1205–0154. There is currently no capacity to gather narratives describing plans for future obligation and expenditures of remaining funds. The ETA believes the collection of this information is necessary to ensure that the Secretary can provide accurate updates to the OIG and OMB on the status of the expenditure of these funds. The ETA plans to request all states to provide an update on the status and future plans for the administrative funds including:

- Amount obligated but not expended to date, as well as the goods and services obtained from the funds expended.
- Amount of obligated by unexpended funds, as well as the goods and services expected to be obtained from the funds.
- If there are no plans to spend the unexpended funds, a plan to expend the funds along with a timeline for their liquidation and the goods and services expected to be obtained from the funds.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information if the collection of information does not display a valid OMB Control Number. *See* 5 CFR 1320.5(a) and 1320.6. The ETA seeks to clear this ICR using emergency processing procedures, because of the OIG recommendation and recent OMB guidance.

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section so they are received no later than February 29, 2012. In order to help ensure appropriate consideration, comments should reference OMB Control Number 1205–0154. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Agency: Employment and Training Administration (ETA).

Title of Collection: Unemployment Insurance Trust Fund Activity.

OMB Control Number: 1205–0154.

Requested Duration of Authorization: Six (6) months.

Affected Public: State, Local, and Tribal Governments.

Total Estimated Number of Respondents: 53.

Frequency of Collection: Various.

Total Estimated Number of Responses: 3,710.

Estimated Time per Response: 0.5 hours.

Total Estimated Annual Burden Hours: 1,855.

Total Estimated Annual Other Costs Burden: $0.

Dated: February 10, 2012.

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2012–3719 Filed 2–16–12; 8:45 am]

BILLING CODE 4510–23–P

DEPARTMENT OF LABOR

Employment and Training Administration

Notice of Funding Opportunity and Solicitation for Grant Applications (SGA) for Serving Young Adult Ex-Offenders Through Training and Service-Learning

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice of Solicitation for Grant Applications (SGA).

Funding Opportunity Number: SGA/DFA PY 11–03.

SUMMARY: Through this notice, the Department of Labor's Employment and Training Administration (ETA) announces the availability of approximately $30 million to serve juvenile offenders ages 18–21 who have been involved in the juvenile justice system from the age of 14 or above and have never been convicted as an adult under Federal or State Law. ETA expects to award a minimum of 20 grants at various amounts up to $1.5 million each to cover a 30-month period that includes up to four months of planning and a minimum of 26 months of operation. Any non-profit organization with IRS 501(c)(3) status, unit of state or local government, or any Indian and Native American entity eligible for grants under WIA Section 166 may apply for these grants. Service-learning projects conducted through these grants must integrate meaningful community service with instruction and reflection that enrich the learning experience, teach civic responsibility, and encourage lifelong civic engagement. Training provided through these grants is expected to lead to credentials recognized by in demand industries in the grantee's geographic area to be served.

Through service-learning, returning offenders are offered the opportunity to reestablish community-based trust while enhancing their work-based skills and status in their communities.

The complete SGA and any subsequent SGA amendments, in connection with this solicitation are described in further detail on ETA's Web site at *http://www.doleta.gov/grants/* or on *http://www.grants.gov.* The Web sites provide application information, eligibility requirements, review and selection procedures and other program requirements governing this solicitation.

DATES: The closing date for receipt of applications is April 17, 2012.

FOR FURTHER INFORMATION CONTACT: Denise Roach, 200 Constitution Avenue NW., Room N–4716, Washington, DC 20210; Telephone: 202–693–3820.

The Grant Officer for this SGA is Latifa Jeter.

Signed February 13, 2012 in Washington, DC.

Eric D. Luetkenhaus,

Grant Officer, Employment and Training Administration.

[FR Doc. 2012–3773 Filed 2–16–12; 8:45 am]

BILLING CODE 4510–FT–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2011–0747]

Blasting and the Use of Explosives; Extension of the Office of Management and Budget's (OMB) Approval of Information Collection (Paperwork Requirements)

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Request for public comments.

SUMMARY: OSHA solicits public comments concerning its proposal to extend the Office of Management and Budget's (OMB) approval of the information collection requirements specified in the Standard on Blasting and the Use of Explosives (29 CFR part 1926, subpart U).

DATES: Comments must be submitted (postmarked, sent, or received) by April 17, 2012.

ADDRESSES:

Electronically: You may submit comments and attachments electronically at *http://www.regulations.gov*, which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments.

Facsimile: If your comments, including attachments, are not longer than 10 pages you may fax them to the OSHA Docket Office at (202) 693–1648.

Mail, hand delivery, express mail, messenger, or courier service: When using this method, you must submit a copy of your comments and attachments to the OSHA Docket Office, Docket No. OSHA–2011–0747, U.S. Department of Labor, Occupational Safety and Health Administration, Room N–2625, 200 Constitution Avenue NW., Washington, DC 20210. Deliveries (hand, express mail, messenger, and courier service) are accepted during the Department of Labor's and Docket Office's normal business hours, 8:15 a.m. to 4:45 p.m., e.t.

Instructions: All submissions must include the Agency name and OSHA docket number (OSHA–2011–0747) for the Information Collection Request (ICR). All comments, including any personal information you provide, are placed in the public docket without change, and may be made available online at *http://www.regulations.gov*. For further information on submitting comments, see the ''Public Participation'' heading in the section of this notice titled **SUPPLEMENTARY INFORMATION.**

Docket: To read or download comments or other material in the docket, go to *http://www.regulations.gov* or the OSHA Docket Office at the address above. All documents in the docket (including this **Federal Register** notice) are listed in the *http://www.regulations.gov* index; however, some information (e.g., copyrighted material) is not publicly available to read or download from the Web site. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. You may also contact Theda Kenney at the address below to obtain a copy of the ICR.

FOR FURTHER INFORMATION CONTACT: Theda Kenney or Todd Owen, Directorate of Standards and Guidance, OSHA, Room N–3609, 200 Constitution Avenue NW., Washington, DC 20210, telephone: (202) 693–2222.

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Labor, as part of its continuing effort to reduce paperwork and respondent (i.e., employer) burden, conducts a preclearance consultation program to provide the public with an opportunity to comment on proposed and continuing information collection requirements in accord with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506(c)(2)(A)). This program ensures that information is in the desired format, reporting burden (time and costs) is minimal, collection instruments are clearly understood, and OSHA's estimate of the information collection burden is accurate. The Occupational Safety and Health Act of 1970 (the OSH Act) (29 U.S.C. 651 *et seq.*) authorizes information collection by employers as necessary or appropriate for enforcement of the OSH Act or for developing information regarding the causes and prevention of occupational injuries, illnesses, and accidents (29 U.S.C. 657). The OSH Act also requires that OSHA obtain such information with minimum burden upon employers, especially those

operating small businesses, and to reduce to the maximum extent feasible unnecessary duplication of efforts in obtaining information (29 U.S.C. 657).

The Standard on Blasting and the Use of Explosives (29 CFR part 1926, subpart U) specifies a number of paperwork requirements. The following is a brief description of the collection of information requirements contained in the Subpart.

General Provisions (§ 1926.900)

§ 1926.900(d)—Paragraph (d) states that employers must ensure that explosives not in use are kept in a locked magazine, unavailable to persons not authorized to handle explosives. The employers must maintain an inventory and use record of all explosives—in use and not in use. In addition, the employer must notify the appropriate authorities in the event of any loss, theft, or unauthorized entry into a magazine.

§ 1926.900(k)(3)(i)—Paragraph (k)(3)(i) requires employers to display adequate signs warning against the use of mobile radio transmitters on all roads within 1,000 feet of blasting operations to prevent the accidental discharge of electric blasting caps caused by current induced by radar, radio transmitters, lightening, adjacent power lines, dust storms, or other sources of extraneous electricity. The employer must certify and maintain a record of alternative provisions made to adequately prevent any premature firing of electric blasting caps.

§ 1926.900(o)—Employers must notify the operators and/or owners of overhead power lines, communication lines, utility lines, or other services and structures when blasting operations will take place in proximity to those lines, services, or structures.

§ 1926.903(d)—The employer must notify the hoist operator prior to transporting explosives or blasting agents in a shaft conveyance.

§ 1926.903(e)—Employers must perform weekly inspections on the electrical system of trucks used for underground transportation of explosives. The weekly inspection is to detect any failure in the system which would constitute an electrical hazard. The most recent certification of inspection must be maintained and must include the date of inspection, a serial number or other identifier of the truck inspected, and the signature of the person who performed the inspection.

§ 1926.905(t)—Under § 1926.905(t), the employer blaster must maintain an accurate and up-to-date record of explosives, blasting agents, and blasting supplies used in a blast. In addition, the employer must also maintain an accurate running inventory of all explosives and blasting agents stored on the operation.

§ 1926.909(a)—Employers must post a code of blasting agents on one or more conspicuous places at the operation. Additionally, all employees shall familiarize themselves with the code and conform to it at all times. Danger signs warning of blasting agents shall also be placed at suitable locations.

II. Special Issues for Comment

OSHA has a particular interest in comments on the following issues:

- Whether the proposed information collection requirements are necessary for the proper performance of the Agency's functions, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and costs) of the information collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply; for example, by using automated or other technological information collection and transmission techniques.

III. Proposed Actions

OSHA is requesting that OMB extend its approval of the collection of information requirements contained in the Standard on Blasting and the Use of Explosives. The Agency will include this summary in its request to OMB to extend the approval of these collection of information requirements.

Type of Review: Extension of currently approved collection.

Title: Blasting and the Use of Explosives (29 CFR part 1926, subpart U).

OMB Number: 1218–0217.

Affected Public: Business or other for-profits.

Number of Respondents: 160.

Total Responses: 217.

Frequency: On occasion.

Average Time per Response: Time varies from 5 minutes (.08 hour) to notify a hoist operator of blasting agents to 8 hours to develop an alternative plan if an employer is unable to display adequate signs warning against the use of mobile radio transmitters during blasting operations.

Total Burden Hours: 1,294.

Estimated Cost (Operation and Maintenance): $400,000.

IV. Public Participation—Submission of Comments on This Notice and Internet Access to Comments and Submissions

You may submit comments in response to this document as follows: (1) Electronically at *http://www.regulations.gov*, which is the Federal eRulemaking Portal; (2) by facsimile (fax); or (3) by hard copy. All comments, attachments, and other material must identify the Agency name and the OSHA docket number for the ICR (Docket No. OSHA–2011–0747). You may supplement electronic submissions by uploading document files electronically. If you wish to mail additional materials in reference to an electronic or facsimile submission, you must submit them to the OSHA Docket Office (see the section of this notice titled **ADDRESSES**). The additional materials must clearly identify your electronic comments by your name, date, and the docket number so the Agency can attach them to your comments.

Because of security procedures, the use of regular mail may cause a significant delay in the receipt of comments. For information about security procedures concerning the delivery of materials by hand, express delivery, messenger, or courier service, please contact the OSHA Docket Office at (202) 693–2350 (TTY (877) 889–5627).

Comments and submissions are posted without change at *http://www.regulations.gov.* Therefore, OSHA cautions commenters about submitting personal information, such as social security numbers and dates of birth. Although all submissions are listed in the *http://www.regulations.gov* index, some information (e.g., copyrighted material) is not publicly available to read or download through this Web site. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. Information on using the *http://www.regulations.gov* Web site to submit comments and access the docket is available at the Web site's ''UserTips'' link. Contact the OSHA Docket Office for information about materials not available through the Web site, and for assistance in using the Internet to locate docket submissions.

V. Authority and Signature

David Michaels, Ph.D., MPH, Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506

et seq.) and Secretary of Labor's Order No. 4–2010 (75 FR 55355).

Signed at Washington, DC, on February 13, 2012.

David Michaels,

Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2012–3733 Filed 2–16–12; 8:45 am]

BILLING CODE 4510–26–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice 12–013]

NASA Advisory Council; Technology and Innovation Committee; Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, Public Law 92–463, as amended, the National Aeronautics and Space Administration (NASA) announces a meeting of the Technology and Innovation Committee of the NASA Advisory Council (NAC).

DATES: Tuesday, March 6, 2012, 8 a.m. to 4:15 p.m., local time.

ADDRESSES: NASA Headquarters, 300 E Street SW., Room MIC–6A (6H45), Washington, DC 20546.

FOR FURTHER INFORMATION CONTACT: Mr. Mike Green, Office of the Chief Technologist, NASA Headquarters, Washington, DC 20546, (202) 358–4710, fax (202) 358–4078, or *g.m.green@nasa.gov*.

SUPPLEMENTARY INFORMATION: The meeting will be open to the public up to the capacity of the room. The agenda for the meeting includes the following topics:

—Office of the Chief Technologist Update
—Overview of FY 2013 NASA Budget Request for Space Technology
—Report on Review of NASA Space Technology Roadmap by National Research Council and Agency's Response Plan
—Update by Agency Human Spaceflight Architecture Team on Technology Needs
—Overview of Role of Technology in James Webb Space Telescope Program

It is imperative that the meeting be held on these dates to accommodate the scheduling priorities of the key participants. Attendees will be requested to sign a register and to comply with NASA security requirements, including the presentation of a valid picture ID, before receiving an access badge. Foreign nationals attending this meeting will be required to provide a copy of their passport, visa, or green card in addition to providing the following information no less than 10 working days prior to the meeting: Full name; gender; date/place of birth; citizenship; visa/green card information (number, type, expiration date); passport information (number, country, expiration date); employer/affiliation information (name of institution, address, country, telephone); title/position of attendee. To expedite admittance, attendees with U.S. citizenship can provide identifying information 3 working days in advance by contacting Mr. Mike Green via email at *g.m.green@nasa.gov* or by telephone at (202) 358–4710.

Patricia D. Rausch,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 2012–3776 Filed 2–16–12; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice 12–014]

NASA Advisory Council; Education and Public Outreach Committee; Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, Public Law 92–463, as amended, the National Aeronautics and Space Administration announces a meeting of the Education and Public Outreach Committee of the NASA Advisory Council (NAC).

DATES: Monday, March 5, 2012, 9 a.m. to 5 p.m., local Time.

ADDRESSES: NASA Headquarters, 300 E Street SW., Washington, DC 20546, Room 5H45–A.

FOR FURTHER INFORMATION CONTACT: This meeting will also take place telephonically and via WebEx. Any interested person should contact Ms. Erika G. Vick, Executive Secretary for the Education and Public Outreach Committee, National Aeronautics and Space Administration, Washington, DC, at *Erika.vick-1@nasa.gov,* no later than 4 p.m., local time, March 1, 2012, to get further information about participating via teleconference and/or WebEx.

SUPPLEMENTARY INFORMATION: The agenda for the meeting includes the following topics:

—NASA Budget Overview
—Education Redesign Status
—Public Outreach Status with focus on Participatory Engagement Initiative
—Remarks by New NAC Chair
—Messaging Strategy for Education and Public Outreach

The meeting will be open to the public up to the seating capacity of the room. It is imperative that the meeting be held on this date to accommodate the scheduling priorities of the key participants. Visitors will need to show a valid picture identification such as a driver's license to enter the NASA Headquarters building (West Lobby—Visitor Control Center), and must state that they are attending the NASA Advisory Council Education and Public Outreach Committee meeting in Room 5H45–A, before receiving an access badge. Foreign nationals must fax a copy of their passport, and print or type their name, current address, citizenship, company affiliation (if applicable) to include address, telephone number, and their title, place of birth, date of birth, U.S. visa information to include type, number, and expiration date, U.S. Social Security Number (if applicable), and place and date of entry into the U.S., fax to Erika Vick, NASA Advisory Council Education and Public Outreach Committee Executive Secretary, FAX: (202) 358–4332, by no later than Monday, February 27, 2012. To expedite admittance, attendees with U.S. citizenship can provide identifying information three working days in advance by contacting Erika Vick via email at *erika.vick-1@nasa.gov* or by telephone at (202) 358–2209 or fax: (202) 358–4332.

Patricia D. Rausch,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 2012–3777 Filed 2–16–12; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

National Endowment for the Arts; Submission for OMB Review; Comment Request

The National Endowment for the Arts (NEA) has submitted the following public information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995: *Grant Application Guidance Survey.* Copies of this ICR, with applicable supporting documentation, may be obtained by visiting *www.Reginfo.gov.*

Comments should be sent to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for the National Endowment for the Arts, Office of Management and Budget, Room 10235, Washington, DC 20503 202/395–7316, within 30 days from the date of this publication in the **Federal Register**.

The Office of Management and Budget (OMB) is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Could help minimize the burden of the collection of information on those who are to respond, including through the use of electronic submission of responses through Grants.gov.

SUPPLEMENTARY INFORMATION: The Endowment requests the review of all of its funding application guidelines and grantee reporting requirements. This entry is issued by the Endowment and contains the following information: (1) The title of the form; (2) how often the required information must be reported; (3) who will be required or asked to report; (4) what the form will be used for; (5) an estimate of the number of responses; (6) the average burden hours per response; (7) an estimate of the total number of hours needed to prepare the form. This entry is not subject to 44 U.S.C. 3504(h).

Agency: National Endowment for the Arts.

Title: Grant Application Guidance Survey.

OMB Number: Not yet assigned—new request.

Frequency: Semi-annually.

Affected Public: Nonprofit organizations, government agencies, and individuals.

Estimated Number of Respondents: 5,714.

Estimated Time per Respondent: 3 minutes.

Total Burden Hours: 286.

Total Annualized Capital/Startup Costs: 0.

Total Annual Costs (Operating/Maintaining Systems or Purchasing Services): $300.

Description: Through the Grant Application Guidance Survey, the NEA will solicit and collect customer feedback on the guidance it provides to organizations and government agencies that apply for grants. This feedback will be used regularly to identify customer service issues with the intent of improving Government service to its customers. Data collected from this survey will also be used to report on performance on one of the Agency's strategic outcomes from its FY2012–2016 Strategic Plan (attached), ensuring that survey results will be reported publicly.

Kathleen Edwards,

Director, Administrative Services, National Endowment for the Arts.

[FR Doc. 2012–3709 Filed 2–16–12; 8:45 am]

BILLING CODE 7537–01–P

THE NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Meetings of Humanities Panel

AGENCY: The National Endowment for the Humanities.

ACTION: Notice of meetings.

SUMMARY: Pursuant to the provisions of the Federal Advisory Committee Act (Pub. L. 92–463, as amended), notice is hereby given that the following meetings of Humanities Panels will be held at the Old Post Office, 1100 Pennsylvania Avenue NW., Washington, DC 20506.

FOR FURTHER INFORMATION CONTACT: Lisette Voyatzis, Advisory Committee Management Officer, National Endowment for the Humanities, Washington, DC 20506; telephone (202) 606–8322. Hearing-impaired individuals are advised that information on this matter may be obtained by contacting the Endowment's TDD terminal on (202) 606–8282.

SUPPLEMENTARY INFORMATION: The proposed meetings are for the purpose of panel review, discussion, evaluation and recommendation on applications for financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including discussion of information given in confidence to the agency by the grant applicants. Because the proposed meetings will consider information that is likely to disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential and/or information of a personal nature the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, pursuant to authority granted me by the Chairman's Delegation of Authority to Close Advisory Committee meetings, dated July 19, 1993, I have determined that these meetings will be closed to the public pursuant to subsections (c)(4), and (6) of section 552b of Title 5, United States Code.

1. *Date:* March 13, 2012.
Time: 8:30 a.m. to 5 p.m.
Room: 315.
Program: This meeting will review applications on the subject of History submitted to the Scholarly Editions grant program in the Division of Research Programs, at the December 8, 2011 deadline.

2. *Date:* March 14, 2012.
Time: 8:30 a.m. to 5 p.m.
Room: 315.
Program: This meeting will review applications on the subject of Literature submitted to the Scholarly Editions grant program in the Division of Research Programs, at the December 8, 2011 deadline.

3. *Date:* March 20, 2012.
Time: 8:30 a.m. to 5 p.m.
Room: 315.
Program: This meeting will review applications on the subject of Philosophy and Religion submitted to the Scholarly Editions grant program in the Division of Research Programs, at the December 8, 2011 deadline.

4. *Date:* March 20, 2012.
Time: 9 a.m. to 5 p.m.
Room: 415.
Program: This meeting will review applications for The Sustaining Cultural Heritage Collections grant program, submitted to the Division of Preservation and Access at the December 1, 2011 deadline.

5. *Date:* March 21, 2012.
Time: 8:30 a.m. to 5 p.m.
Room: 315.
Program: This meeting will review applications on the subject of History and Literature submitted to the Collaborative Research grant program in the Division of Research Programs, at the December 8, 2011 deadline.

6. *Date:* March 22, 2012.
Time: 9 a.m. to 5 p.m.
Room: 415.
Program: This meeting will review applications for The Sustaining Cultural Heritage Collections grant program, submitted to the Division of Preservation and Access at the December 1, 2011 deadline.

7. *Date:* March 22, 2012.
Time: 8:30 a.m. to 5 p.m.
Room: 315.
Program: This meeting will review applications on the subject of the Americas submitted to the Collaborative Research grant program in the Division of Research Programs, at the December 8, 2011 deadline.

8. *Date:* March 26, 2012.
Time: 9 a.m. to 5 p.m.
Room: 421.
Program: This meeting will review applications on the subject of African American History & Sites submitted to the America's Historical and Cultural Organizations grants program in the Division of Public Programs, at the January 11, 2012 deadline.
9. *Date:* March 27, 2012.
Time: 8:30 a.m. to 5 p.m.
Room: 527.
Program: This meeting will review applications on the subject of the Arts submitted to the Scholarly Editions grant program in the Division of Research Programs, at the December 8, 2011 deadline.
10. *Date:* March 28, 2012.
Time: 8:30 a.m. to 5 p.m.
Room: 527.
Program: This meeting will review applications on the subject of Old World Archaeology submitted to the Collaborative Research grant program in the Division of Research Programs, at the December 8, 2011 deadline.
11. *Date:* March 28, 2012.
Time: 9 a.m. to 5 p.m.
Room: 421.
Program: This meeting will review applications for Digital Projects in the America's Historical and Cultural Organizations grants program, submitted to the Division of Public Programs, at the January 11, 2012 deadline.
12. *Date:* March 29, 2012.
Time: 9 a.m. to 5 p.m.
Room: 315.
Program: This meeting will review applications for The Sustaining Cultural Heritage Collections grant program, submitted to the Division of Preservation and Access at the December 1, 2011 deadline.
13. *Date:* March 29, 2012.
Time: 9 a.m. to 5 p.m.
Room: 421.
Program: This meeting will review applications on the subject of United States History submitted to the America's Media Makers grants program in the Division of Public Programs, at the January 11, 2012 deadline.

Lisette Voyatzis,

Advisory Committee Management Officer.

[FR Doc. 2012–3753 Filed 2–16–12; 8:45 am]

BILLING CODE 7536–01–P

NATIONAL SCIENCE FOUNDATION

U.S. Antarctic Program Blue Ribbon Panel Review; Notice of Meeting

In accordance with Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting:

Name: U.S. Antarctic Program Blue Ribbon Panel Review, #76826.
Date/Time: March 5, 2012, 8 a.m. to 5 p.m.
Place: National Science Foundation, 4201 Wilson Boulevard, Room 1295, Arlington, VA 22230.
Type of Meeting: Open.
Contact Person: Sue LaFratta, Office of Polar Programs (OPP). National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230. (703) 292–8030.
Minutes: May be obtained from the contact person listed above.
Purpose of Meeting: The Panel will conduct an independent review of the current U.S. Antarctic Program to ensure the nation is pursuing the best twenty-year trajectory for conducting science and diplomacy in Antarctica—one that is environmentally sound, safe, innovative, affordable, sustainable, and consistent with the Antarctic Treaty.
Agenda: Present the Panel with additional programmatic information related to opportunities and challenges for Antarctic research and research support; discussion of findings and recommendations; planning for additional meetings.

Dated: February 14, 2012.

Susanne Bolton,

Committee Management Officer.

[FR Doc. 2012–3781 Filed 2–16–12; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Reactor Safeguards Meeting of the ACRS Subcommittee on Power Uprates; Revision to February 23, 2012, ACRS Meeting Federal Register Notice

The **Federal Register** Notice for the ACRS Subcommittee meeting on Power Uprates, scheduled to be held on February 23, 2012, is being revised to notify the following:

The meeting has been moved to Friday, February 24, 2012, from 8:30 a.m. to 5 p.m.

The notice of this meeting was previously published in the **Federal Register** on January 30, 2012 [77 FR 4585–4586]. All other items remain the same as previously published.

Further information regarding this meeting can be obtained by contacting Weidong Wang, Designated Federal Official (Telephone: 301–415–6279, Email: *Weidong.Wang@nrc.gov*) between 7:30 a.m. and 5:15 p.m. (ET).

Dated: February 13, 2012.

Antonio F. Dias,

Technical Advisor, Advisory Committee on Reactor Safeguards.

[FR Doc. 2012–3840 Filed 2–16–12; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Reactor Safeguards Meeting of the ACRS Subcommittee on Thermal-Hydraulics Phenomena; Revision to February 22, 2012, ACRS Meeting Federal Register Notice

The Federal Register Notice for the ACRS Subcommittee meeting on Thermal-Hydraulics Phenomena scheduled to be held on February 22, 2012, has been cancelled.

The notice of this meeting was previously published in the **Federal Register** on February 1, 2012 [77 FR 5063].

Further information regarding this meeting can be obtained by contacting Kent Howard, Designated Federal Official (Telephone: 301–415–2989, Email: *Kent.Howard@nrc.gov*) between 7:30 a.m. and 5:15 p.m. (ET).

Dated: February 13, 2012.

Antonio F. Dias,

Technical Advisor, Advisory Committee on Reactor Safeguards.

[FR Doc. 2012–3842 Filed 2–16–12; 8:45 am]

BILLING CODE 7590–01–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 489 and Form F–N; SEC File No. 270–361; OMB Control No. 3235–0411.

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 489 (17 CFR 230.489) under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) requires foreign banks and foreign insurance companies and holding companies and finance subsidiaries of

foreign banks and foreign insurance companies that are exempted from the definition of ''investment company'' by virtue of rules 3a–1 (17 CFR 270.3a–1), 3a–5 (17 CFR 270.3a–5), and 3a–6 (17 CFR 270.3a–6) under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) to file Form F–N (17 CFR 239.43) to appoint an agent for service of process when making a public offering of securities in the United States. During calendar year 2010, approximately 13 entities were required by rule 489 to make 15 Form F–N submissions. The Commission has previously estimated that the total annual burden associated with information collection and Form F–N preparation and submission is one hour per filing. Based on the Commission's experience with disclosure documents generally, the Commission continues to believe that this estimate is appropriate. The estimated annual burden of complying with the rule's filing requirement is approximately 15 hours, as some of the entities submitted multiple filings.

The estimates of average burden hours are made solely for the purposes of the Paperwork Reduction Act of 1995 and are not derived from a comprehensive or even representative survey or study of the cost of Commission rules and forms.

The collection of information under Form F–N 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, *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: February 14, 2012.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–3768 Filed 2–16–12; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, *Copies Available From:* Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension: Rule 6c–7, SEC File No. 270–269, OMB Control No. 3235–0276.

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'') is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

Rule 6c–7 (17 CFR 270.6c–7) under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) (''1940 Act'') provides exemption from certain provisions of Sections 22(e) and 27 of the 1940 Act for registered separate accounts offering variable annuity contracts to certain employees of Texas institutions of higher education participating in the Texas Optional Retirement Program. There are approximately 50 registrants governed by rule 6c–7. The burden of compliance with rule 6c–7, in connection with the registrants obtaining from a purchaser, prior to or at the time of purchase, a signed document acknowledging the restrictions on redeemability imposed by Texas law, is estimated to be approximately 3 minutes of professional time per response for each of approximately 2,400 purchasers annually (at an estimated $67 per hour),[1] for a total annual burden of 120 hours (at a total annual cost of $8,040).

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 or forms. The Commission does not include in the estimate of average burden hours the time preparing registration statements and sales literature disclosure regarding the restrictions on redeemability imposed by Texas law. The estimate of burden hours for completing the relevant registration statements are reported on the separate PRA submissions for those statements. (See the separate PRA submissions for Form N–3 (17 CFR 274.11b) and Form N–4 (17 CFR 274.11c.)

The Commission requests written comments on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information 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. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to 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.*

February 14, 2012.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–3767 Filed 2–16–12; 8:45 am]

BILLING CODE 8011–01–P

[1] $67/hour figure for a Compliance Clerk is from SIFMA's Office Salaries in the Securities Industry 2010, modified by Commission staff to account for an 1,800-hour work year and multiplied by 2.93 to account for bonuses, firm size, employee benefits and overhead.

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 29944; File No. 812–13962]

Pacific Life Insurance Company, et al.; Notice of Application

February 13, 2012.

AGENCY: Securities and Exchange Commission (the ''Commission'').

ACTION: Notice of application for an order under section 12(d)(1)(J) of the Investment Company Act of 1940, as amended (the ''Act''), for an exemption from sections 12(d)(1)(A) and (B) of the Act, under sections 6(c) and 17(b) of the Act for an exemption from section 17(a) of the Act, and under section 6(c) of the Act for an exemption from rule 12d1–2(a) under the Act.

Summary of the Application: Applicants request an order that would (a) permit certain series of registered open-end management investment companies to acquire shares of other registered open-end management investment companies and unit

investment trusts (''UITs'') that are within or outside the same ''group of investment companies,'' as defined in section 12(d)(1)(G)(ii) of the Act, as the acquiring company and (b) permit certain series of registered open-end management investment companies relying on rule 12d1–2 under the Act to invest in certain financial instruments.

Applicants: Pacific Life Insurance Company (''Pacific Life''), Pacific Life & Annuity Company (''PL&A,'' and collectively with Pacific Life and any insurance company controlling, controlled by, or under common control with Pacific Life or PL&A, the ''Insurance Companies''); Pacific Life Fund Advisors LLC (the ''Manager''); Pacific Select Fund (the ''Fund''); and Pacific Select Distributors, Inc. (the ''Distributor'').

Filing Dates: The application was filed on September 20, 2011, and amended on December 16, 2011 and February 10, 2012.

Hearing or Notification of Hearing: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on March 9, 2012, and should be accompanied by proof of service on applicants in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: The Commission: Secretary, U.S. Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090; Applicants: c/o Robin S. Yonis, Esq., Pacific Life Fund Advisors LLC, 700 Newport Center Drive, Newport Beach, California 92660.

FOR FURTHER INFORMATION CONTACT: Mark N. Zaruba, Attorney Advisor, at (202) 551–6878, or Mary Kay Frech, Branch Chief, at (202) 551–6814 (Office of Investment Company Regulation, Division of Investment Management).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's Web site by searching for the file number, or an applicant using the ''Company'' name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

Applicants' Representations

1. The Fund is a Massachusetts business trust, registered under the Act as an open-end management investment company, and is comprised of multiple series (the ''Series''), each of which has its own investment objective, policies and restrictions.[1] Shares of the Series are not offered directly to the public. Shares of the Series are offered through separate accounts that are registered as UITs under the Act (''Registered Separate Accounts'') or that are exempt from registration under the Act (''Unregistered Separate Accounts,'' and together with the Registered Separate Accounts, ''Separate Accounts'') of the Insurance Companies and serve as the underlying funding vehicles for the variable life insurance contracts and variable annuity contracts (the ''Contracts'') issued by the Insurance Companies. Shares of the Series may also be offered to qualified pension and retirement plans, certain of the general accounts of the Insurance Companies, or to other Series.

2. The Manager is a Delaware limited liability company registered as an investment adviser under the Investment Advisers Act of 1940, as amended (the ''Advisers Act''), and serves as investment adviser to the Series. The Manager is a wholly-owned subsidiary of Pacific Life and PL&A. PL&A is a wholly-owned subsidiary of Pacific Life and Pacific Life is a wholly-owned subsidiary of Pacific Mutual Holding Company.

3. The Distributor is a California corporation and serves as the Fund's principal underwriter and distributor. The Distributor is registered as a broker-dealer with the Commission and the Financial Industry Regulatory Authority, Inc. (''FINRA''). The Distributor is a wholly-owned subsidiary of Pacific Life. The Distributor also serves as the distributor for the Contracts.

4. Applicants request relief to permit: (a) Certain Series (each, a ''Fund of Funds,'' and collectively, the ''Funds of Funds'') to acquire shares of registered open-end management investment companies and UITs that are not part of the same ''group of investment companies,'' as defined in section 12(d)(1)(G)(ii) of the Act, as the Funds of Funds (the ''Unaffiliated Investment Companies'' and ''Unaffiliated Trusts,'' respectively, and together, the ''Unaffiliated Funds'');[2] (b) the Unaffiliated Investment Companies, their principal underwriters and any broker or dealer registered under the Securities Exchange Act of 1934, as amended (the ''Exchange Act'', and any such broker or dealer, a ''Broker''), to sell shares of the Unaffiliated Investment Companies to the Funds of Funds in excess of the limitations in section 12(d)(1)(B) of the Act; (c) the Funds of Funds to acquire shares of certain other Series in the same ''group of investment companies,'' as defined in section 12(d)(1)(G)(ii) of the Act, as the Fund of Funds (the ''Affiliated Funds,'' and together with the Unaffiliated Funds, the ''Underlying Funds'');[3] and (d) the Affiliated Funds, their principal underwriters and any Broker to sell shares of the Affiliated Funds to the Fund of Funds in excess of the limitations in section 12(d)(1)(B) of the Act. Applicants also request an order under sections 6(c) and 17(b) of the Act exempting the transactions described in (a) through (d) above from section 17(a) of the Act to the extent necessary to permit an Underlying Fund that is an affiliated person of a Fund of Funds to sell its shares to, and redeem its shares from, the Fund of Funds.

5. Applicants also request an exemption to the extent necessary to permit a Fund of Funds that invests in Underlying Funds in reliance on section 12(d)(1)(G) of the Act (a ''Section 12(d)(1)(G) Fund of Funds''), and that is eligible to invest in securities (as defined in section 2(a)(36) of the Act) in reliance on rule 12d1–2 under the Act, to also invest, to the extent consistent

[1] Applicants request that the order extend to any future Series of the Fund, and any other existing or future registered open-end management investment company and series thereof that are part of the same ''group of investment companies,'' as defined in section 12(d)(1)(G)(ii) of the Act, as the Fund and are, or may in the future be, advised by the Manager or any other investment adviser controlling, controlled by, or under common control with the Manager (any such entity is included in the term, ''Series''). All entities that currently intend to rely on the requested order are named as applicants. Any other entity that relies on the order in the future will comply with the terms and conditions of the application.

[2] Certain of the Unaffiliated Funds may have obtained exemptions from the Commission necessary to permit their shares to be listed and traded on a national securities exchange at negotiated prices (''ETFs'').

[3] Certain of the Underlying Funds currently pursue, or may in the future pursue, their investment objectives through a master-feeder arrangement in reliance on section 12(d)(1)(E) of the Act. In accordance with condition 12, a Fund of Funds may not invest in an Underlying Fund that operates as a feeder fund unless the feeder fund is part of the same ''group of investment companies,'' as defined in section 12(d)(1)(G)(ii) of the Act, as its corresponding master fund or the Fund of Funds. If a Fund of Funds invests in an Affiliated Fund that operates as a feeder fund and the corresponding master fund is not within the same ''group of investment companies,'' as defined in section 12(d)(1)(G)(ii) of the Act, as the Fund of Funds and Affiliated Fund, the master fund would be an Unaffiliated Fund for purposes of the application and its conditions.

with its investment objectives, policies, strategies and limitations, in financial instruments that may not be securities within the meaning of section 2(a)(36) of the Act (''Other Investments'').

Applicants' Legal Analysis

A. Investments in Underlying Funds—Section 12(d)(1)

1. Section 12(d)(1)(A) of the Act prohibits a registered investment company (an ''acquiring company'') from acquiring shares of another investment company (an ''acquired company'') if the securities represent more than 3% of the total outstanding voting stock of the acquired company, more than 5% of the total assets of the acquiring company, or, together with the securities of any other investment companies, more than 10% of the total assets of the acquiring company. Section 12(d)(1)(B) of the Act prohibits a registered open-end investment company, its principal underwriter and any Broker from selling the shares of the investment company to another investment company if the sale will cause the acquiring company to own more than 3% of the acquired company's voting stock, or if the sale will cause more than 10% of the acquired company's voting stock to be owned by investment companies generally.

2. Section 12(d)(1)(J) of the Act provides that the Commission may exempt any person, security, or transaction, or any class or classes of persons, securities or transactions, from any provision of section 12(d)(1) of the Act if the exemption is consistent with the public interest and the protection of investors. Applicants seek an exemption under section 12(d)(1)(J) of the Act from the limitations of sections 12(d)(1)(A) and (B) of the Act to the extent necessary to permit the Funds of Funds to acquire shares of the Underlying Funds in excess of the limits set forth in section 12(d)(1)(A) of the Act and to permit the Underlying Funds, their principal underwriters and any Broker to sell shares of the Underlying Funds to the Funds of Funds in excess of the limits set forth in section 12(d)(1)(B) of the Act.

3. Applicants state that the proposed arrangement will not give rise to the policy concerns underlying sections 12(d)(1)(A) and (B) of the Act, which include concerns about undue influence by a Fund of Funds or its affiliated persons over the Underlying Funds, excessive layering of fees, and overly complex fund structures. Accordingly, applicants believe that the requested exemption is consistent with the public interest and the protection of investors.

4. Applicants state that the proposed arrangement will not result in undue influence by a Fund of Funds or its affiliated persons over the Underlying Funds. The concern about undue influence does not arise in connection with a Fund of Funds' investment in the Affiliated Funds, since the Affiliated Funds are part of the same ''group of investment companies,'' as defined in section 12(d)(1)(G)(ii) of the Act, as the Funds of Funds. To limit the control that a Fund of Funds or its affiliated persons may have over an Unaffiliated Fund, applicants state that condition 1 prohibits: (a) The Manager and any person controlling, controlled by or under common control with the Manager, any investment company and any issuer that would be an investment company but for section 3(c)(1) or section 3(c)(7) of the Act advised or sponsored by the Manager or any person controlling, controlled by or under common control with the Manager (collectively, the ''Group'') and (b) any other investment adviser within the meaning of section 2(a)(20)(B) of the Act to a Fund of Funds (each, a ''Subadviser''), any person controlling, controlled by or under common control with a Subadviser, and any investment company or issuer that would be an investment company but for section 3(c)(1) or 3(c)(7) of the Act (or portion of such investment company or issuer) advised or sponsored by a Subadviser or any person controlling, controlled by or under common control with the Subadviser (collectively, the ''Subadviser Group'') from controlling (individually or in the aggregate) an Unaffiliated Fund within the meaning of section 2(a)(9) of the Act.

5. Applicants further state that condition 2 precludes a Fund of Funds, the Manager, any Subadviser, promoter or principal underwriter of a Fund of Funds, and any person controlling, controlled by or under common control with any of those entities (each, a ''Fund of Funds Affiliate'') from taking advantage of an Unaffiliated Fund, with respect to transactions between the Fund of Funds or a Fund of Funds Affiliate and the Unaffiliated Fund or the Unaffiliated Fund's investment adviser(s), sponsor, promoter, principal underwriter and any person controlling, controlled by or under common control with any of those entities (each, an ''Unaffiliated Fund Affiliate'').

6. Condition 5 precludes a Fund of Funds or Fund of Funds Affiliate (except to the extent it is acting in its capacity as an investment adviser to an Unaffiliated Investment Company or sponsor to an Unaffiliated Trust) from causing an Unaffiliated Fund to purchase a security in an offering of securities during the existence of any underwriting or selling syndicate of which a principal underwriter is an officer, director, member of an advisory board, Manager, Subadviser, or employee of the Fund of Funds, or a person of which any such officer, director, Manager, Subadviser, member of an advisory board, or employee is an affiliated person (each, an ''Underwriting Affiliate,'' except any person whose relationship to the Unaffiliated Fund is covered by section 10(f) of the Act is not an Underwriting Affiliate). An offering of securities during the existence of any underwriting or selling syndicate of which a principal underwriter is an Underwriting Affiliate is an ''Affiliated Underwriting.''

7. As an additional assurance that an Unaffiliated Investment Company understands the implications of an investment by a Fund of Funds under the requested order, prior to an investment in the shares of the Unaffiliated Investment Company in excess of the limit in section 12(d)(1)(A)(i) of the Act, the Fund of Funds and the Unaffiliated Investment Company will execute an agreement (the ''Participation Agreement'') stating, without limitation, that their respective boards of directors or trustees (for any entity, the ''Board'') and their investment advisers understand the terms and conditions of the order and agree to fulfill their respective responsibilities under the order. Applicants note that an Unaffiliated Investment Company (other than an ETF whose shares are purchased by a Fund of Funds in the secondary market) will retain the right at all times to reject any investment by a Fund of Funds.[4]

8. Applicants do not believe that the proposed arrangement will involve excessive layering of fees. With respect to investment advisory fees, applicants state that, in connection with the approval of any investment advisory contract under section 15 of the Act, the Board of the Fund, including a majority of the trustees who are not ''interested persons,'' as defined in section 2(a)(19) of the Act (for any Board, the ''Independent Trustees''), will find that the advisory fees charged to a Fund of Funds under the advisory contract are based on services provided that are in

[4] An Unaffiliated Investment Company, including an ETF, would retain its right to reject any initial investment by a Fund of Funds in excess of the limit in section 12(d)(1)(A)(i) of the Act by declining to execute the Participation Agreement with the Fund of Funds.

addition to, rather than duplicative of, services provided pursuant to any Underlying Fund's advisory contract(s). Applicants further state that the Manager will waive fees otherwise payable to it by a Fund of Funds in an amount at least equal to any compensation (including fees received pursuant to any plan adopted by an Unaffiliated Investment Company pursuant to rule 12b–1 under the Act) received from an Unaffiliated Fund by the Manager, or an affiliated person of the Manager, other than any advisory fees paid to the Manager or an affiliated person of the Manager by an Unaffiliated Investment Company, in connection with the investment by the Fund of Funds in the Unaffiliated Fund.

9. Applicants state that with respect to Registered Separate Accounts that invest in a Fund of Funds, no sales load will be charged at the Fund of Funds level or at the Underlying Fund level. Other sales charges and service fees, as defined in Rule 2830 of the Conduct Rules of the NASD (''NASD Conduct Rule 2830''),[5] if any, will only be charged at the Fund of Funds level or at the Underlying Fund level, not both. With respect to other investments in a Fund of Funds, any sales charges and/or service fees charged with respect to shares of the Fund of Funds will not exceed the limits applicable to funds of funds as set forth in NASD Conduct Rule 2830.

10. Applicants represent that each Fund of Funds will represent in the Participation Agreement that no Insurance Company sponsoring a Registered Separate Account funding Contracts will be permitted to invest in the Fund of Funds unless the Insurance Company has certified to the Fund of Funds that the aggregate amount of all fees and charges associated with each Contract that invests in the Fund of Funds, including fees and charges at the Separate Account, Fund of Funds, and Underlying Fund levels, is reasonable in relation to the services rendered, the expenses expected to be incurred, and the risks assumed by the Insurance Company.

11. Applicants state that the proposed arrangement will not create an overly complex fund structure. Applicants note that an Underlying Fund will be prohibited from acquiring securities of any investment company or company relying on section 3(c)(1) or 3(c)(7) of the Act in excess of the limits contained in section 12(d)(1)(A) of the Act, except to the extent that such Underlying Fund: (a) Acquires such securities in compliance with section 12(d)(1)(E) of the Act and either is an Affiliated Fund or is in the same ''group of investment companies,'' as defined in Section 12(d)(G)(ii) of the Act, as its corresponding master fund; (b) receives securities of another investment company as a dividend or as a result of a plan of reorganization of a company (other than a plan devised for the purpose of evading section 12(d)(1) of the Act); or (c) acquires (or is deemed to have acquired) securities of another investment company pursuant to exemptive relief from the Commission permitting such Underlying Fund to: (i) acquire securities of one or more investment companies for short-term cash management purposes, or (ii) engage in interfund borrowing and lending transactions.

B. Investments in Underlying Funds—Section 17(a)

1. Section 17(a) of the Act generally prohibits sales or purchases of securities between a registered investment company and its affiliated persons or affiliated persons of such persons. Section 2(a)(3) of the Act defines an ''affiliated person'' of another person to include (a) any person directly or indirectly owning, controlling, or holding with power to vote, 5% or more of the outstanding voting securities of the other person; (b) any person 5% or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote by the other person; and (c) any person directly or indirectly controlling, controlled by, or under common control with the other person.

2. Applicants state that the Funds of Funds and the Affiliated Funds may be deemed to be under common control and therefore affiliated persons of one another. Applicants also state that the Funds of Funds and the Underlying Funds may be deemed to be affiliated persons of one another if a Fund of Funds acquires 5% or more of an Underlying Fund's outstanding voting securities. In light of these possible affiliations, section 17(a) of the Act could prevent an Underlying Fund from selling shares to, and redeeming shares from, a Fund of Funds.[6]

3. Section 17(b) of the Act authorizes the Commission to grant an order permitting a transaction otherwise prohibited by section 17(a) of the Act if it finds that (a) the terms of the proposed transaction are fair and reasonable and do not involve overreaching on the part of any person concerned; (b) the proposed transaction is consistent with the policies of each registered investment company involved; and (c) the proposed transaction is consistent with the general purposes of the Act. Section 6(c) of the Act permits the Commission to exempt any person or transactions from any provision of the Act if such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

4. Applicants submit that the proposed transactions satisfy the standards for relief under sections 17(b) and 6(c) of the Act, as the terms are fair and reasonable and do not involve overreaching. Applicants state that the terms upon which an Underlying Fund will sell its shares to or purchase its shares from a Fund of Funds will be based on the net asset value of each Underlying Fund.[7] Applicants also state that the proposed transactions will be consistent with the policies of each Fund of Funds and Underlying Fund, and with the general purposes of the Act.

C. Other Investments by Section 12(d)(1)(G) Funds of Funds

1. Section 12(d)(1)(G) of the Act provides that section 12(d)(1) will not apply to securities of an acquired company purchased by an acquiring company if: (i) The acquiring company and acquired company are part of the same ''group of investment companies,'' as defined in section 12(d)(1)(G)(ii) of the Act; (ii) the acquiring company holds only securities of acquired companies that are part of the same ''group of investment companies,'' as defined in section 12(d)(1)(G)(ii) of the Act, government securities, and short-

[5] Any references to NASD Conduct Rule 2830 include any successor or replacement rule to NASD Conduct Rule 2830 that may be adopted by FINRA.

[6] Applicants acknowledge that receipt of any compensation by (a) an affiliated person of a Funds of Funds, or an affiliated person of such person, for the purchase by the Fund of Funds of shares of an Underlying Fund or (b) an affiliated person of an Underlying Fund, or an affiliated person of such person, for the sale by the Underlying Fund of its shares to a Fund of Funds may be prohibited by section 17(e)(1) of the Act. The Participation Agreement also will include this acknowledgement.

[7] To the extent purchases and sales of shares of an ETF occur in the secondary market (and not through principal transactions directly between a Fund of Funds and an ETF), relief from section 17(a) of the Act would not be necessary. The requested relief is intended to cover, however, transactions directly between ETFs and a Fund of Funds. Applicants are not seeking relief from section 17(a) for, and the requested relief will not apply to, transactions where an ETF could be deemed an affiliated person, or an affiliated person of an affiliated person, of a Fund of Funds because the investment adviser to the ETF or an entity controlling, controlled by or under common control with the investment adviser to the ETF also is a Manager to the Fund of Funds.

term paper; (iii) the aggregate sales loads and distribution-related fees of the acquiring company and the acquired company are not excessive under rules adopted pursuant to section 22(b) or section 22(c) of the Act by a securities association registered under section 15A of the Exchange Act or by the Commission; and (iv) the acquired company has a policy that prohibits it from acquiring securities of registered open-end management investment companies or registered UITs in reliance on section 12(d)(1)(F) or (G) of the Act.

2. Rule 12d1–2 under the Act permits a registered open-end investment company or a registered UIT that relies on section 12(d)(1)(G) of the Act to acquire, in addition to securities issued by another registered investment company in the same group of investment companies, government securities, and short-term paper: (1) Securities issued by an investment company that is not in the same group of investment companies, when the acquisition is in reliance on section 12(d)(1)(A) or 12(d)(1)(F) of the Act; (2) securities (other than securities issued by an investment company); and (3) securities issued by a money market fund, when the investment is in reliance on rule 12d1–1 under the Act. For the purposes of rule 12d1–2, ''securities'' means any security as defined in section 2(a)(36) of the Act.

3. Applicants state that the proposed arrangement would comply with the provisions of rule 12d1–2 under the Act, but for the fact that the Section 12(d)(1)(G) Funds of Funds may invest a portion of their assets in Other Investments. Applicants request an order under section 6(c) of the Act for an exemption from rule 12d1–2(a) to allow the Section 12(d)(1)(G) Funds of Funds to invest in Other Investments. Applicants assert that permitting the Section 12(d)(1)(G) Funds of Funds to invest in Other Investments as described in the application would not raise any of the concerns that the requirements of section 12(d)(1) of the Act were designed to address.

4. Consistent with its fiduciary obligations under the Act, each Section 12(d)(1)(G) Fund of Funds' board of trustees will review the advisory fees charged by the Section 12(d)(1)(G) Fund of Funds' investment adviser(s) to ensure that the fees are based on services provided that are in addition to, rather than duplicative of, services provided pursuant to the advisory agreement of any investment company in which the Section 12(d)(1)(G) Fund of Funds may invest.

Applicants' Conditions

Applicants agree that the order granting the requested relief shall be subject to the following conditions:

A. Investments in Underlying Funds by Funds of Funds

1. The members of the Group will not control (individually or in the aggregate) an Unaffiliated Fund within the meaning of section 2(a)(9) of the Act. The members of a Subadviser Group will not control (individually or in the aggregate) an Unaffiliated Fund within the meaning of section 2(a)(9) of the Act. If, as a result of a decrease in the outstanding voting securities of an Unaffiliated Fund, the Group or a Subadviser Group, each in the aggregate, becomes a holder of more than 25% of the outstanding voting securities of the Unaffiliated Fund, then the Group or the Subadviser Group (except for any member of the Group or the Subadviser Group that is a Separate Account) will vote its shares of the Unaffiliated Fund in the same proportion as the vote of all other holders of the Unaffiliated Fund's shares. This condition will not apply to a Subadviser Group with respect to an Unaffiliated Fund for which the Subadviser or a person controlling, controlled by, or under common control with the Subadviser acts as the investment adviser within the meaning section 2(a)(20)(A) of the Act (in the case of an Unaffiliated Investment Company) or the sponsor (in the case of an Unaffiliated Trust). A Registered Separate Account will seek voting instructions from its Contract holders and will vote its shares of an Unaffiliated Fund in accordance with the instructions received and will vote those shares for which no instructions were received in the same proportion as the shares for which instructions were received. An Unregistered Separate Account will either (i) vote its shares of the Unaffiliated Fund in the same proportion as the vote of all other holders of the Unaffiliated Fund's shares; or (ii) seek voting instructions from its Contract holders and vote its shares in accordance with the instructions received and vote those shares for which no instructions were received in the same proportion as the shares for which instructions were received.

2. No Fund of Funds or Fund of Funds Affiliate will cause any existing or potential investment by the Fund of Funds in an Unaffiliated Fund to influence the terms of any services or transactions between the Fund of Funds or a Fund of Funds Affiliate and the Unaffiliated Fund or an Unaffiliated Fund Affiliate.

3. The Board of the Fund, including a majority of the Independent Trustees, will adopt procedures reasonably designed to assure that the Manager and any Subadviser are conducting the investment program of the Fund of Funds without taking into account any consideration received by the Fund of Funds or a Fund of Funds Affiliate from an Unaffiliated Fund or an Unaffiliated Fund Affiliate in connection with any services or transactions.

4. Once an investment by a Fund of Funds in the securities of an Unaffiliated Investment Company exceeds the limit of section 12(d)(1)(A)(i) of the Act, the Board of the Unaffiliated Investment Company, including a majority of the Independent Trustees, will determine that any consideration paid by the Unaffiliated Investment Company to a Fund of Funds or a Fund of Funds Affiliate in connection with any services or transactions: (a) Is fair and reasonable in relation to the nature and quality of the services and benefits received by the Unaffiliated Investment Company; (b) is within the range of consideration that the Unaffiliated Investment Company would be required to pay to another unaffiliated entity in connection with the same services or transactions; and (c) does not involve overreaching on the part of any person concerned. This condition does not apply with respect to any services or transactions between an Unaffiliated Investment Company and its investment adviser(s), or any person controlling, controlled by, or under common control with such investment adviser(s).

5. No Fund of Funds or Fund of Funds Affiliate (except to the extent it is acting in its capacity as an investment adviser to an Unaffiliated Investment Company or sponsor to an Unaffiliated Trust) will cause an Unaffiliated Fund to purchase a security in any Affiliated Underwriting.

6. The Board of an Unaffiliated Investment Company, including a majority of the Independent Trustees, will adopt procedures reasonably designed to monitor any purchases of securities by the Unaffiliated Investment Company in an Affiliated Underwriting once an investment by a Fund of Funds in the securities of the Unaffiliated Investment Company exceeds the limit of section 12(d)(1)(A)(i) of the Act, including any purchases made directly from an Underwriting Affiliate. The Board of the Unaffiliated Investment Company will review these purchases periodically, but no less frequently than annually, to determine whether the

purchases were influenced by the investment by the Fund of Funds in the Unaffiliated Investment Company. The Board of the Unaffiliated Investment Company will consider, among other things: (a) Whether the purchases were consistent with the investment objectives and policies of the Unaffiliated Investment Company; (b) how the performance of securities purchased in an Affiliated Underwriting compares to the performance of comparable securities purchased during a comparable period of time in underwritings other than Affiliated Underwritings or to a benchmark such as a comparable market index; and (c) whether the amount of securities purchased by the Unaffiliated Investment Company in Affiliated Underwritings and the amount purchased directly from an Underwriting Affiliate have changed significantly from prior years. The Board of an Unaffiliated Investment Company will take any appropriate actions based on its review, including, if appropriate, the institution of procedures designed to assure that purchases of securities in Affiliated Underwritings are in the best interests of shareholders.

7. Each Unaffiliated Investment Company will maintain and preserve permanently in an easily accessible place a written copy of the procedures described in the preceding condition, and any modifications to such procedures, and will maintain and preserve for a period of not less than six years from the end of the fiscal year in which any purchase in an Affiliated Underwriting occurred, the first two years in an easily accessible place, a written record of each purchase of securities in an Affiliated Underwriting once an investment by a Fund of Funds in the securities of an Unaffiliated Investment Company exceeds the limit of section 12(d)(1)(A)(i) of the Act, setting forth (a) the party from whom the securities were acquired, (b) the identity of the underwriting syndicate's members, (c) the terms of the purchase, and (d) the information or materials upon which the determinations of the Board of the Unaffiliated Investment Company were made.

8. Prior to its investment in shares of an Unaffiliated Investment Company in excess of the limit of section 12(d)(1)(A)(i) of the Act, the Fund of Funds and the Unaffiliated Investment Company will execute a Participation Agreement stating, without limitation, that their Boards and their investment advisers understand the terms and conditions of the order and agree to fulfill their responsibilities under the order. At the time of its investment in shares of an Unaffiliated Investment Company in excess of the limit set forth in section 12(d)(1)(A)(i), a Fund of Funds will notify the Unaffiliated Investment Company of the investment. At such time, the Fund of Funds will also transmit to the Unaffiliated Investment Company a list of the names of each Fund of Funds Affiliate and Underwriting Affiliate. The Fund of Funds will notify the Unaffiliated Investment Company of any changes to the list as soon as reasonably practicable after a change occurs. The Unaffiliated Investment Company and the Fund of Funds will maintain and preserve a copy of the order, the Participation Agreement and the list with any updated information for the duration of the investment and for a period of not less than six years thereafter, the first two years in an easily accessible place.

9. Before approving any advisory contract under section 15 of the Act, the Board of the Fund, including a majority of the Independent Trustees, shall find that the advisory fees charged to the Fund of Funds under the advisory contract(s) are based on services provided that are in addition to, rather than duplicative of, services provided under the advisory contract(s) of any Underlying Fund in which the Fund of Funds may invest. Such finding, and the basis upon which the finding was made, will be recorded fully in the minute books of the Fund.

10. The Manager will waive fees otherwise payable to it by a Fund of Funds in an amount at least equal to any compensation (including fees received pursuant to any plan adopted by an Unaffiliated Investment Company under rule 12b-1 under the Act) received from an Unaffiliated Fund by the Manager, or an affiliated person of the Manager, other than any advisory fees paid to the Manager or its affiliated person by an Unaffiliated Investment Company, in connection with the investment by the Fund of Funds in the Unaffiliated Fund. Any Subadviser will waive fees otherwise payable to the Subadviser, directly or indirectly, by the Fund of Funds in an amount at least equal to any compensation received by the Subadviser, or an affiliated person of the Subadviser, from an Unaffiliated Fund, other than any advisory fees paid to the Subadviser or an affiliated person of the Subadviser by the Unaffiliated Investment Company, in connection with the investment by the Fund of Funds in the Unaffiliated Fund made at the direction of the Subadviser. In the event that the Subadviser waives fees, the benefit of the waiver will be passed through to the Fund of Funds.

11. With respect to Registered Separate Accounts that invest in a Fund of Funds, no sales load will be charged at the Fund of Funds level or at the Underlying Fund level. Other sales charges and service fees, as defined in NASD Conduct Rule 2830, if any, will only be charged at the Fund of Funds level or at the Underlying Fund level, not both. With respect to other investments in a Fund of Funds, any sales charges and/or service fees charged with respect to shares of a Fund of Funds will not exceed the limits applicable to funds of funds set forth in NASD Conduct Rule 2830.

12. No Underlying Fund will acquire securities of any other investment company or company relying on section 3(c)(1) or 3(c)(7) of the Act in excess of the limits contained in section 12(d)(1)(A) of the Act, except to the extent that such Underlying Fund (a) acquires such securities in compliance with section 12(d)(1)(E) of the Act and either is an Affiliated Fund or is in the same ''group of investment companies,'' as defined in section 12(d)(1)(G)(ii) of the Act, as its corresponding master fund; (b) receives securities of another investment company as a dividend or as a result of a plan of reorganization of a company (other than a plan devised for the purpose of evading section 12(d)(1) of the Act); or (c) acquires (or is deemed to have acquired) securities of another investment company pursuant to exemptive relief from the Commission permitting such Underlying Fund to: (i) Acquire securities of one or more investment companies for short-term cash management purposes, or (ii) engage in interfund borrowing and lending transactions.

B. Other Investments by Section 12(d)(1)(G) Funds of Funds

13. Applicants will comply with all provisions of rule 12d1–2 under the Act, except for paragraph (a)(2) to the extent that it restricts any Section 12(d)(1)(G) Fund of Funds from investing in Other Investments as described in the application.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Kevin M. O'Neill,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–66383; File No. SR–EDGX–2012–04]

Self-Regulatory Organizations; EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend EDGX Rule 1.5(q)

February 10, 2012.

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 February 1, 2012, the EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX'') filed with the Securities and Exchange Commission (the ''SEC'' or the ''Commission'') the proposed rule change as described in Items I and II below, which items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

EDGX Exchange, Inc. (''EDGX'' or the ''Exchange''), proposes to amend its rules regarding registration, qualification and continuing education requirements for Authorized Traders of Members that engage solely in proprietary trading. EDGX proposes to amend Rules 2.3 and 11.4 and the Interpretations to Rule 2.5 to recognize a new category of limited representative registration for proprietary traders. The Exchange proposes to expand its registration requirements to include the Proprietary Traders Qualification Examination (''Series 56'') as one of the applicable qualification examinations as determined by the Exchange. The Exchange also proposes to permit Authorized Traders of Members who engage solely in proprietary trading to obtain the Series 56 license in order to effect transactions on the Exchange. In addition, the Exchange proposes to amend Rule 2.3 to make it substantially similar to the rules of the Financial Industry Regulatory Authority (''FINRA'') and other Self-Regulatory Organizations (''SROs'') to require Members to register two registered Principals.[3] The text of the proposed Proprietary Traders Qualification Examination Content Outline is attached as Exhibit 3 and the text of the proposed rule changes is attached as Exhibit 5.[4] These documents are available on the Exchange's Web site at *www.directedge.com,* at the Exchange's principal office, and at the Public Reference Room of 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 Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Background

In July 2011, NASDAQ filed a proposed rule change with the Commission to recognize a new category of limited representative registration for proprietary traders.[5] In addition, in August 2011, NASDAQ filed a related proposed rule change to use the content outline for the Series 56 examination that would be applicable to proprietary traders.[6]

For the purposes of this category of limited representative registration, NASDAQ Rule 1011(o) defines a proprietary trading firm as a firm that embodies the following characteristics: The Member is not required by Section 15(b)(8) of the Exchange Act (the ''Act'') to become a FINRA member but is a member of another registered securities exchange not registered solely under Section 6(g) of the Act; all funds used or proposed to be used by the Member for trading are the Member's own capital, traded through the Member's own accounts; the Member does not, and will not have ''customers'';[7] all Principals and Authorized Traders of the Member acting or to be acting in the capacity of a trader must be owners of, employees of, or contractors to the Member. In addition, NASDAQ Rule 1032(c) defines a proprietary trader as an Authorized Trader whose activities in the investment banking or securities business are limited solely to proprietary trading; passes an appropriate qualification examination; and is an associated person of a proprietary trading firm as defined in NASDAQ Rule 1011(o). NASDAQ Rule 1032(c) identifies the Series 56 as the appropriate qualification examination for proprietary traders' limited representative registration. Furthermore, NASDAQ's proposed category of limited representative registration expressly excludes those associated persons that deal with the public and states those associated persons should continue to register as General Securities Representatives after obtaining the Series 7 license.

NASDAQ worked with FINRA and certain other exchanges, many of which have recently enhanced their registration requirements to require the registration of associated persons,[8] to develop the content outline and qualification examination for proprietary traders. The Series 56 examination program is shared by NASDAQ and the following SROs: Boston Options Exchange, C2 Options Exchange, Incorporated; Chicago Board Options Exchange, Incorporated (''CBOE''); Chicago Stock Exchange, Incorporated; International Securities Exchange, LLC (''ISE''); NASDAQ OMX BX, Inc.; NASDAQ OMX PHLX LLC; National Stock Exchange, Incorporated; New York Stock Exchange, LLC (''NYSE''); NYSE AMEX, Incorporated; and NYSE ARCA, Incorporated. Members of FINRA, NASDAQ and the SROs referenced above developed criteria for the Series 56 examination program, which CBOE filed with the SEC on June 17, 2011.[9]

Adoption of Series 56 by the Exchange

The Exchange believes the Series 56 will assist the Exchange in ensuring it has proper registration, qualification and continuing education requirements

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Exchange notes that it will continue to require per Exchange Rule 2.3(c) that all Authorized Traders who are to function as Principals on the Exchange to [sic] be registered consistent with amended paragraph (c)(2) of Rule 2.3.

[4] The Commission notes that the Outline and the text of the proposed rule change are attached to the filing, not to this Notice.

[5] *See* Securities Exchange [sic] Release No. 64958 (July 25, 2011), 76 FR 45629 (July 29, 2011) (SR–NASDAQ–2011–095). *See also* Securities Exchange [sic] Release No. 65041 (August 5, 2011), 76 FR 49822 (August 11, 2011) (SR–NASDAQ–2011–107).

[6] *See* Securities Exchange [sic] Release No. 65040 (August 5, 2011), 76 FR 49809 (August 11, 2011) (SR–NASDAQ–2011–108).

[7] NASDAQ Rule 0120(g) states, ''the term customer shall not include a broker or dealer.''

[8] *See* Securities Exchange Act Release Nos. 63843 (February 4, 2011), 76 FR 7884 (February 11, 2011) (SR–ISE–2011–155); and 63314 (November 12, 2010), 75 FR 70957 (November 9, 2010) (SR–CBOE–2010–084).

[9] *See supra* note 3. [sic] *See* also Securities Exchange Act Release No. 64699 (June 17, 2011), 76 FR 36945 (June 23, 2011) (SR–CBOE–2011–056).

for associated persons of Members because the Series 56 examination was designed to test a candidate's knowledge of proprietary trading in general and the industry rules applicable to trading of equity securities and listed options contracts. The Series 56 examination covers, among other things, recordkeeping and recording requirements, types and characteristics of securities and investments, trading practices and display execution and trading systems. While the Series 56 examination is primarily dedicated to topics related to proprietary trading, the Series 56 examination also covers some general concepts relating to customers.

The qualification examination consists of 100 multiple choice questions. Candidates have 150 minutes to complete the exam. The content outline, which the Exchange attached as Exhibit 3,[10] describes the following topical sections comprising the examination: Personnel, Business Conduct and Recordkeeping and Reporting Requirements, 9 questions; Markets, Market Participants, Exchanges and SROs, 8 questions; Types and Characteristics of Securities and Investments, 20 questions; Trading Practices and Prohibited Acts, 50 questions; and Display, Execution, and Trading Systems, 13 questions. Representatives from the SROs mentioned above also intend to meet on a periodic basis to evaluate and update, as necessary, the Series 56 examination program.

In addition, NASDAQ and some other SROs have filed or will file similar proposals with the Commission to amend current rules to recognize a new category of limited representative registration for proprietary traders and to permit members engaged solely in proprietary trading to obtain the Series 56 license in order to effect trades on the applicable exchanges.[11] The Exchange proposes to implement the Series 56 examination program upon availability in FINRA's Web CRD® system,[12] notification to its Members and subject to the satisfaction of applicable continuing education requirements, as described in Interpretations .04 and .05 to Rule 2.5.

The Exchange believes that acceptance of the Series 56 qualification examination will benefit both the Exchange and the applicable proprietary traders affected by the proposal. Accordingly, pursuant to the amended rules, as proposed, the Exchange would recognize a new category of limited representative registration for proprietary traders. In addition, the Exchange would expand its registration, qualification and continuing education requirements to include the Series 56 examination as one of the applicable qualification examinations as determined by the Exchange. The Exchange would also permit Authorized Traders of Members who engage solely in proprietary trading to obtain the Series 56 license in order to effect transactions on the Exchange. The Exchange proposes to add Interpretation .06 to Rule 2.5 to incorporate the Series 56 qualification examination as a limited representative registration for proprietary traders, and proposes to identify the characteristics required to satisfy the Exchange's definition of a proprietary trading firm and a proprietary trader, which are modeled after NASDAQ's rules, as discussed above.

In addition, the Exchange proposes to amend Rule 2.3(c)(2) to make it substantially similar to the rules of FINRA and other SROs to require Members to register at least two registered Principals.[13] The proposed amendment applies to firms seeking admission as Members and existing Members, and states that each Member, except a sole proprietorship or a proprietary trading firm with 25 or fewer Authorized Traders (''Limited Size Proprietary Firm''),[14] shall have at least two officers or partners who are registered as Principals with respect to the Member's equities securities business and, at a minimum, one such Principal shall be the Member's Chief Compliance Officer (''CCO'').[15]

The Exchange proposes additional amendments to Rule 2.3(c)(3) and (4) to require Members to register a CCO and a Financial/Operations Principal (''FINOP'') in order to make the Exchange's rules substantially similar to the rules of FINRA and other SROs. In addition, this more accurately reflects the heightened level of accountability inherent in the duty of overseeing compliance by a Member of the Exchange, and in the oversight and preparation of financial reports and the oversight of those employed in financial and operational capacities at each Member firm. The proposed amendments state each Member shall designate a CCO on the Schedule A of Form BD, and requires [sic] the individual designated as a CCO to register with the Exchange and pass the General Securities Principal Examination (Series 24). Similarly, the proposed amendments to Rule 2.3 require each Member subject to Rule 15c3–1 of the Act to designate a FINOP, and requires [sic] the individual designated as a FINOP to successfully complete the Financial and Operations Principal Examination (Series 27), and register in that capacity with the Exchange as prescribed by the Exchange.

The Exchange proposes to make other ministerial amendments to Rule 2.3 to accommodate the placement of the proposed amendments outlined in this rule filing.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[16] in general, and furthers the objectives of Section 6(c)(3)(B) of the Act.[17] Under that section, it is the Exchange's responsibility to prescribe standards of training, experience, and competence for Exchange Members and their associated persons, in particular, by offering an alternative qualification examination for proprietary traders that more closely reflects the practical knowledge that is a pre-requisite to proprietary trading. Pursuant to this statutory obligation, the Exchange requests to recognize a new category of limited representative registration for proprietary traders and to permit Authorized Traders of Members who engage solely in proprietary trading to obtain the Series 56 license. The Exchange believes the Series 56 examination establishes that Authorized Traders of Members have attained specified levels of competence and knowledge generally applicable to proprietary trading.

The Exchange believes that the requirement that persons functioning in certain supervisory capacities, including CCO and a FINOP, be registered through the WebCRD® system and be subject to higher qualification standards appropriately reflects the enhanced responsibility of their roles and is consistent with the Act. The general requirement that Members must have a minimum of two Principals responsible

[10] *See* note 4.

[11] *See supra* notes 2, 3, 6 and 7.

[12] *See www.finra.org/Industry/Compliance/Registration/CRD/*

[13] The Exchange proposes to communicate this amendment to Members by publishing an Information Circular on the Exchange's Web site. Existing Members shall receive additional time to satisfy this requirement.

[14] The Exchange proposes to create an exception to Rule 2.3(c)(2) where a Limited Size Proprietary Firm must register at least one Principal with the Exchange. In addition, the Exchange may waive the two Principal requirement in situations that indicate conclusively that only one Principal associated with the Member should be required.

[15] The Commission notes that EDGX is an equities exchange.

[16] 15 U.S.C. 78f(b).

[17] 15 U.S.C. 78f(c)(3)(B).

for oversight of Member organization activity, who must be registered as such and pass a principal exam, should help the Exchange strengthen the regulation of its Member firms, and prepare those individuals for their responsibilities. The nature of the firm, however, may dictate that more than two Principals are needed to provide appropriate supervision. In addition, the requirement for each Member to have a CCO who must register and pass the Series 24 exam and a FINOP who must register and pass the Series 27 exam is appropriate based on the heightened level of accountability inherent in the duty of overseeing compliance by a Member of the Exchange, and in the oversight and preparation of financial reports and the oversight of those employed in financial and operational capacities at each Member firm.

The Exchange believes that this proposal will enhance its ability to ensure an effective supervisory structure for those conducting business on the Exchange. The requirements apply broadly and are intended to help close a regulatory gap which has resulted in varying registration, qualification, and supervision requirements across markets. The Exchange believes that the changes proposed to its rules will strengthen its regulatory structure and should enhance the ability of its Authorized Traders and Members to comply with the Exchange's rules as well as with the federal securities laws.

In addition, the Exchange believes that the proposed rule change is consistent with the principles of Section 11A(a)(1)(C)(ii) of the Act in that it seeks to assure fair competition among brokers and dealers and among exchange markets. The Exchange believes that the proposed rule will promote uniformity of regulation across markets, thus reducing opportunities for regulatory arbitrage. EDGX's proposed rule change helps ensure that all persons conducting a securities business through EDGX are appropriately supervised, as the Commission expects of all SROs.

The proposed changes are also consistent with Section 6(b)(5) of the Act,[18] because they would promote just and equitable principles of trade, remove impediments to, and perfect the mechanism of, a free and open market and a national market system, and, in general, protect investors and the public interest, by enabling such persons to qualify for registration with the Exchange by offering an alternative qualification examination that specifically addresses industry topics that establish the foundation for the regulatory and procedural knowledge necessary for such persons electing to register as Proprietary Traders. Similarly, including new requirements for Members to maintain at least two Principals, a CCO and a FINOP, harmonizes the Exchange's rules with substantially similar rules of FINRA and other SROs. Accordingly, the modifications to EDGX Rules 2.3 and 11.4 and the Interpretations to Rule 2.5 promote just and equitable principles of trade, remove impediments to, and perfect the mechanism of, a free and open market and a national market system.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has designated this rule filing as non-controversial under Section 19(b)(3)(A) of the Act[19] and paragraph (f)(6) of Rule 19b–4 thereunder.[20] The Exchange asserts that the proposed rule changes: (1) Will not significantly affect the protection of investors or the public interest; (2) will not impose any significant burden on competition; (3) and will not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate. In addition, the Exchange provided the Commission with written notice of its intent to file the proposed rule changes, along with a brief description and text of the proposed rule changes, at least five business days prior to the date of filing.[21] For the foregoing reasons, this rule filing qualifies for immediate effectiveness as a ''noncontroversial'' rule change under paragraph (f)(6) of Rule 19b–4 because the Series 56 qualification examination has been adopted or will be adopted for use by NASDAQ and other SROs. The Series 56 examination also reflects a collaborative effort to adopt an appropriate qualification examination for a new registration category. In addition, the Exchange's proposal to include new requirements for Members to maintain at least two Principals, a CCO and a FINOP, harmonizes the Exchange's rules with substantially similar rules of FINRA and other SROs.

The rule changes as proposed will allow the Exchange to recognize a new category of limited representative registration for proprietary traders. The Exchange believes that Authorized Traders of Members who engage solely in proprietary trading, obtain the Series 56 license, and wish to register with EDGA would be disadvantaged by having to wait for the proposed rule changes to become operative. Accordingly, because the Exchange believes that implementation of the standards proposed in this filing is important to its maintenance of a fair and orderly market and is non-controversial, the Exchange requested that the Commission waive the 30-day pre-operative waiting period contained in Rule 19b–4(f)(6)(iii) under the Act.[22] Waiver of this requirement will allow the Exchange to make the examination available as soon as possible to coincide with its availability on other exchanges. The Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest because the proposal makes the registration, qualification and continuing education requirements of EDGX comparable to those of the other exchanges and will enable EDGX to recognize the Series 56 exam as a valid qualification for proprietary traders.[23] Therefore, the Commission designates the proposal operative upon filing.

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.

[18] 15 U.S.C. 78f(b)(5).

[19] 15 U.S.C. 78s(b)(3)(A).

[20] 17 CFR 240.19b–4.

[21] 17 CFR 240.19b–4(f)(6).

[22] 17 CFR 240.19b–4(f)(6)(iii).

[23] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

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 No. SR–EDGX–2012–04 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–EDGX–2012–04. 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–EDGX–2012–04 and should be submitted by March 9, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[24]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–3707 Filed 2–16–12; 8:45 am]

BILLING CODE 8011–01–P

[24] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–66384; File No. SR–C2–2012–006]

Self-Regulatory Organizations; C2 Options Exchange, Incorporated; Notice of Filing of a Proposed Rule Change Relating to Its Automated Improvement Mechanism

February 13, 2012.

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 January 31, 2012, 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 substantially 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 rules relating to its Automated Improvement Mechanism (''AIM''). The text of the proposed rule change is available on the Exchange's Web site (*http://www.c2exchange.com*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this proposed rule change is to amend C2 Rule 6.51 to permit an Initiating Participant to elect to have last priority in AIM's order allocation. AIM allows a Participant to submit an Agency Order along with a contra-side second order (a principal order or a solicited order for the same size as the Agency Order) into an Auction where other participants could compete with the Initiating Participant's second order to execute against the Agency Order, which guarantees that the Agency Order will receive an execution.[3] Initiating Participants must submit the Agency Order at the better of the NBBO or the Agency Order's limit price (if the order is a limit order).[4] Once an Auction commences, the Initiating Participant cannot cancel it.[5] Upon receipt of an Agency Order (and the Initiating Participant's second order), the Exchange will commence the Auction by issuing a Request For Response (''RFR'') detailing the side and size of the Agency Order. The RFR period will last for one (1) second.[6] At the conclusion of an Auction, an Agency Order will be allocated at the best price(s) in accordance with the applicable matching algorithm rules for that class, subject to the allocation provisions of Rule 6.51(b)(3).

Under this proposal, when submitting an Agency Order to initiate an Auction against a single-price submission, the Initiating Participant will have the opportunity to elect to have last priority in AIM's order allocation. If the Initiating Participant makes this election, the Initiating Participant would be allocated only the amount of contracts remaining, if any, after the Agency Order is allocated to all other Auction participants willing to trade with the Agency Order at the single-price submission price.[7] If it makes this election, the Initiating Participant may not be allocated any contracts, or may be allocated fewer contracts than it

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* C2 Rule 6.51.

[4] *See* C2 Rule 6.51(a)(2). The Commission notes that if the Agency Order is for less than 50 contracts, the Initiating Participant must submit the Agency Order at the better of the NBBO price improved by one minimum price improvement increment, which increment shall be determined by the Exchange but may not be smaller than one cent; or the Agency Order's limit price (if the order is a limit order). *See* C2 Rule 6.51(a)(3).

[5] *See* C2 Rule 6.51(b)(1)(A).

[6] *See* C2 Rule 6.51(b)(1). Several types of events will cause an Auction to conclude. *See* C2 Rule 6.51(b)(2).

[7] The Exchange notes that Chapter V, Section 18(f)(v), The Price Improvement Period (''PIP''), of the Rules of the Boston Exchange Group, LLC includes a similar provision that permits an options participant initiating a PIP auction to designate a lower amount for which it will retain certain priority and trade allocation privileges upon the conclusion of the PIP auction than the 40% of the PIP order to which the initiating options participant is otherwise entitled pursuant to PIP's allocation order.

would otherwise receive pursuant to Rule 6.51(b)(3)(F) (generally 40%).

As an example, suppose an Initiating Participant submits to an Auction an Agency Order for 1,000 contracts and makes the election described above:

- If at the conclusion of the Auction, other Auction participants are willing to trade with 800 of these contracts at the single-price submission price or better price(s) resulting from the Auction, then the Initiating Participant will be allocated the remaining 200 contracts (or 20%) for execution against its contra-side order at its specified single price.
- If at the conclusion of the Auction, other Auction participants are willing to trade with 600 of these contracts at the single-price submission price or better price(s) resulting from the Auction, then the Initiating Participant will be allocated the remaining 400 contracts (or 40%) for execution against its contra-side order at its specified single price.
- If at the conclusion of the Auction, other Auction participants are willing to trade with 400 of these contracts at the single-price submission price or better price(s) resulting from the Auction, then the Initiating Participant will be allocated 600 contracts for execution against its contra-side order at its specified single price.
- If at the conclusion of the Auction, other Auction participants are willing to trade with the entire Agency Order at the single-price submission price or better price(s) resulting from the Auction, then the Initiating Participant will be allocated no contracts.

Under this proposal, Agency Orders submitted to AIM will continue to be guaranteed execution at a price at least as good as the NBBO while providing the opportunity for execution at a price better than the NBBO.

The Exchange believes this proposal will incent more Participants to initiate Auctions, because the additional flexibility encourages increased participation by Participants willing to trade with Agency Orders at the NBBO but not at a price better than the NBBO and by Participants willing to facilitate and stop a customer order at a particular price even when there is not a desire to trade against any or all of the customer order. Additionally, this proposal provides the possibility that other Participants may receive increased order allocations through AIM, which the Exchange believes could increase participation in Auctions. The Exchange believes that this proposal may ultimately provide additional opportunities for price improvement over the NBBO for its customers.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the requirements of the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to a national securities exchange and, in particular, the requirements of Section 6(b) of the Act [8]. Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) [9] requirements that the rules of an exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts, to remove impediments to and to perfect the mechanism for a free and open market and a national market system, and, in general, to protect investors and the public interest.

In particular, the Exchange believes this proposed rule change is a reasonable modification designed to provide additional flexibility for Participants to obtain executions on behalf of their customers while continuing to provide meaningful, competitive Auctions. The Exchange also believes that the proposed rule change will increase the number of and participation in Auctions, which will ultimately enhance competition in the AIM Auctions and provide customers with additional opportunities for price improvement.

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

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will: (A) By order approve or disapprove 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–C2–2012–006 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–C2–2012–006. 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 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–C2–2012–006, and should be submitted on or before March 9, 2012.

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(5).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–3736 Filed 2–16–12; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–66385; File No. SR–NYSEAmex–2012–03]

Self-Regulatory Organizations; NYSE Amex LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Provide for ''Self-Trade Prevention'' on the Exchange

February 13, 2012.

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 January 30, 2012, NYSE Amex LLC (the ''Exchange'' or ''NYSE Amex'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to add new Commentary .02 to NYSE Amex Options Rule 964NY (Display, Priority and Order Allocation—Trading Systems) to provide for ''Self-Trade Prevention'' on the Exchange. The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and *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.

[10] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to add new Commentary .02 to NYSE Amex Options Rule 964NY (Display, Priority and Order Allocation—Trading Systems) to provide for ''Self-Trade Prevention'' on the Exchange.[3] As proposed, the Exchange would cancel any resting Market Maker quote(s) and order(s)[4] to buy (sell) that are priced equal to or higher (lower) than an incoming Market Maker quote, order or both to sell (buy) entered under the same trading permit identification.[5] The following examples illustrate how Self-Trade Prevention would function:

Example 1

- The National Best Bid and Offer (''NBBO'') for a particular option series is $1.15 (bid)—$1.20 (offer);
- The Exchange Best Bid and Offer (''BBO'') is $1.15 (bid)—$1.25 (offer);
- A Market Maker has a single resting PNP Order to buy on the Exchange's Consolidated Book with a price of $1.15;
- If the Market Maker submits a PNP Order to sell with a price of $1.15, the NYSE Amex System would cancel the Market Maker's resting PNP Order to buy with a price of $1.15.[6]

Example 2

- The NBBO and BBO are the same as in Example 1;
- A Market Maker has two separate resting PNP Orders to buy on the Exchange's Consolidated Book, with prices of $1.15 and $1.13, respectively;
- If the Market Maker submits a PNP Order to sell with a price of $1.14, the NYSE Amex System would cancel the Market Maker's resting PNP Order to buy with a price of $1.15, but would not cancel the Market Maker's resting PNP Order to buy with a price of $1.13.[7]

As proposed, Self-Trade Prevention would be in effect throughout the trading day for all Market Markers on the Exchange,[8] but not during Trading Auctions.[9] In this regard, the Exchange believes that it is highly unlikely that a Market Maker would trade against its own resting interest during a Trading Auction. Moreover, the Exchange notes that it would be difficult to implement this functionality from a technological and operational perspective because it would require the Exchange to cancel resting, executable Market Maker trading interest as it is calculating the price at which to conduct the Trading Auction. For these reasons, the Exchange is not applying Self-Trade Prevention to Trading Auctions.

The Exchange also proposes that Self-Trade Prevention would not be applicable to individual legs of Complex Orders.[10] In this regard, senders of Complex Orders, including Market Makers, view them as discrete orders, serving a particular investment purpose, that are contingent on all of the legs of the Complex Order being executed. Thus, they are only interested in having all of the legs of a Complex Order executed. Because the non-execution of

[3] Self-Trade Prevention would only be applicable to electronic trading on the Exchange.

[4] The Exchange will specify from time to time via a Regulatory Information Bulletin the Market Maker trading interest (i.e., quotes and orders) to which Self-Trade Prevention will apply. Currently, the Exchange plans to initially apply Self-Trade Prevention to the following order types used by Market Makers: ''PNP Orders'' and ''PNP–Blind Orders.'' PNP Orders and PNP–Blind Orders are defined in NYSE Amex Options Rule 900.3NY, and each is a type of non-routable Limit Order that is only executed on the Exchange. The Exchange notes that Market Makers primarily use these order types, as opposed to other order types offered by the Exchange, because they are similar to quotes (i.e., they are non-routable Limit Orders). The Exchange currently plans to expand Self-Trade Prevention to other Market Maker trading interest (e.g., quotes) when certain technology changes have been completed, and would announce any such expansion through a Regulatory Information Bulletin under this proposed rule change pursuant to Commentary .02 of NYSE Amex Options Rule 964NY. In the future, the Exchange may expand Self-Trade Prevention to other orders used by Market Makers (including routable orders), and it also would announce any such changes through a Regulatory Information Bulletin under this proposed rule change pursuant to Commentary .02 of NYSE Amex Options Rule 964NY. The Exchange would submit a separate proposed rule change if it were to make Self-Trade Prevention available to non-Market Maker trading interest.

[5] The Exchange would use a Market Maker's trading permit identification (''TPID'') to monitor for self-trades in the proposed Self-Trade Prevention functionality. TPIDs are assigned to Market Makers, as well as other ATP Holders, to identify them in the Exchange's systems. Market Makers on the Exchange are not able to submit orders on an agency basis. Thus, a Market Maker within a firm that conducts both an agency and market making business would have a unique TPID that could only be used for that Market Maker's quotes and orders.

[6] Example 1 illustrates that Self-Trade Prevention would result in the cancellation of the Market Maker's resting order (or quote) to buy regardless of whether the incoming order (or quote) and the resting order (or quote) would actually execute against each other.

[7] Example 2 illustrates that Self-Trade Prevention would not result in the cancellation of the Market Maker's resting order (or quote) to buy with a price of $1.13 because the price of the resting order (or quote) to buy is lower than the price of the incoming order (or quote) to sell.

[8] Market Markers on the Exchange would not have the ability to deactivate Self-Trade Prevention or change any settings related to it.

[9] *See, e.g.*, NYSE Amex Options Rule 952NY.

[10] *See* NYSE Amex Options Rule 900.3NY(e), which defines Complex Order. *See also* NYSE Amex Options Rule 980NY, which describes electronic Complex Order trading.

one leg of a Complex Order is contrary to the investment purpose of the Complex Order, the Exchange has determined to not apply Self-Trade Prevention in a manner that would prevent a Complex Order sent by a Market Maker from executing against that Market Maker's resting interest in the leg markets.

The Exchange notes that Self-Trade Prevention would not relieve or modify a Market Maker's obligations under the Exchange's Rules, such as the Market Maker's quoting obligations, or any other rules and regulations to which the Market Maker is subject.

The Exchange believes that the proposed Self-Trade Prevention is very similar to functionality currently offered by the Nasdaq Options Market (''NOM''). In particular, NOM provides market makers on its market with an ''anti-internalization'' functionality, whereby quotes and orders entered by NOM market makers using the same market participant identifier will not be executed against quotes and orders entered on the opposite side of the market by the same market maker using the same identifier, but instead the NOM system will cancel the oldest of the quotes or orders back to the entering party prior to execution.[11] Similarly, the Chicago Board Options Exchange (''CBOE'') provides for a market-maker trade prevention order, which is a market maker immediate-or-cancel order that, if it would trade against a resting quote or order for the same market-maker, is cancelled along with the resting quote or order.[12] Additionally, NYSE Arca Equities provides for a self trade prevention order modifier that prevents orders so designated from executing against resting opposite side orders entered under the same equity trading permit identification that are also designated with the modifier.[13] The change proposed herein would therefore provide Market Makers with a method of managing their trading interest that is similar to functionalities that are currently available on other markets.

Because of the technology changes associated with this proposed rule change, the Exchange proposes to announce the implementation date of Self-Trade Prevention on the Exchange via a Regulatory Information Bulletin. This Bulletin also would include the Market Maker trading interest to which Self-Trade Prevention initially would apply.[14]

2. Statutory Basis

As discussed above, the Exchange believes that the proposed rule change is designed to promote just and equitable principles of trade because it would provide Market Makers with a functionality to manage their trading interest that is similar to functionalities currently available on other markets.[15] Additionally, the Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices, to remove impediments to, and perfect the mechanisms of, a free and open market and a national market system and, in general, to protect investors and the public interest, because it would allow Market Makers to better manage their trading interest and provide a means to prevent executions against their own trading interest. The Exchange notes that Market Makers have asked for this functionality to prevent them from inadvertently trading with their own interest. In such a situation, the firms ask the Exchange to nullify the trades, which they are permitted to do under the Exchange's rules because they are on both sides of the trades.[16] While the proposed Self-Trade Prevention functionality would prevent inadvertent self-trading, the Exchange notes that the functionality would also prevent intentional self-trading. In this regard, the proposed rule change provides a means to prevent manipulative conduct such as ''wash trading.''

Presently, the Exchange is proposing that Self-Trade Prevention be applicable only for Market Makers. The Exchange has made this decision because Market Makers are the most likely market participants to execute against their own trading interest. The Exchange may propose to expand the Self-Trade Prevention functionality to other ATP Holders in the future, subject to being in a position to implement the functionality in a manner consistent with a firm's agency responsibilities to its customer orders. Accordingly, the Exchange believes that the proposed rule change is not designed to permit unfair discrimination.

For the reasons set forth above, the Exchange believes that the proposed rule change is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the ''Act''),[17] in general, and furthers the objectives of Section 6(b)(5) of the Act,[18] in particular.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not significantly affect the protection of investors or the public interest, does not impose any significant burden on competition, and, by its terms, does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[19] and Rule 19b–4(f)(6) thereunder.[20]

[11] *See* Chapter VI, Section 10(6) of the NOM Rules.

[12] *See* CBOE Rule 6.53(c)(v).

[13] *See* NYSE Arca Equities Rule 7.31(qq). Similar to the Self-Trade Prevention functionality proposed in this filing, the NYSE Arca Equities Self Trade Prevention modifier is not in effect during auctions.

[14] *See supra* note 4. As mentioned above, the Exchange notes that any such announcements regarding Self-Trade Prevention would not be for the purpose of, or permit the Exchange to, expand the applicability of Self-Trade Prevention beyond Market Maker trading interest. Any such expansion would be the subject of a separate proposed rule change submitted by the Exchange to the Commission. The Exchange further notes that the Commission has previously permitted other option exchanges to communicate settings or eligibility for various exchange mechanisms to their members through exchange notices, bulletins or circulars. *See, e.g.,* Interpretation and Policy .05 to CBOE Rule 6.74A, which provides that any determinations made by CBOE regarding CBOE's Automated Improvement Mechanism, such as eligible classes, order size parameters and the minimum price increment for certain responses, shall be communicated in a Regulatory Circular. *See also* CBOE Rules 6.45A and 6.45B, which provide that CBOE will issue a Regulatory Circular to specify certain priority-related information, including specifying which priority rules will govern which classes of options any time the exchange changes the priority.

[15] *See supra* notes 11, 12 and 13.

[16] Under Commentary .02 to NYSE Amex Options Rule 965NY, a ''trade may be nullified if all parties to the trade agree to the nullification,'' and when ''all parties to a trade have agreed to a trade nullification, one party must promptly notify the Exchange for dissemination of cancellation information to the Options Price Reporting Authority.''

[17] 15 U.S.C. 78f(b).

[18] 15 U.S.C. 78f(b)(5).

[19] 15 U.S.C. 78s(b)(3)(A).

[20] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, 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 the five-day prefiling requirement.

The Exchange has requested that the Commission waive the 30-day operative delay. The Commission believes that waiver of the operative delay is consistent with the protection of investors and the public interest because the proposal will provide a tool for Exchange market makers to better manage their trading interest and provide a means to prevent manipulative conduct such as ''wash trading.'' Therefore, the Commission designates the proposal operative upon filing.[21]

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–NYSEAmex–2012–03 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEAmex–2012–03. 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 the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEAmex–2012–03 and should be submitted on or before March 9, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[22]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–3738 Filed 2–16–12; 8:45 am]

BILLING CODE 8011–01–P

[21] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[22] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–66386; File No. SR–NYSEArca–2012–08]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Provide for ''Self-Trade Prevention'' on the Exchange

February 13, 2012.

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 January 30, 2012, NYSE Arca, Inc. (the ''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to add new Commentary .01 to NYSE Arca Options Rule 6.76A (Order Execution—OX) to provide for ''Self-Trade Prevention'' on the Exchange. The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and *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 add new Commentary .01 to NYSE Arca Options Rule 6.76A (Order Execution—OX) to provide for ''Self-Trade Prevention'' on the Exchange.[3] As proposed, the Exchange would cancel any resting Market Maker quote(s) and order(s)[4] to buy (sell) that are priced equal to or higher (lower) than an incoming Market Maker quote, order or both to sell (buy) entered under the same trading permit

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Self-Trade Prevention would only be applicable to electronic trading on the Exchange.

[4] The Exchange will specify from time to time via a Regulatory Information Bulletin the Market Maker trading interest (i.e., quotes and orders) to which Self-Trade Prevention will apply. Currently, the Exchange plans to initially apply Self-Trade Prevention to the following order types used by Market Makers: ''PNP Orders,'' PNP–Blind Orders,'' and ''PNP–Light Orders.'' PNP Orders, PNP–Blind Orders, and PNP–Light Orders are defined in NYSE Arca Options Rule 6.62, and each is a type of non-routable Limit Order that is only executed on the Exchange. The Exchange notes that Market Makers primarily use these order types, as opposed to other order types offered by the Exchange, because they are similar to quotes (i.e., they are non-routable Limit Orders). The Exchange currently plans to expand Self-Trade Prevention to other Market Maker trading interest (e.g., quotes) when certain technology changes have been completed, and would announce any such expansion through a Regulatory Information Bulletin under this proposed rule change pursuant to Commentary .01 of NYSE Arca Options Rule 6.76A. In the future, the Exchange may expand Self-Trade Prevention to other orders used by Market Makers (including routable orders), and it also would announce any such changes through a Regulatory Information Bulletin under this proposed rule change pursuant to Commentary .01 of NYSE Arca Options Rule 6.76A. The Exchange would submit a separate proposed rule change if it were to make Self-Trade Prevention available to non-Market Maker trading interest.

identification.[5] The following examples illustrate how Self-Trade Prevention would function:

Example 1

- The National Best Bid and Offer (''NBBO'') for a particular option series is $1.15 (bid)—$1.20 (offer);
- The Exchange Best Bid and Offer (''BBO'') is $1.15 (bid)—$1.25 (offer);
- A Market Maker has a single resting PNP Order to buy on the Exchange's Consolidated Book with a price of $1.15;
- If the Market Maker submits a PNP Order to sell with a price of $1.15, the NYSE Arca System would cancel the Market Maker's resting PNP Order to buy with a price of $1.15.[6]

Example 2

- The NBBO and BBO are the same as in Example 1;
- A Market Maker has two separate resting PNP Orders to buy on the Exchange's Consolidated Book, with prices of $1.15 and $1.13, respectively;
- If the Market Maker submits a PNP Order to sell with a price of $1.14, the NYSE Arca System would cancel the Market Maker's resting PNP Order to buy with a price of $1.15, but would not cancel the Market Maker's resting PNP Order to buy with a price of $1.13.[7]

As proposed, Self-Trade Prevention would be in effect throughout the trading day for all Market Markers on the Exchange,[8] but not during Trading Auctions.[9] In this regard, the Exchange believes that it is highly unlikely that a Market Maker would trade against its own resting interest during a Trading Auction. Moreover, the Exchange notes that it would be difficult to implement this functionality from a technological and operational perspective because it would require the Exchange to cancel resting, executable Market Maker trading interest as it is calculating the price at which to conduct the Trading Auction. For these reasons, the Exchange is not applying Self-Trade Prevention to Trading Auctions.

The Exchange also proposes that Self-Trade Prevention would not be applicable to individual legs of Complex Orders.[10] In this regard, senders of Complex Orders, including Market Makers, view them as discrete orders, serving a particular investment purpose, that are contingent on all of the legs of the Complex Order being executed. Thus, they are only interested in having all of the legs of a Complex Order executed. Because the non-execution of one leg of a Complex Order is contrary to the investment purpose of the Complex Order, the Exchange has determined to not apply Self-Trade Prevention in a manner that would prevent a Complex Order sent by a Market Maker from executing against that Market Maker's resting interest in the leg markets.

The Exchange notes that Self-Trade Prevention would not relieve or modify a Market Maker's obligations under the Exchange's Rules, such as the Market Maker's quoting obligations, or any other rules and regulations to which the Market Maker is subject.

The Exchange believes that the proposed Self-Trade Prevention is very similar to functionality currently offered by the Nasdaq Options Market (''NOM''). In particular, NOM provides market makers on its market with an ''anti-internalization'' functionality, whereby quotes and orders entered by NOM market makers using the same market participant identifier will not be executed against quotes and orders entered on the opposite side of the market by the same market maker using the same identifier, but instead the NOM system will cancel the oldest of the quotes or orders back to the entering party prior to execution.[11] Similarly, the Chicago Board Options Exchange (''CBOE'') provides for a market-maker trade prevention order, which is a market maker immediate-or-cancel order that, if it would trade against a resting quote or order for the same market-maker, is cancelled along with the resting quote or order.[12] Additionally, NYSE Arca Equities provides for a self trade prevention order modifier that prevents orders so designated from executing against resting opposite side orders entered under the same equity trading permit identification that are also designated with the modifier.[13] The change proposed herein would therefore provide Market Makers with a method of managing their trading interest that is similar to functionalities that are currently available on other markets. Because of the technology changes associated with this proposed rule change, the Exchange proposes to announce the implementation date of Self-Trade Prevention on the Exchange via a Regulatory Information Bulletin. This Bulletin also would include the Market Maker trading interest to which Self-Trade Prevention initially would apply.[14]

2. Statutory Basis

As discussed above, the Exchange believes that the proposed rule change is designed to promote just and equitable principles of trade because it would provide Market Makers with a functionality to manage their trading interest that is similar to functionalities currently available on other markets.[15] Additionally, the Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices, to remove impediments to, and perfect the mechanisms of, a free and open market and a national market system and, in general, to protect investors and the public interest, because it would allow Market Makers to better manage their trading interest and provide a means to prevent executions against their own

[5] The Exchange would use a Market Maker's trading permit identification (''TPID'') to monitor for self-trades in the proposed Self-Trade Prevention functionality. TPIDs are assigned to Market Makers, as well as other OTP Firms and OTP Holders, to identify them in the Exchange's systems. Market Makers on the Exchange are not able to submit orders on an agency basis. Thus, a Market Maker within a firm that conducts both an agency and market making business would have a unique TPID that could only be used for that Market Maker's quotes and orders.

[6] Example 1 illustrates that Self-Trade Prevention would result in the cancellation of the Market Maker's resting order (or quote) to buy regardless of whether the incoming order (or quote) and the resting order (or quote) would actually execute against each other.

[7] Example 2 illustrates that Self-Trade Prevention would not result in the cancellation of the Market Maker's resting order (or quote) to buy with a price of $1.13 because the price of the resting order (or quote) to buy is lower than the price of the incoming order (or quote) to sell.

[8] Market Markers on the Exchange would not have the ability to deactivate Self-Trade Prevention or change any settings related to it.

[9] *See, e.g.,* NYSE Arca Options Rule 6.64.

[10] *See* NYSE Arca Options Rule 6.62(e), which defines Complex Order. *See also* NYSE Arca Options Rule 6.91, which describes electronic Complex Order trading.

[11] *See* Chapter VI, Section 10(6) of the NOM Rules.

[12] *See* CBOE Rule 6.53(c)(v).

[13] *See* NYSE Arca Equities Rule 7.31(qq). Similar to the Self-Trade Prevention functionality proposed in this filing, the NYSE Arca Equities Self Trade Prevention modifier is not in effect during auctions.

[14] *See supra* note 4. As mentioned above, the Exchange notes that any such announcements regarding Self-Trade Prevention would not be for the purpose of, or permit the Exchange to, expand the applicability of Self-Trade Prevention beyond Market Maker trading interest. Any such expansion would be the subject of a separate proposed rule change submitted by the Exchange to the Commission. The Exchange further notes that the Commission has previously permitted other option exchanges to communicate settings or eligibility for various exchange mechanisms to their members through exchange notices, bulletins or circulars. *See, e.g.,* Interpretation and Policy .05 to CBOE Rule 6.74A, which provides that any determinations made by CBOE regarding CBOE's Automated Improvement Mechanism, such as eligible classes, order size parameters and the minimum price increment for certain responses, shall be communicated in a Regulatory Circular. *See also* CBOE Rules 6.45A and 6.45B, which provide that CBOE will issue a Regulatory Circular to specify certain priority-related information, including specifying which priority rules will govern which classes of options any time the exchange changes the priority.

[15] *See supra* notes 11, 12 and 13.

trading interest. The Exchange notes that Market Makers have asked for this functionality to prevent them from inadvertently trading with their own interest. In such a situation, the firms ask the Exchange to nullify the trades, which they are permitted to do under the Exchange's rules because they are on both sides of the trades.[16] While the proposed Self-Trade Prevention functionality would prevent inadvertent self-trading, the Exchange notes that the functionality would also prevent intentional self-trading. In this regard, the proposed rule change provides a means to prevent manipulative conduct such as ''wash trading.''

Presently, the Exchange is proposing that Self-Trade Prevention be applicable only for Market Makers. The Exchange has made this decision because Market Makers are the most likely market participants to execute against their own trading interest. The Exchange may propose to expand the Self-Trade Prevention functionality to other OTP Holders and OTP Firms in the future, subject to being in a position to implement the functionality in a manner consistent with a firm's agency responsibilities to its customer orders. Accordingly, the Exchange believes that the proposed rule change is not designed to permit unfair discrimination.

For the reasons set forth above, the Exchange believes that the proposed rule change is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the ''Act''),[17] in general, and furthers the objectives of Section 6(b)(5) of the Act,[18] in particular.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

[16] Under Commentary .02 to NYSE Arca Options Rule 6.77, a ''trade may be nullified if all parties to the trade agree to the nullification,'' and when ''all parties to a trade have agreed to a trade nullification, one party must promptly notify the Exchange for dissemination of cancellation information to the Options Price Reporting Authority.''

[17] 15 U.S.C. 78f(b).

[18] 15 U.S.C. 78f(b)(5).

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not significantly affect the protection of investors or the public interest, does not impose any significant burden on competition, and, by its terms, does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act [19] and Rule 19b–4(f)(6) thereunder.[20]

The Exchange has requested that the Commission waive the 30-day operative delay. The Commission believes that waiver of the operative delay is consistent with the protection of investors and the public interest because the proposal will provide a tool for Exchange market makers to better manage their trading interest and provide a means to prevent manipulative conduct such as ''wash trading.'' Therefore, the Commission designates the proposal operative upon filing.[21]

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–NYSEArca-2012–08 on the subject line.

[19] 15 U.S.C. 78s(b)(3)(A).

[20] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, 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 the five-day prefiling requirement.

[21] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2012–08. 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 the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca-2012–08 and should be submitted on or before March 9, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[22]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–3739 Filed 2–16–12; 8:45 am]

BILLING CODE 8011–01–P

DEPARTMENT OF STATE

[Public Notice: 7802]

Department of State Performance Review Board Members

In accordance with section 4314(c)(4) of 5 United States Code, the Department of State has appointed the following individuals to the Department of State Performance Review Board for Senior

[22] 17 CFR 200.30–3(a)(12).

Executive Service members: Lois E. Quam, Chairperson, Executive Director for the Global Health Initiative, Office of the Secretary, Department of State; Frank A. Rose, Deputy Assistant Secretary, Bureau of Arms Control, Verification and Compliance, Department of State; Sharon L. Waxman, Senior Advisor, Office of the Under Secretary for Civilian Security, Democracy, and Human Rights, Department of State.

Dated: February 13, 2012.

Steven A. Browning,

Acting Director General of the Foreign Service and Director of Human Resources, Department of State.

[FR Doc. 2012–3788 Filed 2–16–12; 8:45 am]

BILLING CODE 4710–15–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Request for Petitions To Modify the Rules of Origin Under the Dominican Republic—Central America—United States Free Trade Agreement

AGENCY: Office of the United States Trade Representative.

ACTION: Notice of opportunity to file petitions requesting changes to the non-textile and non-apparel products rules of origin under the Dominican Republic—Central America—United States Free Trade Agreement (''the Agreement'' or ''CAFTA–DR'').

SUMMARY: This notice solicits proposals on appropriate changes that USTR should consider for modifying the CAFTA–DR's rules of origin under Article 4.14 of the Agreement.

DATES: Public comments are due at USTR by close of business, April 17, 2012.

ADDRESSES: Submissions via on-line: *http://www.regulations.gov*. For alternatives to on-line submissions please contact Kent Shigetomi at (202) 395–9459.

FOR FURTHER INFORMATION CONTACT: Kent Shigetomi, Director for Mexico, NAFTA, and the Caribbean, at (202) 395–9459.

SUPPLEMENTARY INFORMATION: On January 23, 2012, the CAFTA–DR Free Trade Commission (''FTC'' or ''the Commission''), the plurilateral ministerial-level body responsible for supervising the implementation of the CAFTA–DR, agreed to consider modifying the rules of origin established in the Agreement, particularly in light of more recent free trade agreements. The CAFTA–DR requires each government to provide preferential tariff treatment to goods that meet the Agreement's origin rules. In the United States, those rules are implemented through the Dominican Republic—Central America—United States Free Trade Agreement Implementation Act (Public Law 109–53, 119 Stat. 462) (19 U.S.C. 4011(a) (''the Act'')). Under the Act, goods imported into the United States qualify for preferential treatment if they meet the requirements of the general CAFTA–DR rules of origin set out in section 203 of the Act and the CAFTA–DR product-specific rules set out in the Harmonized Tariff System. The Agreement allows the Parties to amend the Agreement's origin rules as they deem appropriate. Section 203(o)(3) of the Act authorizes the President to proclaim modifications to the CAFTA–DR product-specific origin rules set forth in the HTS, subject to the consultation and layover provisions of section 104 of the Act.

Additional Information: The United States and the other CAFTA–DR Parties have not yet decided whether to make changes to the Agreement's rules of origin and, if such changes were made, what the scope or extent of such changes should be. The United States and the other CAFTA–DR Parties expect to take into account several factors in considering whether to make such changes, including: (1) The extent that any such changes may reduce transaction and manufacturing costs or increase trade among the Parties; (2) the feasibility of devising, implementing, and monitoring new rules of origin; and (3) the level and breadth of interest that manufacturers, processors, traders, and consumers in the Parties express for making particular changes. The Parties expect to make only those changes that are broadly supported by stakeholders in all countries.

Requirements for Comments/Proposals: Submitters should indicate whether they have discussed their proposals with representatives of the relevant sector in the other Parties and, if such discussions have taken place, the result of those discussions. Submissions should indicate if representatives of the relevant sector in the other Parties do not support the proposal. USTR encourages interested parties to consider submitting proposals jointly with interested parties in the other Parties.

Scope and Coverage of Proposals: USTR encourages interested parties to review the broadest appropriate range of items and to submit proposals that reflect a consensus reached after such a broad-based review. A single proposal can thus include requests covering multiple tariff headings. Proposals should cover entire 8-digit tariff subheadings, and may also be submitted at the 6, 4, or 2 digit level where the intent is to cover all subsidiary tariff lines.

Requirements for Submissions: Persons submitting written comments must do so in English and must identify (on the first page of the submission) ''CAFTA–DR Rules of Origin.'' In order to be assured of consideration, comments should be submitted by noon, [60 days after publication].

In order to ensure the timely receipt and consideration of comments, USTR strongly encourages commenters to make on-line submissions, using the *http://www.regulations.gov* Web site. Comments should be submitted under the following docket: USTR–2012–0002. To find the docket, enter the docket number in the ''Enter Keyword or ID'' window at the *http://www.regulations.gov* 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 ''Notices'' under ''Document Type'' on the search-results page, and click on the link entitled ''Submit a Comment.'' (For further information on using the www.regulations.gov Web site, please consult the resources provided on the Web site by clicking on the ''Help'' tab.)

The *http://www.regulations.gov* Web site provides the option of making submissions by filling in a comments field, or by attaching a document. USTR prefers submissions to be provided in an attached document. If a document is attached, it is sufficient to type ''See attached'' in the ''Type Comment'' and attach a file in the ''Upload File(s)'' field. USTR also prefers submissions in Microsoft Word (.doc) or Adobe Acrobat (.pdf). If the submission is in an application other than those two, please indicate the name of the application in the ''Comments'' field.

A person seeking to request that information contained in a submission from that person be treated as business confidential information must certify that such information is business confidential and would not customarily be released to the public by the submitter. For any comments submitted electronically containing business confidential information, the file name of the business confidential version should begin with the characters ''BC.'' 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.

Additionally, ''BUSINESS CONFIDENTIAL'' must be included in the ''Type Comment'' field. Filers of submissions containing business confidential information must also submit a public version of their comments indicating where confidential information has been redacted. The non-confidential summary will be placed in the docket and open to public inspection. The file name of the public version should begin with the character ''P.'' The ''BC'' and ''P'' should be followed by the name of the person or entity submitting the comments or reply comments. Filers submitting comments containing no business confidential information should name their file using the character ''P,'' followed by the name of the person or entity submitting the comments.

Please do not attach separate cover letters to electronic submissions; rather, include any information that might appear in a cover letter in the comments themselves. Similarly, to the extent possible, please include any exhibits, annexes, or other attachments in the same file as the submission itself, not as separate files.

USTR strongly urges submitters to file comments through *www.regulations.gov*, if at all possible. Any alternative arrangements must be made with Kent Shigetomi in advance of transmitting a comment. Mr. Shigetomi should be contacted at (202) 395–9459. General information concerning USTR is available at *http://www.ustr.gov*.

Inspection of Submissions: Submissions in response to this notice, except for information granted ''business confidential'' status, will be available for public viewing at *http://www.regulations.gov*. Such submissions may be viewed by entering the docket number USTR–2012–0002 in the search field at: *http://www.regulations.gov*.

John M. Melle,

Assistant U.S. Trade Representative for the Americas.

[FR Doc. 2012–3717 Filed 2–16–12; 8:45 am]

BILLING CODE 3190–W2–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

Reports, Forms, and Recordkeeping Requirements

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.), this notice announces that the Information Collection Request (ICR) abstracted regarding the passenger motor vehicle insurance companies and rental/leasing companies comply with 49 CFR Part 544, Insurer Reporting Requirement, has been forwarded to the Office of Management and Budget (OMB) for review and comment. The ICR describes the nature of the information collections and their expected burden. The **Federal Register** Notice with a 60-day comment period was published on November 25, 2011 (76 FR 72750). The agency received no comments.

DATES: Comments must be submitted on or before March 19, 2012.

ADDRESSES: Send comments, within 30 days, to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street NW., Washington, DC 20503, Attention NHTSA Desk Officer.

Comments are invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimate of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

A comment to OMB is most effective if OMB receives it within 30 days of publication.

FOR FURTHER INFORMATION CONTACT: Ms. Carlita Ballard at the National Highway Traffic Safety Administration, Office of International Policy, Fuel Economy and Consumer Programs (NVS–131), 1200 New Jersey Ave., SE., West Building, Room W43–439, NVS–131, Washington, DC 20590. Ms. Ballard's telephone number is (202) 366–0846. Please identify the relevant collection of information by referring to its OMB Control Number.

SUPPLEMENTARY INFORMATION:

National Highway Traffic Safety Administration

Title: 49 CFR part 544; Insurer Reporting Requirement.

OMB Control Number: 2127–0547.

Type of Request: Request for public comment on a previously approved collection of information.

Abstract: This information collection supports the Department's strategic goal of Economic Growth and Trade. The Motor Vehicle Theft Law Enforcement Act of 1984, added Title VI to the Motor Vehicle and Information Cost Savings Act (recodified as Chapter 331 of Title 49, United States Code) which mandated this information collection. The 1984 Theft Act was amended by the Anti Car Theft Act (ACTA) of 1992 (Pub. L. 102–519). NHTSA is authorized under 49 U.S.C. 33112, to collect this information. This information collection supports the agency's economic growth and trade goal through rulemaking implementation developed to help reduce the cost of vehicle ownership by reducing the cost of comprehensive insurance coverage. 49 U.S.C. 33112 requires certain passenger motor vehicle insurance companies and rental/leasing companies to provide information to NHTSA on comprehensive insurance premiums, theft and recoveries and actions taken to address motor vehicle theft.

Affected Public: Business or other for profit.

Estimated Total Annual Burden: Based on prior years' insurer compilation information, the agency estimates that the time to review and compile information for the reports will take approximately a total of 19,625 burden hours (17,500 man-hours for 25 insurance companies and 2,125 man-hours for 5 rental and leasing companies). Claim Adjusters incur separate burden hours from the number of insurers. Claim adjuster's duties are those of normal business practice and do not assist in preparing or compiling information for the reports. There has been a decrease in the number of companies required to report since the last reporting period, also, some companies have merged into one entity or have been exempted from the reporting requirements since the last reporting period. The agency has re-estimated the burden hours to be 19,625 total annual hours requested in lieu of 63,238 as the current OMB inventory. This is a decrease of 43,613 hours. Most recent year insurer compilation information estimates reveal that it takes an average cost of $47.00 per hour for clerical and technical staff to prepare the annual reports. Therefore, the agency estimates the total cost associated with the burden hours is $922,375.

The burden hour for rental and leasing companies is significantly less than that for insurance companies because rental and leasing companies comply with fewer reporting requirements than the insurance companies. The reporting burden is

based on insurers' salaries, clerical and technical expenses, and labor costs.

Comments are invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimate of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

A Comment to OMB is most effective if OMB receives it within 30 days of publication.

Issued on: February 13, 2012.

Christopher J. Bonanti,

Associate Administrator for Rulemaking.

[FR Doc. 2012–3760 Filed 2–16–12; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2012–0019; Notice 1]

Utilimaster Corporation, Receipt of Petition for Decision of Inconsequential Noncompliance

AGENCY: National Highway Traffic Safety Administration, DOT.

ACTION: Receipt of Petition.

SUMMARY: Utilimaster Corporation (Utilimaster) [1] has determined that certain model year 2009–2011 Utilimaster walk-in van-type trucks manufactured between September 1, 2009, and December 22, 2011, do not fully comply with paragraph S4.2.1 of Federal Motor Vehicle Safety Standard (FMVSS) No. 206, *Door Locks and Door Retention Components.* Utilimaster has filed an appropriate report dated December 30, 2011, pursuant to 49 CFR part 573, *Defect and Noncompliance Responsibility and Reports.*

Pursuant to 49 U.S.C. 30118(d) and 30120(h) (see implementing rule at 49 CFR part 556), Spartan Motors, Inc.,[2] on behalf of Utilimaster has submitted a petition for an exemption from the notification and remedy requirements of 49 U.S.C. Chapter 301 on the basis that this noncompliance is inconsequential to motor vehicle safety.

This notice of receipt of Utilimaster's petition is published under 49 U.S.C. 30118 and 30120 and does not represent any agency decision or other exercise of judgment concerning the merits of the petition.

Affected are approximately 9,861 model year 2009–2011 Utilimaster walk-in van-type trucks manufactured between September 1, 2009, and December 22, 2011.

NHTSA notes that the statutory provisions (49 U.S.C. 30118(d) and 30120(h)) that permit manufacturers to file petitions for a determination of inconsequentiality allow NHTSA to exempt manufacturers only from the duties found in sections 30118 and 30120, respectively, to notify owners, purchasers, and dealers of a defect or noncompliance and to remedy the defect or noncompliance. Therefore, these provisions only apply to the subject 9,861 [3] model year 2009–2011 trucks that Utilimaster no longer controlled at the time it determined that the noncompliance existed.

Utilimaster explains that the noncompliance is that while the sliding doors on the vehicles are equipped with a door latch system with a fully latched position, no door closure warning system, as required by paragraph S4.2.1 of FMVSS No. 206, is installed.

Paragraph S4.2.1 of FMVSS No. 206 requires in pertinent part:

S4.2 Sliding Side Doors.

S4.2.1 Latch System. Each sliding door system shall be equipped with either:

(a) At least one primary door latch system, or

(b) A door latch system with a fully latched position and a door closure warning system. The door closure warning system shall be located where it can be clearly seen by the driver. Upon certification a manufacturer may not thereafter alter the designation of a primary latch. Each manufacturer shall, upon request from the National Highway Traffic Safety Administration, provide information regarding such designation * * *

Summary of Utilimaster's Analysis and Arguments

The sliding door latch requirements contained in paragraph S4.2.1 of FMVSS No. 206 were adopted in February 2007 as part of a broader upgrade to the Agency's existing door latch and retention requirements. The standard defines ''Primary Door Latch'' as ''a latch equipped with both a fully latched position and a secondary latched position and is designated as a 'primary door latch' by the manufacturer.'' It defines ''Door Closure Warning System'' as ''a system that will activate a visual signal when a door latch system is not in its fully latched position and the vehicle ignition is activated.'' The effective date of these requirements was September 1, 2009. (The load test requirements of paragraph S4.2.2 of FMVSS No. 206 became effective September 1, 2010; the subject vehicles do comply with the load requirements.)

As set forth in Utilimaster's noncompliance report, Utilimaster determined that the new latch requirements applied to these vehicles, but were not designed into vehicles built after the effective date. (This omission was the result of Utilmaster's previous misinterpretation as to the applicability of the FMVSS No. 206 amendments to these particular vehicles.)

Specifically, the sliding doors on the subject vehicles are equipped with a door latch that does not meet the above-referenced definition of a ''primary door latch,'' because these vehicles lack a secondary latched position. Thus, these vehicles do not meet the paragraph S4.2.1(a) compliance option. Moreover, these vehicles are not equipped with a ''door closure warning system'' and, therefore, they do not meet the paragraph S4.2.1(b) compliance option. In any event, we believe that the omission of a door closure warning system on these vehicles is inconsequential to safety. This is due to the particular characteristics of the sliding doors on these vehicles, which will immediately provide adequate visual (and audible) feedback to the driver to alert him or her in the event a door is unlatched.

The door has approximately 0.315 inches of engagement into the door seal. Therefore, should the sliding door not be in the latched position, it would be readily apparent to the driver before the vehicle is driven.

Even if the driver did not notice the gap in the door prior to the vehicle being driven, these doors would provide immediate visual feedback to the driver as soon as the vehicle begins to move. The sliding doors, on these vehicles, are designed to slide longitudinally on a track when the sliding door handle is activated and a small force is applied in the same longitudinal direction. As a

[1] Utilimaster Corporation, a wholly owned subsidiary of Spartan Motors, Inc., is manufacturer of motor vehicles and is registered under the laws of Delaware.

[2] Spartan Motors, Inc., is a manufacturer of motor vehicles and is registered under the laws of the state of Michigan.

[3] Utilimaster's petition, which was filed under 49 CFR part 556, requests an agency decision to exempt Utilimaster as a vehicle manufacturer from the notification and recall responsibilities of 49 CFR part 573 for the 9,861 affected vehicles. However, a decision on this petition cannot relieve vehicle distributors and dealers of the prohibitions on the sale, offer for sale, introduction or delivery for introduction into interstate commerce of the noncompliant vehicles under their control after Utilimaster notified them that the subject noncompliance existed.

consequence, if the sliding door is not fully closed and latched and the driver is not aware, this fact would become immediately apparent to the driver when the vehicle is accelerated from rest, as the sliding door would glide rearward from the force created by the acceleration. Thus, while these vehicles may not meet the express requirements of paragraph S4.2.1 or the definition of a ''door closure warning system,'' Utilimaster believes they do meet the intent of these requirements. The use of other visual signals, such as a dash-mounted telltale, might be necessary for vehicles with rear sliding doors, such as minivans or other passenger vehicles, but the sliding doors on the subject vehicles are located in the front within plain view of the driver.

In adopting the upgraded sliding door standards in 2007, the Agency stated that it was particularly concerned with children riding in the rear seats of passenger vans (minivans or ''MPVs'').[4]

As noted above, these vehicles are used exclusively in commercial applications and are driven exclusively by professional drivers (primarily without a passenger). The commercial application of walk-in vans is highly repetitive in nature. To ensure safety and to maximize productivity, corporations have adopted highly regimented training programs for drivers in addition to requiring them to carry a commercial driver's license. The regimented training for the high majority of commercial applications requires that drivers enter and exit the vehicle from the curb side of the van. The repetitive use of the van results in highly repeatable results from one stop to the next. The likelihood that a driver would move the vehicle with the door left inadvertently open is very low. Moreover, the likelihood that the driver would be ejected from the driver's seat, through a curb-side door, left unintentionally unlatched, is even less probable. These drivers must adhere to corporate policies as they relate to operating the vehicle. For example, UPS has strictly enforced requirements for the drivers to always have the seatbelts fastened when the vehicle is in motion. Walk-In vans with sliding doors very similar in design to those on the subject vehicles have been in use for several decades. We are not aware of a driver or passenger ever having been ejected from, or fallen through an open sliding cab door, of our vehicles, while the vehicle was in motion.

The sliding doors on these vehicles meet all load test and inertial requirements of FMVSS No. 206, paragraph S4.2. Therefore, this noncompliance will not increase the risk of occupant ejection under conditions addressed by such requirements.

In summation, Utilimaster believes that the described noncompliance of its vehicles is inconsequential to motor vehicle safety, and that its petition, to exempt from providing recall notification of noncompliance as required by 49 U.S.C. 30118 and remedying the recall noncompliance as required by 49 U.S.C. 30120 should be granted.

Comments: Interested persons are invited to submit written data, views, and arguments on this petition. Comments must refer to the docket and notice number cited at the beginning of this notice and be submitted by any of the following methods:

a. By mail addressed to: U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.

b. By hand delivery to U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590. The Docket Section is open on weekdays from 10 a.m. to 5 p.m. except Federal holidays.

c. Electronically: By logging onto the Federal Docket Management System (FDMS) Web site at *http://www.regulations.gov/.* Follow the online instructions for submitting comments. Comments may also be faxed to 1–202–493–2251.

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.

Documents submitted to a docket may be viewed by anyone at the address and times given above. The documents may also be viewed on the Internet at *http://www.regulations.gov* by following the online instructions for accessing the dockets. DOT's complete Privacy Act Statement is available for review in the **Federal Register** published on April 11, 2000, (65 FR 19477–78).

The petition, supporting materials, and all comments received before the close of business on the closing date indicated below will be filed and will be considered. All comments and supporting materials received after the closing date will also be filed and will be considered to the extent possible. When the petition is granted or denied, notice of the decision will be published in the **Federal Register** pursuant to the authority indicated below.

DATES: *Comment Closing Date:* March 19, 2012.

Authority: (49 U.S.C. 30118, 30120: delegations of authority at CFR 1.50 and 501.8)

Issued on: February 13, 2012.

Claude H. Harris,

Director, Office of Vehicle Safety Compliance.

[FR Doc. 2012–3766 Filed 2–16–12; 8:45 am]

BILLING CODE 4910–59–P

[4] 72 FR 5387.

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

FEDERAL RESERVE SYSTEM

FEDERAL DEPOSIT INSURANCE CORPORATION

Agency Information Collection Activities: Submission for OMB Review; Joint Comment Request

AGENCY: Office of the Comptroller of the Currency (OCC), Treasury; Board of Governors of the Federal Reserve System (Board); and Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice of information collection to be submitted to OMB for review and approval under the Paperwork Reduction Act of 1995.

SUMMARY: In accordance with the requirements of the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. chapter 35), the OCC, the Board, and the FDIC (the ''agencies'') 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. On November 21, 2011, the agencies, under the auspices of the Federal Financial Institutions Examination Council (FFIEC), requested public comment for 60 days on a proposal to extend, with revision, the Consolidated Reports of Condition and Income (Call Report), which are currently approved collections of information. After considering the comments received on

the proposal, the FFIEC and the agencies will proceed with the reporting changes and instructional revisions that had been proposed to take effect March 31, 2012. The FFIEC and the agencies will also implement the two less detailed Call Report revisions that had been proposed for implementation as of June 30, 2012. As for the two new schedules that also had been proposed to be added to the Call Report beginning June 30, 2012,[1] the FFIEC and the agencies are continuing to evaluate these proposed schedules in light of the comments received. The FFIEC's and the agencies' decisions regarding these two proposed schedules will be the subject of a separate **Federal Register** notice and any resulting new reporting requirements will not take effect before the September 30, 2012, report date.

DATES: Comments must be submitted on or before March 19, 2012.

ADDRESSES: Interested parties are invited to submit written comments to any or all of the agencies on the revisions to the Call Report for March 31, 2012, and June 30, 2012, for which the agencies are requesting approval from OMB. All comments, which should refer to the OMB control number(s), will be shared among the agencies.

OCC: You should direct all written comments to: Communications Division, Office of the Comptroller of the Currency, Mailstop 2–3, Attention: 1557–0081, 250 E Street SW., Washington, DC 20219. In addition, comments may be sent by fax to (202) 874–5274, or by electronic mail to *regs.comments@occ.treas.gov*. You may personally inspect and photocopy comments at the OCC, 250 E Street, SW., Washington, DC 20219. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 874–4700. Upon arrival, visitors will be required to present valid government-issued photo identification and to submit to security screening in order to inspect and photocopy comments.

Board: You may submit comments, which should refer to ''Consolidated Reports of Condition and Income (FFIEC 031 and 041),'' by any of the following methods:

- *Agency Web Site: http://www.federalreserve.gov*. Follow the instructions for submitting comments at: *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm*.
- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Email: regs.comments@federalreserve.gov*. Include reporting form number in the subject line of the message.
- *Fax:* (202) 452–3819 or (202) 452–3102.
- *Mail:* Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW., Washington, DC 20551.

All public comments are available from the Board's Web site at *www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm* as submitted, unless modified for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper in Room MP–500 of the Board's Martin Building (20th and C Streets, NW.) between 9 a.m. and 5 p.m. on weekdays.

FDIC: You may submit comments, which should refer to ''Consolidated Reports of Condition and Income, 3064–0052,'' by any of the following methods:

- *Agency Web Site: http://www.fdic.gov/regulations/laws/federal/propose.html*. Follow the instructions for submitting comments on the FDIC Web site.
- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Email: comments@FDIC.gov*. Include ''Consolidated Reports of Condition and Income, 3064–0052'' in the subject line of the message.
- *Mail:* Gary A. Kuiper, Counsel, Attn: Comments, Room F–1086, 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 550 17th Street Building (located on F Street) on business days between 7 a.m. and 5 p.m.

Public Inspection: All comments received will be posted without change to *http://www.fdic.gov/regulations/laws/federal/propose.html* including any personal information provided. Comments may be inspected at the FDIC Public Information Center, Room E–1002, 3501 Fairfax Drive, Arlington, VA 22226, between 9 a.m. and 5 p.m. on business days.

Additionally, commenters may send a copy of their comments to the OMB desk officer for the agencies, Shagufta Ahmed, by mail to the Office of Information and Regulatory Affairs, U.S. Office of Management and Budget, New Executive Office Building, Room 10235, 725 17th Street NW., Washington, DC 20503, or by fax to (202) 395–6974.

INFORMATION CONTACT: For further information about the revisions discussed in this notice, please contact any of the agency clearance officers whose names appear below. In addition, copies of the Call Report forms and instructions can be obtained at the FFIEC's Web site (*http://www.ffiec.gov/ffiec_report_forms.htm*).

OCC: Mary Gottlieb, OCC Clearance Officer, (202) 874–5090, Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency, 250 E Street SW., Washington, DC 20219.

Board: Cynthia Ayouch, Federal Reserve Board Clearance Officer, (202) 452–3829, Division of Research and Statistics, Board of Governors of the Federal Reserve System, 20th and C Streets NW., Washington, DC 20551. Telecommunications Device for the Deaf (TDD) users may call (202) 263–4869.

FDIC: Gary A. Kuiper, Counsel, (202) 898–3877, Legal Division, Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC 20429.

SUPPLEMENTARY INFORMATION: The agencies are proposing to revise and extend for three years the Call Report, which is currently an approved collection of information for each agency.

Report Title: Consolidated Reports of Condition and Income (Call Report).

Form Number: Call report: FFIEC 031 (for banks and savings associations with domestic and foreign offices) and FFIEC 041 (for banks and savings associations with domestic offices only).

Frequency of Response: Quarterly.

Affected Public: Insured banks and savings associations.

OCC

OMB Number 1557–0081.

Estimated Number of Respondents: 2,035 (1,399 national banks and 636 Federal savings associations).

Estimated Time per Response: National banks: 53.49 burden hours per quarter to file. Federal savings associations: 53.90 burden hours per quarter to file and 188 burden hours for the first year to convert systems and conduct training.

Estimated Total Annual Burden: National banks: 299,350 burden hours to file. Federal savings associations: 137,120 burden hours to file plus 119,568 burden hours for the first year to convert systems and conduct training. Total: 556,038 burden hours.

Board

OMB Number: 7100–0036.

Estimated Number of Respondents: 827 state member banks.

[1] Schedule RI–C, Disaggregated Data on the Allowance for Loan and Lease Losses, and Schedule RC–U, Loan Origination Activity (in Domestic Offices).

Estimated Time per Response: 55.52 burden hours per quarter to file.

Estimated Total Annual Burden: 183,660 burden hours.

FDIC

OMB Number: 3064–0052.

Estimated Number of Respondents: 4,630 (4,570 insured state nonmember banks and 60 state savings associations).

Estimated Time per Response: State nonmember banks: 40.49 burden hours per quarter to file. State savings associations: 40.69 burden hours per quarter to file and 188 burden hours for the first year to convert systems and conduct training.

Estimated Total Annual Burden: State nonmember banks: 740,157 burden hours to file. State savings associations: 9,766 burden hours to file plus 11,280 burden hours for the first year to convert systems and conduct training.

Total: 761,203 burden hours.

The estimated time per response for the quarterly filings of the Call Report is an average that varies by agency because of differences in the composition of the institutions under each agency's supervision (e.g., size distribution of institutions, types of activities in which they are engaged, and existence of foreign offices). The average reporting burden for the filing of the Call Report (excluding the estimated burden for the two new schedules that had been proposed for implementation in June 2012 but are not part of this submission to OMB because the FFIEC and the agencies are continuing to evaluate these proposed schedules) is estimated to range from 17 to 700 hours per quarter, depending on an individual institution's circumstances.[2]

As approved by OMB, savings associations will convert from filing the Thrift Financial Report (TFR) (formerly OMB Number: 1550–0023) to filing the Call Report effective as of the March 31, 2012, report date (unless an institution elects to begin filing the Call Report before that report date).[3] Thus, savings associations will incur an initial burden of converting systems and training staff to prepare and file the Call Report in place of the TFR. Accordingly, the burden estimates above in this notice for savings associations also include the time to convert to filing the Call Report, including implementing the necessary systems changes and training staff on Call Report preparation and filing, which is estimated to average 188 hours per savings association.

In general, larger savings associations and those with more complex operations would likely expend a greater number of hours, on average, than smaller savings associations and those with less complex operations. A savings association's use of service providers for the information and accounting support of key functions, such as credit processing, transaction processing, deposit and customer information, general ledger, and reporting should result in lower burden hours for converting to the Call Report. Savings associations with staff having experience in preparing and filing the Call Report should incur lower initial burden hours for converting to the Call Report from the TFR. For further information about the estimated initial burden hours for savings associations' conversion to the Call Report from the TFR, see 76 FR 39986, July 7, 2011.

Type of Review: Revision and extension of currently approved collections.

General Description of Reports

These information collections are mandatory: 12 U.S.C. 161 (for national banks), 12 U.S.C. 324 (for state member banks), 12 U.S.C. 1817 (for insured state nonmember commercial and savings banks), and 12 U.S.C. 1464 (for Federal and state savings associations). At present, except for selected data items, these information collections are not given confidential treatment.

Abstract

Institutions submit Call Report data to the agencies each quarter for the agencies' use in monitoring the condition, performance, and risk profile of individual institutions and the industry as a whole. Call Report data provide the most current statistical data available for evaluating institutions' corporate applications, for identifying areas of focus for both on-site and off-site examinations, and for monetary and other public policy purposes. The agencies use Call Report data in evaluating interstate merger and acquisition applications to determine, as required by law, whether the resulting institution would control more than ten percent of the total amount of deposits of insured depository institutions in the United States. Call Report data are also used to calculate institutions' deposit insurance and Financing Corporation assessments and national banks' and Federal savings associations' semiannual assessment fees.

Current Actions

On November 21, 2011, the agencies requested comment on a limited number of proposed revisions to the Call Report (76 FR 72035) for implementation in 2012 that are focused primarily on institutions with $1 billion or more in total assets. The new data items were proposed to be added to the Call Report as of the June 30, 2012, report date, except for two proposed revisions that would take effect March 31, 2012, in connection with the initial filing of Call Reports by savings associations. These proposed new data items are intended to provide data needed for reasons of safety and soundness or other public purposes and would assist the agencies in gaining a better understanding of institutions' lending activities and credit risk exposures. The agencies also proposed certain revisions to the Call Report instructions that would take effect March 31, 2012.

The Call Report changes in the agencies' November 2011 proposal, the first four of which were proposed for implementation in June 2012 and the final three of which were proposed for implementation in March 2012, included:

- A new Schedule RI–C, Disaggregated Data on the Allowance for Loan and Lease Losses, in which institutions with total assets of $1 billion or more would report a breakdown by key loan category of the end-of-period allowance for loan and lease losses (ALLL) disaggregated on the basis of impairment method and the end-of-period recorded investment in held-for-investment loans and leases related to each ALLL balance;
- A new Schedule RC–U, Loan Origination Activity (in Domestic Offices), in which institutions with total assets of $300 million or more would report, separately for several loan categories, the quarter-end amount of loans (in domestic offices) reported in Schedule RC–C, Loans and Lease Financing Receivables, that was originated during the quarter, and institutions with total assets of $1 billion or more would also report for these loan categories the portions of the quarter-end amount of loans originated during the quarter that were (a) originated under a newly established loan commitment and (b) not originated under a loan commitment;
- New Memorandum items in Schedule RC–N, Past Due and Nonaccrual Loans, Leases, and Other Assets, for the total outstanding balance and related carrying amount of purchased credit-impaired loans accounted for under Accounting

[2] This estimate does not include the burden associated with the implementation of proposed Schedules RI–C and RC–U.

[3] See 76 FR 39981, July 7, 2011, at *http://www.ffiec.gov/pdf/FFIEC_forms/FFIEC031_FFIEC041_20110707_ffr.pdf* and the Office of Thrift Supervision's CEO Letter #391 dated July 7, 2011, at *http://www.ots.treas.gov/_files/25391.pdf.*

Standards Codification (ASC) Subtopic 310–30 that are past due 30 through 89 days and still accruing, past due 90 days or more and still accruing, and in nonaccrual status;

• New items in Schedule RC–P, 1–4 Family Residential Mortgage Banking Activities, in which institutions with $1 billion or more in total assets and smaller institutions with significant mortgage banking activities would report the amount of representation and warranty reserves for 1–4 family residential mortgage loans sold (in domestic offices), with separate disclosure of reserves for representations and warranties made to U.S. government and government-sponsored agencies and to other parties;

• New items in Schedule RC–M, Memoranda, in which savings associations and certain state savings and cooperative banks would report on the test they use to determine their compliance with the Qualified Thrift Lender requirement and whether they have remained in compliance with this requirement.

• Revisions to two existing items in Schedule RC–R, Regulatory Capital, used in the calculation of the leverage ratio denominator to accommodate certain differences between the regulatory capital standards that apply to the leverage capital ratios of banks versus savings associations.

• Instructional revisions addressing the discontinued use of specific valuation allowances by savings associations when they begin to file the Call Report instead of the TFR beginning in March 2012; the reporting of the number of deposit accounts of $250,000 or less in Schedule RC–O, Other Data for Deposit Insurance and FICO Assessments, by institutions that have issued certain brokered deposits; and the accounting and reporting treatment for capital contributions in the form of cash or notes receivable.

Further details concerning the preceding proposed Call Report changes may be found in Sections II.A through II.G of the agencies' November 2011 **Federal Register** notice.[4]

The agencies collectively received comments on their November 2011 **Federal Register** notice from eight entities: four banking organizations, two bankers' associations, a commercial lending software company, and a news organization. One bankers' association offered the general statement that its ''members expressed no concerns with many of the agencies' proposed revisions.'' None of the commenters specifically addressed the reporting changes proposed for implementation as of March 31, 2012. All eight of the commenters addressed one or both of the two new schedules proposed to be added to the Call Report as of June 30, 2012: Schedule RI–C, Disaggregated Data on the Allowance for Loan and Lease Losses, and Schedule RC–U, Loan Origination Activity (in Domestic Offices). One bankers' association expressed support for the proposed new items for past due and nonaccrual purchased credit-impaired loans, which were also proposed to be added to the Call Report as of June 30, 2012, and recommended ''that the agencies adopt these proposed revisions without change.'' The news organization supported the proposed collection of data on representation and warranty reserves for 1–4 family residential mortgage loans beginning June 30, 2012. The agencies concur with this commenter's suggestion that the instructions for the new items for these reserves clarify that representations and warranties made to mortgage insurers of loans sold fall within the scope of these items.

In addition, the news organization recommended that the agencies consider significantly revising the information they collect on mortgage banking activities in Schedule RC–P by adding further detail in certain areas and deleting certain existing items. These recommendations go well beyond the agencies' current proposal to add new items for representation and warranty reserves to Schedule RC–P. The FFIEC and the agencies will consider the news organization's ideas in conjunction with their evaluation of other possible Call Report revisions that would be included in a future proposal.

After considering the comments the agencies received, the FFIEC and the agencies are proceeding with the revisions proposed for implementation as of the March 31, 2012, report date as well as the proposed new items for past due and nonaccrual purchased credit-impaired loans and representation and warranty reserves for 1–4 family residential mortgages effective as of the June 30, 2012, report date.[5] As for the new schedules for disaggregated ALLL data and selected loan origination data proposed for implementation as of June 30, 2012, the FFIEC and the agencies are continuing to evaluate these two proposed schedules in light of the comments received. When the FFIEC and the agencies have decided whether and how to proceed with these proposed new schedules, a separate **Federal Register** notice will be published and, if applicable, submissions by the agencies will be made to OMB. Because of the additional time necessary for the FFIEC and the agencies to determine the outcome of proposed new Call Report Schedules RI–C and RC–U and to allow sufficient lead time for affected institutions to prepare for any resulting new reporting requirements, the collection of disaggregated ALLL data and selected loan origination data would not take effect before the September 30, 2012, report date.

The list below summarizes each of the Call Report changes included in the agencies' November 2011 proposal along with its implementation status:

• Proposed new Schedule RI–C, Disaggregated Data on the Allowance for Loan and Lease Losses: Remains under review by the FFIEC and the agencies; not to be implemented before September 30, 2012;

• Proposed new Schedule RC–U, Loan Origination Activity (in Domestic Offices): Remains under review by the FFIEC and the agencies; not to be implemented before September 30, 2012;

• New Memorandum items in Schedule RC–N, Past Due and Nonaccrual Loans, Leases, and Other Assets: Implement June 30, 2012;

• New items in Schedule RC–P, 1–4 Family Residential Mortgage Banking Activities: Implement June 30, 2012;

• New items in Schedule RC–M, Memoranda: Implement March 31, 2012;

• Revisions to two existing items in Schedule RC–R, Regulatory Capital: Implement March 31, 2012;

• Instructional revisions addressing the discontinuation of certain valuation allowances by savings associations; the reporting of certain deposit accounts in Schedule RC–O; and the accounting and reporting treatment for certain capital

[4] See 76 FR 72038–72045, November 21, 2011.

[5] In December 2011, the agencies separately requested approval from OMB to add six new items of limited scope and applicability to Call Report Schedule RC–O, Other Data for Deposit Insurance and FICO Assessments that also would take effect June 30, 2012. These six new Call Report Schedule RC–O items are: (a) For large and highly complex institutions, Memorandum item 16, ''Portion of loans restructured in troubled debt restructurings that are in compliance with their modified terms and are guaranteed or insured by the U.S. government (including the FDIC)''; (b) For large and highly complex institutions that own another insured depository institution, Memorandum items 17.a through 17.d for the fully consolidated amounts of total deposit liabilities before exclusions, total allowable exclusions, unsecured other borrowings with a remaining maturity of one year or less, and estimated amount of uninsured deposits; and (c) For all institutions that own another insured depository institution, Memorandum item 9.a for the fully consolidated amount of reciprocal brokered deposits. See 76 FR 77315, December 12, 2011.

contributions: Implement March 31, 2012.

Consistent with longstanding practice, for the March 31, 2012, and June 30, 2012, report dates, as applicable, institutions may provide reasonable estimates for any new or revised Call Report item initially required to be reported as of that date for which the requested information is not readily available.

Request for Comment

Public comment is requested on all aspects of this joint notice. Comments are invited on:

(a) Whether the proposed revisions to the collections of information that are the subject of this notice are necessary for the proper performance of the agencies' functions, including whether the information has practical utility;

(b) The accuracy of the agencies' estimates of the burden of the information collections as they are proposed to be revised, including the validity of the methodology and assumptions used;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(d) Ways to minimize the burden of information collections 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.

Comments submitted in response to this joint notice will be shared among the agencies. All comments will become a matter of public record.

Dated: February 9, 2012.

Michele Meyer,

Assistant Director, Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency.

Board of Governors of the Federal Reserve System.

Robert deV. Frierson,

Deputy Secretary of the Board.

Dated at Washington, DC, this 10th day of February 2012.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2012–3735 Filed 2–16–12; 8:45 am]

BILLING CODE 4810–33–P; 6210–01–P; 6714–01–P

DEPARTMENT OF VETERANS AFFAIRS

Voluntary Service National Advisory Committee; Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under Public Law 92–463 (Federal Advisory Committee Act) that the annual meeting of the Department of Veterans Affairs Voluntary Service (VAVS) National Advisory Committee (NAC) will be held March 14–16, 2012, at the Charleston Marriott, 170 Lockwood Boulevard, Charleston, South Carolina. On March 14, the meeting will begin at 8 a.m. and end at 11:30 a.m. On March 15–16, the meeting will begin at 8:30 a.m. and end at 4:30 p.m. The meeting is open to the public.

The Committee, comprised of fifty-five national voluntary organizations, advises the Secretary, through the Under Secretary for Health, on the coordination and promotion of volunteer activities within VA facilities. The purposes of this meeting are to provide for Committee review of volunteer policies and procedures; to accommodate full and open communications between organization representatives and the Voluntary Service Office and field staff; to provide educational opportunities geared towards improving volunteer programs with special emphasis on methods to recruit, retain, place, motivate, and recognize volunteers; and to provide Committee recommendations.

The March 14 session will include a National Executive Committee Meeting; Health Fair; and VAVS Representative and Deputy Representative training. In the evening, the James H. Parke Memorial Scholarship recipient will be honored at the Parke Awards Dinner (requires prepayment).

The March 15 business session will include remarks from local officials; the Voluntary Service Report; Veterans Health Administration Update; and remarks by VA officials on the National Cemetery Administration, VA National Sports Programs and Special Events; and insight from a former chief of voluntary service who is now a facility director. Educational workshops will be held in the afternoon and focus on Veterans family advisor program, concierge service, skill-based volunteer managed therapeutic activities, and ICARE customer service.

On March 16, the morning business session will include subcommittee reports; remarks on women Veterans health care; a panel discussion on Veterans transportation; and an update from the Director of the Veterans Canteen Service. The educational workshops will be repeated in the afternoon. The meeting will conclude with a Closing Awards Dinner (requires prepayment) recognizing the recipients of the American Spirit Awards, VAVS Award for Excellence, and the NAC male and female Volunteer of the Year awards.

No time will be allocated at this meeting for receiving oral presentations from the public. However, the public may submit written statements for the Committee's review to Ms. Laura Balun, Designated Federal Officer, Voluntary Service Office (10B2A), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420, or by email at *Laura.Balun@va.gov*. Any member of the public wishing to attend the meeting or seeking additional information should contact Ms. Balun at (202) 461–7300.

By Direction of the Secretary.

Dated: February 13, 2012.

Vivian Drake,

Committee Management Officer.

[FR Doc. 2012–3729 Filed 2–16–12; 8:45 am]

BILLING CODE P

DEPARTMENT OF VETERANS AFFAIRS

Rehabilitation Research and Development Service Scientific Merit Review Board; Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under Public Law 92–463 (Federal Advisory Committee Act) that a meeting of the Rehabilitation Research and Development Service Scientific Merit Review Board will be held on March 6–8 and 13–14, 2012, at the Hyatt Regency Crystal City, 2799 Jefferson Davis Highway, Arlington, VA, from 8 a.m. to 5 p.m. each day. The following subcommittees of the Board will meet to evaluate merit review applications:

March 6—Aging and Neurodegenerative Disease.

March 6–7—Brain Injury: Traumatic Brain Injury (TBI) and Stroke; Musculoskeletal/Orthopedic Rehabilitation; Psychological Health and Social Reintegration; and Regenerative Medicine.

March 6–8—Rehabilitation Engineering and Prosthetics/Orthotics.

March 7—Career Development Award Program.

March 13—Spinal Cord Injury.

March 13–14—Brain Injury: TBI and Stroke; Career Development Award Program; Psychological Health and Social Reintegration; and Sensory Systems/Communication.

The purpose of the Board is to review rehabilitation research and development applications and advise the Director, Rehabilitation Research and Development Service, and the Chief Research and Development Officer on the scientific and technical merit, the mission relevance, and the protection of human and animal subjects.

A general session of each subcommittee meeting will be open to the public for approximately one hour at the start of each meeting to cover administrative matters and to discuss the general status of the program. The remaining portion of each subcommittee meeting will be closed to the public for the discussion, examination, reference to, and oral review of the research applications and critiques. No oral or written comments will be accepted from the public for either portion of the meetings.

During the closed potion of each meeting, discussion and recommendations will include qualifications of the personnel conducting the studies (the disclosure of which would constitute a clearly unwarranted invasion of personal privacy), as well as research information (the premature disclosure of which would likely compromise significantly the implementation of proposed agency action regarding such research projects). As provided by subsection 10(d) of Public Law 92–463, as amended by Public Law 94–409, closing the meeting is in accordance with 5 U.S.C. 552b(c)(6) and (9)(B).

Those who plan to attend the general session should contact Tiffany Asqueri, Designated Federal Officer, Rehabilitation Research and Development Service, at Department of Veterans Affairs (10P9R), 810 Vermont Avenue NW., Washington, DC 20420, or email at *tiffany.asqueri@va.gov.* For further information, please call Mrs. Asqueri at (202) 443–5757.

Dated: February 13, 2012.

By Direction of the Secretary.

Vivian Drake,

Committee Management Officer.

[FR Doc. 2012–3741 Filed 2–16–12; 8:45 am]

BILLING CODE P

FEDERAL REGISTER

Vol. 77 Friday,

No. 33 February 17, 2012

Part II

Commodity Futures Trading Commission

17 CFR Parts 4 and 23

Business Conduct Standards for Swap Dealers and Major Swap Participants With Counterparties; Final Rule

COMMODITY FUTURES TRADING COMMISSION

17 CFR Parts 4 and 23

RIN 3038–AD25

Business Conduct Standards for Swap Dealers and Major Swap Participants With Counterparties

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rules.

SUMMARY: The Commodity Futures Trading Commission (''Commission'' or ''CFTC'') is adopting final rules to implement Section 4s(h) of the Commodity Exchange Act (''CEA'') pursuant to Section 731 of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the ''Dodd-Frank Act''). These rules prescribe external business conduct standards for swap dealers and major swap participants.

DATES: *Effective Date:* These final rules will become effective on April 17, 2012.

Compliance Date: Swap dealers and major swap participants must comply with the rules in subpart H of part 23 on the later of 180 days after the effective date of these rules or the date on which swap dealers or major swap participants are required to apply for registration pursuant to Commission rule 3.10.

FOR FURTHER INFORMATION CONTACT: Phyllis J. Cela, Chief Counsel, Division of Enforcement; Katherine Scovin Driscoll, Senior Trial Attorney, Division of Enforcement; Theodore M. Kneller, Attorney Advisor, Division of Enforcement; Mary Q. Lutz, Attorney Advisor, Division of Enforcement; Barry McCarty, Attorney Advisor, Division of Enforcement; Michael Solinsky, Chief Trial Attorney, Division of Enforcement; Mark D. Higgins, Counsel, Office of General Counsel; and Peter Sanchez, Special Counsel, Division of Swap Dealer and Intermediary Oversight, Commodity Futures Trading Commission, 1155 21st Street NW., Washington, DC 20581. Telephone number: (202) 418–7642.

SUPPLEMENTARY INFORMATION: The Commission is adopting final rules §§ 23.400–402, 23.410, 23.430–434, 23.440, and 23.450–451 under Section 4s(h) of the CEA and § 4.6(a)(3) under Section 1a(12) of the CEA.

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I. Introduction

On July 21, 2010, President Obama signed the Dodd-Frank Act.[1] Title VII of the Dodd-Frank Act amended the CEA [2] to establish a comprehensive new regulatory framework for swaps.[3] The legislation was enacted 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 robust recordkeeping and real-time reporting regimes; and (4) enhancing the Commission's rulemaking and enforcement authorities with respect to, among others, all registered entities and intermediaries subject to the Commission's oversight.

On December 22, 2010, the Commission published in the **Federal Register** proposed subpart H of part 23 of the Commission's Regulations to implement new Section 4s(h) of the CEA pursuant to Section 731 of the Dodd-Frank Act (the ''proposed rules'' or ''proposing release'').[4] There was a 60-day period for the public to comment on the proposing release, which ended on February 22, 2011. On May 4, 2011, the Commission published in the **Federal Register** a notice to re-open the public comment period for an additional 30 days, which ended on June 3, 2011.[5] The Commission has determined to adopt the proposed rules with a few exceptions and with certain modifications, discussed below, to address the comments the Commission received. One rule that the Commission has determined not to adopt at this time is proposed § 155.7, which would have required Commission registrants to comply with swap execution standards.[6] Should the Commission determine to consider execution standards at a later date, it would re-propose such rules.

Section 731 of the Dodd-Frank Act amends the CEA by adding Section 4s(h).[7] Section 4s(h) provides the Commission with both mandatory and discretionary rulemaking authority to impose business conduct standards on swap dealers and major swap participants in their dealings with counterparties, including Special Entities.[8] The proposing release included rules mandated by Section 4s(h) as well as discretionary rules that the Commission determined were appropriate in the public interest, for the protection of investors and in furtherance of the purposes of the CEA.[9]

In compliance with Sections 712(a)(1) and 752(a) [10] of the Dodd-Frank Act, Commission staff consulted and coordinated with the Securities and Exchange Commission (''SEC''),[11] prudential regulators and foreign authorities. Commission staff also consulted informally with staff from the Department of Labor (''DOL'') and the Internal Revenue Service (''IRS'') with respect to certain Special Entity definitions and the intersection of their regulatory requirements with the Dodd-Frank Act business conduct standards provisions. This ongoing consultation and coordination effort is described more fully in Section II of this adopting release.

In addition, Commission staff consulted with foreign authorities, specifically European Commission and United Kingdom Financial Services Authority staff. Commission staff also considered the existing and ongoing work of the International Organization of Securities Commissions (''IOSCO''). Staff consultations with foreign authorities revealed similarities in the proposed rules and foreign regulatory requirements.[12]

The Commission received more than 120 written submissions on the proposing release from a range of commenters.[13] Commission staff also met with representatives from at least 33 of the commenters and other members of the public. Commenters included members of Congress, dealers, advisors, large asset managers, consumer advocacy groups and pension beneficiaries, end-users, trade or professional organizations and Special Entities such as State and municipal

[1] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010).

[2] 7 U.S.C. 1 *et seq.,* as amended by the Dodd-Frank Act. All references to the CEA are to the CEA as amended by the Dodd-Frank Act except where otherwise noted.

[3] Title VII of the Dodd-Frank Act also amended the federal securities laws to establish a similar comprehensive new regulatory framework for security-based swaps.

[4] Proposed Rules for Business Conduct Standards for Swap Dealers and Major Swap Participants With Counterparties, 75 FR 80638, Dec. 22, 2010 (''proposing release'').

[5] Reopening and Extension of Comment Periods for Rulemakings Implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act, 76 FR 25274, May 4, 2011 (''Extension of Comment Periods''). As reflected in the public comment file, the Commission continued to receive comments and meet with commenters after the comment period officially closed.

[6] Proposing release, 75 FR at 80648–49 and 80662.

[7] 7 U.S.C. 6s(h).

[8] Section 4s(h)(2)(C) defines Special Entity as: ''(i) A Federal Agency; (ii) a State, State agency, city, county, municipality, or other political subdivision of a State; (iii) an employee benefit plan, as defined in section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002); (iv) any governmental plan, as defined in section 3 of the Employee Retirement Income Security Act of 1974; or (v) any endowment, including an endowment that is an organization described in section 501(c)(3) of the Internal Revenue Code of 1986.''

[9] *See* Section 4s(h)(3)(D) (''Business conduct requirements adopted by the Commission shall establish such other standards and requirements as the Commission may determine are appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of [the CEA.]''); *see also* Sections 4s(h)(1)(D), 4s(h)(5)(B) and 4s(h)(6). The proposed and final rules are informed by existing requirements for market intermediaries under the CEA and Commission Regulations, the federal securities laws, self-regulatory organization (''SRO'') rules, prudential regulator standards for banks, industry ''best practices'' and requirements applicable under foreign regulatory regimes. *See* proposing release, 75 FR at 80639 for further discussion of the sources the Commission considered in drafting the proposing release.

[10] Section 712(a)(1) of the Dodd-Frank Act requires that the Commission consult with SEC and prudential regulators in promulgating rules pursuant to Section 4s(h). Section 752(a) of the Dodd-Frank Act states in part, that the Commission, SEC, and the prudential regulators ''shall consult and coordinate with foreign regulatory authorities on the establishment of consistent international standards with respect to the regulation (including fees) of swaps * * *.''

[11] *See* proposing release, 75 FR at 80640 for further discussion of the Commission's consultation and coordination with the SEC before issuing the proposing release.

[12] *See* proposing release, 75 FR at 80640 for further discussion of the Commission's consultation with foreign authorities. *See generally* European Union Markets in Financial Instruments Directive (''MiFID''), Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments; *see also* European Union Market Abuse Directive (''Market Abuse Directive''), Directive 2006/6/EC of the European Parliament and of the Council of 28 January 2003 on market abuse; Proposal for a Directive of the European Parliament and of the Council on markets in financial instruments repealing Directive 2004/39/EC, COM (2011) 656 final (Oct. 20, 2011) (''MiFID II Proposal'').

[13] Subsequent to the issuance of the proposing release, the Commission received written submissions from the public, available in the comment file on *www.cftc.gov,* including, but not limited to those listed in the table in Appendix 1 to this adopting release.

governmental entities, ERISA pension plan sponsors and administrators, government pension plan administrators and endowments. These comments and meetings were in addition to seven written submissions received by the Commission and at least 33 meetings held by Commission staff with commenters and other members of the public prior to the publication of the proposing release.[14] The proposed rules included a scope provision,[15] definitions,[16] general compliance provisions,[17] rules that would apply to dealings with all counterparties [18] and rules that would apply to dealings with Special Entities.[19] While the comments touched on all aspects of the proposing release, many of them concerned the proposed requirements for swap dealers and major swap participants in their dealings with Special Entities.

The Commission has reviewed and considered the comments and, in Sections III and IV below, has endeavored to address both the primary themes running throughout the comment letters and the significant points made by individual commenters. The final rules, like the statute and proposed rules, are principles based and generally follow the framework of the proposed rules.[20] The text has been clarified in a number of respects to take into account the comments received by the Commission and to harmonize with the SEC's and DOL's regulatory approaches. The Commission discusses each of the final rules in separate sections below, which address the changes from the proposed rules, if any, and the content of the final rules.[21] The discussions address comments concerning costs and benefits, as well as alternative approaches proposed by commenters. The Commission also provides guidance, where appropriate, to assist swap dealers and major swap participants in complying with their new duties. The Commission also states that it does not view the business conduct standards statutory provisions or rules in subpart H of part 23 to impose a fiduciary duty on a swap dealer or major swap participant with respect to any other party.

II. Regulatory Intersections

A. Securities and Exchange Commission Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants

In addition to CEA Section 4s(h), which was added by Section 731 of the Dodd-Frank Act, Section 764 of the Dodd-Frank Act added virtually identical business conduct standards provisions in Section 15F(h) of the Securities Exchange Act of 1934 (''Exchange Act'').[22] Section 15F(h) [23] of the Exchange Act provides the SEC with rulemaking authority to impose business conduct standards on security-based swap dealers (''SBS Dealers'') and major security-based swap participants (''Major SBS Participants'' and collectively ''SBS Entities'') in their dealings with counterparties, including Special Entities. Furthermore, Section 712(a)(1) of the Dodd-Frank Act requires that the Commission and SEC consult with one another in promulgating certain rules including business conduct standards.[24]

On July 18, 2011, the SEC published in the **Federal Register** proposed rules for Business Conduct Standards for SBS Entities (''SEC's proposed rules'').[25] The comment period for the SEC's proposed rules closed on August 29, 2011. Following publication of the SEC's proposed rules, commenters requested that the Commission work with the SEC to harmonize the rules for swap dealers, major swap participants, and SBS Entities.[26]

Commission staff worked closely with SEC staff in the development of the Commission's proposed rules,[27] the SEC's proposed rules, and these final rules. Additionally, the Commission and SEC staffs held thirteen joint external consultations on business conduct standards with interested parties following the publication of the SEC's proposed rules.[28] The Commission's objective was to establish consistent requirements for CFTC and SEC registrants to the extent practicable given the differences in existing regulatory regimes and approaches. At this time, the SEC's business conduct standards rules for SBS Entities remain at the proposal stage; however, the Commission believes it has appropriately harmonized its final rules with the SEC's proposed rules, to the extent practicable, and will continue to work with the SEC as it approaches finalization of the SEC's proposed rules.

B. Department of Labor ERISA Fiduciary Regulations

Special Entities defined in Section 4s(h)(2)(C) of the CEA include ''any employee benefit plan, as defined in Section 3'' [29] of the Employee Retirement Income Security Act of 1974 (''ERISA''). DOL is the federal agency responsible for administering and enforcing Title I of ERISA.[30]

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[14] Prior to the publication of the proposing release, the Commission received several written submissions from the public, available in the comment file on *www.cftc.gov,* including, but not limited to: American Benefits Council letter, dated Sept. 8, 2010; American Benefits Council and the Committee on the Investment of Employee Benefit Assets letter, dated Oct. 19, 2010; National Futures Association letter, dated Aug. 25, 2010 (''NFA Aug. 25, 2010 Letter''); New York City Bar Association letter, dated Nov. 29, 2010; Ropes & Gray letter, dated Sept. 2, 2010; Securities Industry and Financial Markets Association and International Swaps and Derivatives Association letter, dated Oct. 22, 2010 (''SIFMA/ISDA Oct. 22, 2010 Letter''); Swap Financial Group letter, dated Aug. 9, 2010; Swap Financial Group presentation entitled ''Briefing for SEC/CFTC Joint Working Group,'' dated Aug. 9, 2010; and Morgan Stanley letter, dated Dec. 3, 2010.

[15] *See* proposed § 23.400.

[16] *See* proposed § 23.401.

[17] *See* proposed § 23.402.

[18] *See* proposed §§ 23.410, 23.430, 23.431, 23.432, 23.433, and 23.434.

[19] *See* proposed §§ 23.440, 23.450 and 23.451.

[20] The requirements under Section 4s(h), generally, do not distinguish between swap dealers and major swap participants. However, the Commission has considered the nature of the business done by swap dealers and major swap participants and determined that certain of the final rules will not apply to major swap participants. In particular, major swap participants will not be subject to the institutional suitability, ''know your counterparty'' and scenario analysis requirements, or to a pay-to-play restriction. This is discussed further in the sections below addressing those rules.

[21] The Commission is not adopting a diligent supervision rule in this rulemaking, finding that such a rule would be duplicative of the proposed diligent supervision rule in a separate rulemaking. *See* Regulations Establishing and Governing the Duties of Swap Dealers and Major Swap Participants, 75 FR 71397, Nov. 23, 2010 (''Governing the Duties of Swap Dealers'') (proposed § 23.602 imposing additional diligent supervision requirements on swap dealers and major swap participants). The final rules also do not include a free standing prohibition against front running or trading ahead of counterparty transactions as proposed in § 23.410(c) because the Commission has determined that such trading, depending on the facts and circumstances, would violate the Commission's prohibitions against fraudulent, deceptive or manipulative practices, including Sections 4b, 4s(h)(4)(A) and 6(c)(1) of the Act and Regulations §§ 23.410 and 180.1.

[22] 15 U.S.C. 78a *et seq.* All references to the Exchange Act are to the Exchange Act as amended by the Dodd-Frank Act.

[23] 15 U.S.C. 78*o*–10(h).

[24] Section 712(a)(1) of the Dodd-Frank Act requires that the Commission consult with the SEC and prudential regulators in promulgating rules pursuant to Section 4s(h).

[25] SEC proposed rules, Business Conduct Standards for Security-Based Swap Dealers & Major Security-Based Swap Participants, 76 FR 42396, Jul. 18, 2011.

[26] *See, e.g.,* FIA/ISDA/SIFMA Sept. 14 Letter, at *passim;* CFA/AFR Aug. 29 Letter, at *passim.*

[27] *See* proposing release, 75 FR at 80640 (Commission staff and SEC staff jointly held numerous external consultations with stakeholders prior to publication of the proposed rules in the **Federal Register**).

[28] A list of Commission staff consultations in connection with this final rulemaking is posted on the Commission's Web site, *available at http://www.cftc.gov/.*

[29] 29 U.S.C. 1002.

[30] 29 U.S.C. 1001 *et seq.;* History of EBSA and ERISA, available at *http://www.dol.gov/ebsa/aboutebsa/history.html.*

On October 22, 2010, DOL published in the **Federal Register** proposed revisions (''DOL's proposed fiduciary rule'') to the regulatory definition of ''fiduciary'' under Section 3(21)(A)(ii) of ERISA.[31] Section 3(21)(A)(ii) states that a person is a fiduciary (''ERISA fiduciary'') to an employee benefit plan subject to Title I of ERISA (''ERISA plan'') ''to the extent it renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so.'' [32] In 1975, DOL issued a regulation that defines the circumstances under which a person renders ''investment advice'' to a plan within the meaning of Section 3(21)(A)(ii).[33] The regulation established a 5-part test that must be satisfied for a person to be treated as an ERISA fiduciary by reason of rendering investment advice.[34] DOL's proposed fiduciary rule would have revised the 5-part test and created a counterparty exception or ''limitation'' for a person acting in its capacity as a purchaser or seller.[35]

The Commission received numerous comments concerning the intersection between ERISA, DOL's proposed fiduciary rule, and existing fiduciary regulation with the business conduct standards under the CEA and the Commission's proposed rules.[36] Many commenters, including ERISA plan sponsors, swap dealers and institutional asset managers, stated that although many ERISA plans currently use swaps as part of their overall hedging or investment strategy, the statutory and regulatory intersections of ERISA and the CEA could prevent ERISA plans from participating in swap markets in the future.[37]

Commenters were primarily concerned that compliance with the business conduct standards under the CEA or the Commission's proposed rules would cause a swap dealer or major swap participant to be an ERISA fiduciary to an ERISA plan and subject to ERISA's prohibited transaction provisions.[38] Thus, if a swap dealer or major swap participant were to become an ERISA fiduciary to an ERISA plan, it would be prohibited from entering into a swap with that ERISA plan absent an exemption.[39] Commenters stated that the penalties for violating ERISA's prohibited transaction provisions are significant and would discourage swap dealers or major swap participants from dealing with ERISA plans.[40]

Prior to proposing the business conduct standards rules, the Commission received submissions from stakeholders concerning the interaction with ERISA, DOL's proposed fiduciary rule and current regulation regarding the definition of ERISA fiduciaries.[41] Thus, Commission and DOL staffs consulted on issues regarding Special Entity definitions that reference ERISA and the intersection of ERISA fiduciary status with the Dodd-Frank Act business conduct provisions.[42]

Informed by discussions between the Commission and DOL staffs, the Commission published its proposed business conduct standards rules. Many commenters, however, expressed ongoing concern that the proposed business conduct standards rules, if adopted in final form without clarification, could have unintended consequences for swap dealers and major swap participants dealing with ERISA plans. Commenters remained concerned that compliance with the business conduct standards could cause a swap dealer or major swap participant to be an ERISA fiduciary to an ERISA plan, which would trigger the prohibited transaction provisions of ERISA.[43] Specifically, commenters expressed concerns that the business conduct standards could: (1) Cause a swap dealer or major swap participant to become an ERISA fiduciary under current law; [44] (2) require a swap dealer or major swap participant to cause a third-party advisor to fail to meet DOL's Qualified Professional Asset Manager (''QPAM'') prohibited transaction class exemption; [45] (3) require a swap dealer or major swap participant to perform certain activities that could make it an ERISA fiduciary under DOL's proposed fiduciary rule, such as calculating and providing a daily mark that is the mid-market value of a swap or providing a scenario analysis of a swap; [46] (4) require a swap dealer or major swap participant to engage in advisor-like activities such as those required under proposed § 23.401(c)—Know your counterparty, proposed § 23.434—Institutional suitability, or proposed § 23.440—Swap dealers acting as advisors to Special Entities; [47] or (5) cause a swap dealer to fail to satisfy the counterparty exception or ''limitation''

[31] Definition of the Term ''Fiduciary,'' 75 FR 65263, Oct. 22, 2010 (''DOL's proposed fiduciary rule'').

[32] 29 U.S.C. 1002(21)(A)(ii).

[33] 29 CFR 2510.3–21(c); *see also* DOL's proposed fiduciary rule, 75 FR at 65264.

[34] *See id.,* at 65264. The 5-part test states in relevant part:

For advice to constitute ''investment advice,'' an adviser * * * must—(1) Render advice as to the value of securities or other property, or make recommendations as to the advisability of investing in, purchasing or selling securities or other property (2) On a regular basis (3) Pursuant to a mutual agreement, arrangement or understanding, with the plan or a plan fiduciary, that (4) The advice will serve as a primary basis for investment decisions with respect to plan assets, and that (5) The advice will be individualized based on the particular needs of the plan.

[35] DOL's proposed fiduciary rule provided that, unless the person has expressly represented that it is acting as a fiduciary, it will not be treated as one if it:

[C]an demonstrate that the recipient of the advice knows or, under the circumstances, reasonably should know, that the person is providing the advice or making the recommendation in its capacity as a purchaser or seller of a security or other property, or as an agent of, or appraiser for, such a purchaser or seller, whose interests are adverse to the interests of the plan or its participants or beneficiaries, and that the person is not undertaking to provide impartial investment advice.

DOL's proposed fiduciary rule, 29 CFR 2310.3–21(c)(2), 75 FR at 65277.

[36] *See, e.g.,* ERIC Feb. 22 Letter, at *passim;* SIFMA/ISDA Feb. 17 Letter, at 5; AMG–SIFMA Feb. 22 Letter, at 8; ABC/CIEBA Feb. 22 Letter, at 2–3.

[37] *See, e.g.,* ABC/CIEBA Feb. 22 Letter, at 2–3; SIFMA/ISDA Feb. 17 Letter, at 5; AMG–SIFMA Feb. 22 Letter, at 8.

[38] Section 406(b) of ERISA (29 U.S.C. 1106(b)) states that an ERISA fiduciary with respect to an ERISA plan shall not—(1) deal with the assets of the plan in his own interest or for his own account, (2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or (3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

[39] In addition to other statutory exemptions, Section 408(a) of ERISA (29 U.S.C. 1108(a)) gives DOL authority to grant administrative exemptions from prohibited transactions prescribed in Section 406 of ERISA.

[40] *See, e.g.,* AMG–SIFMA Feb. 22 Letter, at 8 (''This substantial penalty would serve as a serious disincentive for swap dealers and [major swap participants] from engaging in swap transactions with Special Entities subject to ERISA.''); SIFMA/ISDA Feb. 17 Letter, at 5–6 (''there is a serious risk that [swap dealers] will refuse to engage in swap transactions with an ERISA plan to avoid the risks of costly ERISA violations'').

[41] *See, e.g.,* SIFMA/ISDA Oct. 22, 2010 Letter, at 8 fn. 19 (A swap dealer ''should not be an advisor in circumstances where it is not a fiduciary under [DOL's proposed] standard.'').

[42] Proposing release, 75 FR at 80640 and 80650 fn. 101.

[43] *See, e.g.,* ABC/CIEBA Feb. 22 Letter, at *passim;* ERIC Feb. 22 Letter, at *passim.*

[44] SIFMA/ISDA Feb. 17 Letter, at 5; AMG–SIFMA Feb. 22 Letter, at 8; ABC/CIEBA Feb. 22 Letter, at 2–3.

[45] SIFMA/ISDA Feb. 17 Letter, at 5 fn. 13; AMG–SIFMA Feb. 22 Letter, at 6; ERIC Feb. 22 Letter, at 14; *see also* DOL Amendment to Prohibited Transaction Exemption (PTE) 84–14 for Plan Asset Transactions Determined by Independent Qualified Professional Asset Managers, 75 FR 38837, Jul. 6, 2010 (''DOL QPAM PTE 84–14'').

[46] *See, e.g.,* ABC/CIEBA Feb. 22 Letter, at 5–6; SIFMA/ISDA Feb. 17 Letter, at 32.

[47] *See, e.g.,* SIFMA/ISDA Feb. 17 Letter, at 5 fn. 13; AMG–SIFMA Feb. 22 Letter, at 6; ERIC Feb. 22 Letter, at 14.

provision in DOL's proposed fiduciary rule.[48]

Many commenters also requested that the Commission and DOL publicly coordinate the respective proposed rules to avoid swap dealers and major swap participants being deemed ERISA fiduciaries.[49] On April 28, 2011, DOL submitted a letter to the Chairman of the CFTC regarding its views on DOL's proposed fiduciary rule and potential intersections with the business conduct standards statutory provisions and the Commission's proposed rules.[50] The letter stated that DOL's proposed fiduciary rule ''is not broadly intended to impose ERISA fiduciary obligations on persons who are merely counterparties to plans in arm's length commercial transactions * * * [and] is not intended to upend these expectations by imposing ERISA fiduciary norms on parties who are on the opposite side of plans in such arm's length deals.'' [51] The letter concludes, ''[in DOL's] view, with careful attention to fairly straightforward drafting issues, we can ensure that the DOL regulation and the CFTC business conduct standards are appropriately harmonized.'' [52] Subsequently, the Commission received additional comments stating that, although supportive of DOL's statement of intent and analysis of DOL's proposed fiduciary rule, the letter did not resolve all of their concerns and was non-binding.[53]

On September 19, 2011, DOL announced that it would re-propose its rule on the definition of fiduciary and expected the new proposed rule to be issued in early 2012.[54] DOL also stated that it ''will continue to coordinate closely with the * * * Commission to ensure that this effort is harmonized with other ongoing rulemakings.'' [55] The Commission has continued to coordinate with DOL to ensure that the final business conduct standards rules are appropriately harmonized with ERISA and DOL regulations.[56] DOL has reviewed the Commission's final business conduct standards rules for swap dealers and major swap participants and provided the Commission with the following statement:

> The Department of Labor has reviewed these final business conduct standards and concluded that they do not require swap dealers or major swap participants to engage in activities that would make them fiduciaries under the Department of Labor's current five-part test defining fiduciary advice 29 CFR § 2510.3–21(c). In the Department's view, the CFTC's final business conduct standards neither conflict with the Department's existing regulations, nor compel swap dealers or major swap participants to engage in fiduciary conduct. Moreover, the Department states that it is fully committed to ensuring that any changes to the current ERISA fiduciary advice regulation are carefully harmonized with the final business conduct standards, as adopted by the CFTC and the SEC, so that there are no unintended consequences for swap dealers and major swap participants who comply with these business conduct standards.[57]

After considering the comments and DOL's statement, the Commission has determined that the final business conduct standards are appropriately harmonized with ERISA and DOL regulations. The Commission understands from DOL that compliance with the business conduct standards statutory provisions and Commission rules will not, by itself, cause a swap dealer or major swap participant to be an ERISA fiduciary to an ERISA plan. Furthermore, DOL stated its intention to continue to coordinate and appropriately harmonize with Commission rules when it re-proposes its rule on the definition of fiduciary. Thus, the Commission has determined that issues and concerns raised by commenters regarding ERISA requirements have been addressed appropriately.

C. Securities and Exchange Commission Municipal Advisor Registration

The amendments to the CEA in Section 731 of the Dodd-Frank Act also direct the Commission to adopt business conduct standards rules for swap dealers and major swap participants dealing with Special Entities, which include ''a State, State agency, city, county, municipality, or other political subdivision of a State'' (''State and municipal Special Entities'').[58] In addition, Section 975 of the Dodd-Frank Act amended Section 15B of the Exchange Act to provide for new regulatory oversight of ''municipal advisors,'' [59] that provide advice to a ''municipal entity'' [60] with respect to, among other things, municipal financial products, which include municipal derivatives. Municipal advisors are required to register with the SEC [61] and are subject to the rules of the Municipal Securities Rulemaking Board (''MSRB''), a self-regulatory organization (''SRO'').[62] On January 6, 2011, the SEC published in the **Federal Register** proposed rules for the Registration of Municipal Advisors (''SEC Proposed MA Rules'').[63]

The intersection of the business conduct standards provisions under Section 731 of the Dodd-Frank Act and the municipal advisor provisions under Section 975 raises two important issues. The first issue concerns the regulatory intersection of requirements for SEC-registered municipal advisors and Commission-registered commodity trading advisors (''CTA'') that may serve as qualified independent representatives to a Special Entity under Section 4s(h)(5) and proposed § 23.450. Section 4s(h)(5) of the CEA mandates the Commission to establish a duty for swap dealers or major swap participants that offer to or enter into a swap with a Special Entity to have a reasonable basis to believe that the Special Entity has a qualified independent representative.[64] Thus, an independent representative

[48] *See, e.g.,* SIFMA/ISDA Feb. 17 Letter, at 5–6, 19–21, 23–24, and 39; ABC/CIEBA Feb. 22 Letter, at *passim;* ERIC Feb. 22 Letter, at *passim.*

[49] AFSCME Feb. 22 Letter, at 4; BlackRock Feb. 22 Letter, at 2 and 5; AMG–SIFMA Feb. 22 Letter, at 9; ERIC Feb. 22 Letter, at 2 and 4; Sen. Kerry May 18 Letter, at 1; Sen. Harkin May 3 Letter, at 1–2; Rep. Bachus Mar. 15 Letter, at 2; Rep. Smith July 25 Letter, at 1–2; Sen. Johnson Oct. 4 Letter, at 2.

[50] DOL Apr. 28 Letter.

[51] DOL Apr. 28 Letter, at 1.

[52] DOL Apr. 28 Letter, at 3.

[53] *See, e.g.,* ABC/CIEBA June 3 Letter, at 3.

[54] Office of Public Affairs News Release, U.S. Dept. of Labor, *U.S. Labor Department's EBSA to re-propose rule on definition of a fiduciary* (Sept. 19, 2011).

[55] *Id.*

[56] Final § 23.440—Requirements for swap dealers acting as advisors to Special Entities and § 23.450—Requirements for swap dealers and major swap participants acting as counterparties to Special Entities address the issues raised by commenters. *See* Sections IV.B. and IV.C. of this adopting release for a discussion of final §§ 23.440 and 23.450.

[57] A copy of the statement is included as Appendix 2 of this adopting release.

[58] Section 4s(h)(2)(C)(ii) of the CEA (7 U.S.C. 6s(h)(2)(C)(ii)).

[59] The definition of ''municipal advisor'' means a person (who is not a municipal entity or an employee of a municipal entity) (i) that provides advice to or on behalf of a municipal entity with respect to municipal financial products (including municipal derivatives) or the issuance of municipal securities, including advice with respect to the structure, timing, terms, and other similar matters concerning such financial products or issues, or (ii) that undertakes a solicitation of a municipal entity. The definition includes financial advisors, third-party marketers, and swap advisors that engage in municipal advisory activities. 15 U.S.C. 78*o*–4(e)(4).

[60] Section 975 of the Dodd-Frank Act amended Section 15B(e)(8) of the Exchange Act to define the term ''municipal entity'' as any State, political subdivision of a State, or municipal corporate instrumentality of a State, including (A) any agency, authority, or municipal corporate instrumentality; (B) any plan, program, or pool of assets sponsored or established by the State, political subdivision, or municipal corporate instrumentality or any agency, authority, or instrumentality thereof, and (C) any other issuer of municipal securities. 15 U.S.C. 78*o*–4(e)(8).

[61] 15 U.S.C. 78*o*–4(a)(1).

[62] 15 U.S.C. 78*o*–4(b)(2).

[63] SEC Proposed Registration of Municipal Advisors, 76 FR 824, Jan. 6, 2011 (''SEC Proposed MA Rules'').

[64] Section 4s(h)(5) of the CEA (7 U.S.C. 6s(h)(5)).

under Section 4s(h)(5) that advises State and municipal Special Entities will be subject to registration with the Commission as a CTA,[65] except for those independent representatives who are employees of such entity or otherwise excluded or exempt under the CEA or Commission rules. Similarly, municipal advisors include financial advisors and swap advisors that engage in municipal advisory activities, including providing advice with respect to municipal derivatives, with municipal entities, which include all State and municipal Special Entities. Additionally, registered CTAs ''who are providing advice related to swaps'' are expressly excluded from the definition of ''municipal advisor.'' [66] Accordingly, a registered CTA would be subject to the Commission's regulatory requirements, but not those of the SEC or MSRB, even if such CTA registration were required solely for swap advice provided to a municipal entity.[67] Given these intersections, commenters requested that the Commission coordinate with the SEC to appropriately harmonize the regulatory regime for Commission-registered CTAs that advise municipalities with the regulatory regime for SEC-registered municipal advisors.[68]

A second issue raised by commenters concerns whether compliance with the proposed business conduct standards rules would cause a swap dealer or major swap participant dealing with a State or municipal Special Entity to be deemed to be a municipal advisor.[69] For example, some commenters asked whether a swap dealer that complies with Section 4s(h)(4)(B) and proposed § 23.440, which requires a swap dealer that ''acts as an advisor to a Special Entity'' to ''act in the best interests'' of the Special Entity, would trigger the municipal advisor definition. These commenters opposed such an outcome and requested that the Commission and SEC coordinate and harmonize the proposed rules.[70]

After considering the comments, the Commission has taken steps to ensure that the business conduct standards provisions are appropriately harmonized with the SEC and MSRB regulatory regime for municipal advisors. Commission staff has engaged in several consultations with the staffs of the SEC, MSRB, and the National Futures Association (''NFA'') regarding the regulatory regimes for municipal advisors and CTAs that provide advice to municipal entities with respect to swaps. The Commission is considering several options with respect to CTAs and municipal advisors, including proposing a CTA registration exemption for CTAs that are registered municipal advisors whose CTA activity is limited to swap advice to municipal entities. The Commission is also considering developing rules for CTAs that would be comparable to those adopted by the SEC and MSRB for municipal advisors. Such rules could be adopted by the Commission or, for CTAs that are members of NFA, by NFA. Commission staff continues to consult with SEC staff regarding municipal advisor registration requirements to address the treatment of swap dealers and major swap participants that comply with the Commission's business conducts standards rules. At this time, the rules for the registration of municipal advisors remain at the proposal stage. Therefore, the Commission believes it has appropriately harmonized these final rules and will continue to work with the SEC as it approaches finalization of the SEC's Proposed MA Rules.

D. Commodity Trading Advisor Status for Swap Dealers

The Commission noted in its proposed rules that swap dealers would likely be acting as CTAs when they make recommendations to their counterparties, and particularly recommendations that are tailored to the needs of their counterparty.[71] Classification as a CTA under the CEA subjects a person to various statutory and regulatory requirements including, among others, the anti-fraud provisions of Section 4*o* of the CEA and registration with the Commission.[72] In addition, a CTA, depending on the nature of the relationship, may also owe fiduciary duties to its clients under applicable case law.[73]

Commenters expressed concerns about the implications of swap dealers being treated as CTAs and urged the Commission to make clear that a swap dealer would not be a CTA solely by virtue of providing swap ''recommendations'' to counterparties. One of these commenters noted that a swap dealer operates in a principal-to-principal market and plays a different role than that of a typical CTA that provides advice to ''retail'' clients.[74] This commenter contended that a swap dealer should not be required to register as a CTA in addition to registering in its capacity as a swap dealer. A second commenter stated that by using the term ''advisor'' rather than ''commodity trading advisor'' in the relevant provisions of Section 4s(h)(4), Congress likely regarded the provisions of the CEA regulating CTAs as unrelated to those adopted under Section 4s(h)(4).[75] This commenter requested that the Commission specifically state that no requirement or combination of requirements under the proposed rules would cause a swap dealer, including a swap dealer that makes a recommendation to a Special Entity, to be treated as a CTA.[76]

A ''commodity trading advisor'' includes any person who, for compensation or profit, engages in the business of advising others, either directly or through publications, writings, or electronic media, as to the value of or the advisability of trading in any swap.[77] The CEA, however, excludes from the CTA definition banks, floor brokers, and futures commission merchants (''FCMs''), among others, whose advice is ''solely incidental to the conduct of their business or profession.'' Section 1a(12)(B)(vii) of the CEA also grants the Commission authority to exclude ''such other persons not within the intent of [the CTA definition] as the Commission may specify * * *''; however, such exclusion is limited to advice that is ''solely incidental to the conduct of their business or profession.'' The Commission has determined to provide a similar exclusion for swap dealers whose advice is solely incidental to their business as swap dealers. In determining that a swap dealer's recommendations to a counterparty regarding proposed swap

[65] Section 1a(12) of the CEA (7 U.S.C. 1a(12)) defines ''commodity trading advisor'' to be any person who for compensation or profit, engages in the business of advising others, either directly or through publications, writings, or electronic media, as to the value of or the advisability of trading in any swap, among other CEA jurisdictional products.

[66] The exclusion includes ''any commodity trading advisor registered under the Commodity Exchange Act or persons associated with a commodity trading advisor who are providing advice related to swaps.'' 15 U.S.C. 78*o*-4(e)(4)(C).

[67] To the extent that a registered CTA engages in any municipal advisory activities other than advice related to swaps, registration may still be required with the SEC. *See* SEC Proposed MA Rules, 76 FR at 833; *see also* proposed rule 17 CFR 15Ba1–1(d)(2)(iii), 76 FR at 882.

[68] *See, e.g.,* SFG Feb. 22 Letter, at 2 (''[t]here is a need for a single, harmonized regulatory scheme for credentialing and registering swap advisors''); GFOA Feb. 22 Letter, at 2.

[69] *See, e.g.,* SIFMA/ISDA Feb. 17 Letter, at 6, 19–21, 24, and 34–35; BDA Feb. 22 Letter, at 2.

[70] *See, e.g.,* SIFMA/ISDA Feb. 17 Letter, at 24 and 34 (the Commission and SEC should adopt a unified standard for recognizing when ''advice'' is being given).

[71] Proposing release, 75 FR at 80647–48.

[72] 7 U.S.C. 6m and 6*o*.

[73] *See Commodity Trend Serv., Inc.* v. *CFTC,* 233 F.3d 981, 990 (7th Cir. 2000).

[74] CEF Feb. 22 Letter, at 17.

[75] SIFMA/ISDA Feb. 17 Letter, at 32 fn. 75.

[76] *Id.,* at 34.

[77] Section 1a(12) of the CEA (7 U.S.C. 1a(12)).

transactions or trading strategies should be considered ''solely incidental'' to the conduct of its business, the Commission considered the definition of ''swap dealer.'' Section 1a(49) of the CEA defines the term ''swap dealer'' as a person who (1) holds itself out as a dealer in swaps; (2) makes a market in swaps; (3) regularly enters into swaps with counterparties as an ordinary course of business for its own account; or (4) engages in any activity causing the person to be commonly known in the trade as a dealer or market maker in swaps.[78]

Based on the types of activities that define a swap dealer's business, commenters' views and the statutory scheme under Section 4s(h), the Commission has determined that making swap related recommendations to counterparties is most appropriately considered ''solely incidental'' to the conduct of a swap dealer's business as a dealer or market maker in swaps, including customized swaps, and is not CTA business. Specifically, the Commission has determined that, when making recommendations to a counterparty with respect to an otherwise arm's length principal-to-principal swap transaction with a counterparty a swap dealer will be acting solely incidental to its business as a swap dealer as defined in the CEA and Commission rules. Thus, the Commission has determined to exercise its authority under Section 1a(12)(B)(vii) to add a new exclusion from the CTA definition applicable to swap dealers, including swap dealers that may be excluded or exempt from registration under the CEA or Commission rules, in existing § 4.6. Under new § 4.6(a)(3) a swap dealer is excluded from the definition of the term ''commodity trading advisor'' provided that its ''advisory activities'' are solely incidental to its business as a swap dealer.[79] ''Swap dealer'' is defined for purposes of the rule by reference to the definitions in Section 1a(49) of the CEA and § 1.3, and would include ''associated persons'' [80] acting on behalf of a swap dealer.

With respect to the scope of the ''solely incidental'' exclusion for swap dealers, the Commission is generally of the view that making recommendations to a counterparty would not cause a swap dealer to be a CTA.[81] The exclusion would cover customizing a swap for a counterparty in response to a counterparty's expressed interest or on the swap dealer's own initiative.[82] Also, preparing a term sheet for purposes of outlining proposed terms of a swap for negotiation or otherwise would be an activity solely incidental to a swap dealer's business.

There are advisory activities that the Commission would consider to be beyond the scope of the ''solely incidental'' exclusion, and depending on the facts and circumstances could cause a swap dealer to be a CTA within the statutory definition. For example, a swap dealer that has general discretion to trade the account of, or otherwise act for or on behalf of, a counterparty would be engaging in activity that is not solely incidental to the business of a swap dealer. Limited discretion related to the execution of a particular counterparty order, however, would not cause a swap dealer to be a CTA. Also, the exclusion would not apply if a swap dealer received separate compensation for, or otherwise profited primarily from, advice provided to a counterparty. Furthermore, a swap dealer that enters into an agreement with its counterparty to provide advisory services or a swap dealer that otherwise holds itself out to the public as a CTA would also not be within the ''solely incidental'' exclusion. These examples are not exhaustive. There may be other circumstances in which a swap dealer's activity would fall outside the available exclusion. A determination of whether activity is ''solely incidental'' would necessarily need to be viewed in context based on the particular facts and circumstances.

III. Final Rules for Swap Dealers and Major Swap Participants Dealing With Counterparties Generally

The final business conduct standards rules dealing with counterparty relationships are contained in subpart H of new part 23 of the Commission's Regulations.[83] This section of the adopting release discusses the following rules that apply to swap dealers' and, unless otherwise indicated, major swap participants' dealings with counterparties generally: § 23.400—Scope; § 23.401—Definitions; § 23.402—General provisions; § 23.410—Prohibition on fraud, manipulation and other abusive practices; § 23.430—Verification of counterparty eligibility; § 23.431—Disclosures of material information; § 23.432—Clearing disclosures; § 23.433—Communications-fair dealing; and § 23.434—Recommendations to counterparties-institutional suitability. A section-by-section description of the final rules follows.

A. Sections 23.400, 23.401 and 23.402—Scope, Definitions and General Provisions

1. Section 23.400—Scope

a. Proposed § 23.400—Scope

Proposed § 23.400 set forth the scope of subpart H of new part 23 of the Commission's Regulations, which stated that the rules contained in subpart H were not intended to limit or restrict the applicability of other provisions of the CEA, Commission rules and regulations, or any other applicable laws, rules and regulations.[84] Moreover, the proposed rule provided that subpart H would apply to swap dealers and major swap participants in connection with swap transactions, including swaps that are offered but not entered into.[85] Some of the proposed rules required compliance prior to entering into a swap, while others, such as the requirement to provide a daily mark, were to be in effect during the entire life of a swap.

b. Comments and Final § 23.400—Scope

The Commission received numerous comments regarding issues that relate to the general scope of the proposed business conduct standards, though not necessarily concerning the text of the proposed ''scope'' rule. One commenter requested that the Commission clarify that the business conduct standards rules would not apply to unexpired swaps executed prior to the effective

[78] Section 1a(49) of the CEA (7 U.S.C. 1a(49)).

[79] While swap dealers that make recommendations will be excluded from the CTA definition, they must comply with other applicable provisions (*i.e.,* § 23.434–Suitability and § 23.440–Requirements for swap dealers acting as advisors to Special Entities).

[80] ''Associated person of a swap dealer or major swap participant'' is a defined term in Section 1a(4) of the CEA (7 U.S.C. 1a(4)).

[81] *See* Section III.G. of this adopting release for a discussion of the term ''recommendation'' in connection with the institutional suitability rule in § 23.434.

[82] The ''solely incidental'' exclusion also would encompass providing information to a counterparty that is general transaction, financial, or market information, or swap terms in response to a request for quote.

[83] The ''solely incidental'' CTA exclusion for swap dealers is promulgated in part 4 of the Commission's Regulations.

[84] Proposing release, 75 FR at 80640.

[85] In the proposing release, the Commission commented that the external business conduct standards rules would be most applicable when swap dealers and major swap participants have a pre-trade relationship with their counterparty. Proposing release, 75 FR at 80641. The Commission noted that for swaps initiated on a designated contract market (''DCM'') or swap execution facility (''SEF'') where the swap dealer or major swap participant does not know the counterparty's identity prior to execution, the disclosure and due diligence obligations would not apply. *See* Section III.D.3. and fn. 338 of this adopting release for a discussion of final § 23.431–Disclosures of material information, which address the disclosure duties of swap dealers and major swap participants pursuant to Section 4s(h)(3)(B) with respect to bilateral swaps and swaps executed on a DCM or SEF.

date of the final rules.[86] Another commenter asked the Commission to clarify that certain business conduct standards rules impose duties for swap dealers and major swap participants that continue after the execution of a swap.[87] The Commission confirms that the business conduct standards will not apply to unexpired swaps executed before the effective date of this adopting release and will apply in accordance with the implementation schedule set forth in Section V.C. of this adopting release; however, the Commission will consider a material amendment to the terms of a swap to be a new swap and subject to subpart H of part 23 of the Commission's Regulations. For swaps that are subject to the business conduct standards rules, the Commission clarifies that certain rules by their terms impose ongoing duties on the swap dealer or major swap participant (*e.g.,* § 23.410(a)—Prohibitions on fraud, § 23.410(c)—Confidential treatment of counterparty information, and § 23.433—Communications—fair dealing); however, other rules by their terms do not impose ongoing duties on the swap dealer or major swap participant (*e.g.,* § 23.430—Verification of counterparty eligibility).[88]

Another concern raised by commenters was the meaning of the word ''offer'' in the context of negotiating a swap transaction because certain requirements are triggered when an offer occurs. Other commenters expressed views on the Commission's decision to use the authority granted by Congress to draft discretionary rules for swap transactions instead of solely drafting rules that are explicitly mandated by statute. There were comments suggesting that the discretionary rules should be delegated to an SRO.[89] Commenters also suggested that the rules should not apply to certain sophisticated counterparties or that counterparties be afforded the opportunity to opt in or opt out of these rules.[90] Some believed that swap dealers and major swap participants should be subject to different regulations.[91] Others were concerned about the extraterritorial reach of the Commission's Regulations.[92] Some commentators were concerned that violating the rules could be a basis for a private right of action under the CEA.[93] The Commission addresses these issues in the discussion below.

i. Meaning of ''Offer''

Certain of the business conduct standards duties under the rules are triggered at the time an ''offer'' is made.[94] Two commenters suggested that the rules should be modified to clarify when an ''offer'' occurs.[95] One of the commenters suggested that the Commission should define ''offer'' to mean when sufficient terms are offered that, if accepted, would create a binding agreement under contract law.[96] They believe that this is necessary because, unlike in securities or futures, the terms of the product are not preset but can be negotiated.

The Commission confirms that the term ''offer,'' as used in the business conduct standards rules in subpart H, has the same meaning as in contract law, such that, if accepted, the terms of the offer would form a binding contract.[97] The Commission notes, however, that not all of the rules are triggered when an offer is made. For example, the suitability duty is triggered when a swap dealer makes a ''recommendation.''[98] The final fair dealing rule[99] will apply to all communications by a swap dealer or major swap participant in connection with a swap, including communications made prior to an offer. Other final rules (*e.g.,* the anti-fraud and confidential treatment rules) will be triggered as indicated by their terms. In addition, the Commission expects that for practical purposes swap dealers and major swap participants will comply with certain of their business conduct standards duties through counterparty relationship documentation negotiated with their counterparties well before an ''offer'' or a ''recommendation'' is made.[100]

Swap dealers and major swap participants will be permitted to arrange with third parties, such as the counterparty's prime broker, a method of providing disclosures or verifying that a Special Entity has an independent representative to satisfy its obligations under the rules. But the swap dealer or major swap participant will remain responsible for compliance with the rules.

ii. Discretionary Rules

In the proposing release, the Commission noted that some of the requirements and duties in the proposed rules were mandated by specific provisions in the Dodd-Frank Act, while others were proposed under the Commission's discretionary authority.[101] Some commenters recommended that the final rules be limited to what is mandated by statute until the CFTC gains more familiarity with these markets as they develop.[102] Another commenter expressed a contrary view that Congress intended the Commission to use its discretionary authority because, if it did not, such authority would not have been granted.[103] A commenter suggested that the rules that are promulgated based on the Commission's discretionary authority, such as suitability and scenario analysis, should apply only to a subset of eligible contract participants (''ECPs'') that require additional

[86] SIFMA/ISDA Feb. 17 Letter, at 8.

[87] *See* CFA/AFR Aug. 29 Letter, at 11.

[88] Although certain rules do not impose an ongoing duty on a swap dealer or major swap participant with respect to the swap, a swap dealer or major swap participant would still be required to comply with the duty with respect to subsequent swaps offered or entered into with a counterparty.

[89] *See, e.g.* SIFMA/ISDA Feb. 17 Letter, at 3 and 25–26.

[90] *See, e.g.* SIFMA/ISDA Feb. 17 Letter, at 26; NACUBO Feb. 22 Letter, at 3–4; VRS Feb. 22 Letter, at 3–4; HOOPP Feb. 22 Letter, at 3; NFP Energy End Users, Ex Parte Communication, Jan. 19, 2011 (citing NFP Energy End Users Sept. 20, 2010 Letter, at 14–15).

[91] *See, e.g.,* AMG–SIFMA Jan. 18 Letter, at 2–3; MFA Feb. 22 Letter, at 1–4; CEF Feb. 22 Letter, at 5–6; BlackRock Apr. 12 Letter, at 1–5.

[92] *See, e.g.,* Societe Generale Feb. 18 Letter, at 8–13; Barclays Jan. 11 Letter, at 5–7; Bank of Tokyo May 6 Letter, at 5–6; Barclays Feb. 17 Letter, at *passim.*

[93] *See, e.g.,* VRS Feb. 22 Letter, at 3; ABC/CIEBA Feb. 22 Letter, at 9–10; SIFMA/ISDA Feb. 17 Letter, at 4, 5–6, 10, and 34–35; FHLBanks June 3 Letter, at 6 and 8; AMG–SIFMA Feb. 22 Letter, at 4–5 and 7–8; CEF Feb. 22 Letter, at 3–4 and 9–10; Exelon Feb. 22 Letter, at 3.

[94] *See, e.g.,* final § 23.430(a)—Verification of counterparty eligibility (''before offering to enter into * * * a swap with that counterparty''); final § 23.450(b)(1)—Requirements for swap dealers and major swap participants acting as counterparties to Special Entities (''Any swap dealer or major swap participant that offers to enter or enters into a swap with a Special Entity * * *'').

[95] *See* APPA/LPPC Feb. 22 Letter, at 4; SIFMA/ISDA Feb. 17 Letter, at 35–36.

[96] *See* SIFMA/ISDA Feb. 17 Letter, at 35 fn. 84.

[97] *See, e.g.,* Restatement (Second) of Contracts § 24 (1981) (''An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.''). In addition, as stated in § 23.400, nothing in these rules is intended to limit or restrict the applicability of other applicable laws, rules and regulations, including the federal securities laws.

[98] *See* Section III.G. of this adopting release for a discussion of § 23.434—Recommendations to Counterparties—Institutional Suitability.

[99] *See* Section III.F.3. of this adopting release for a discussion of final § 23.433.

[100] For example, the verification of counterparty eligibility, know your counterparty and the verification of a Special Entity's independent representative would be completed prior to any recommendation or offer. Other forms of documentation may suffice depending on the circumstances. For instance, if a counterparty requests a quote from a swap dealer with which it does not have relationship documentation, the counterparty could book the swap through its prime broker with which the swap dealer may have pre-negotiated documentation.

[101] *See* proposing release, 75 FR at 80639.

[102] *See* BlackRock Feb. 22 Letter, at 1–2; Encana Feb. 22 Letter, at 2.

[103] CFA/AFR Feb. 22 Letter, at 18.

protections.[104] Another commenter suggested that if the Commission does adopt the discretionary rules, it should implement any such additional proposals as SRO rules and allow sophisticated counterparties to opt out of the heightened protections that they may not need or want.[105]

One commenter stated that the Commission's approach in proposing discretionary rules that used industry best practices was reasonable because the proposals have already been endorsed by the industry as workable and achievable.[106] The commenter stated that the Commission should go further, however, because the industry's standards of conduct have been so poor that the industry's own suggestions may not go far enough.

The Commission has determined to adopt the rules proposed under the Commission's discretionary authority along with the mandatory rules, albeit with the changes and for the reasons discussed in the applicable sections of this adopting release that address each final rule. In exercising that discretion, the Commission has acted consistently with the intent of Congress as expressed in Section 4s(h)(3)(D) to establish business conduct standards that the Commission determines are appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the CEA.[107] Many of the discretionary rules adopted by the Commission are based generally on existing Commission and SRO rules for registrants and industry best practices, and extending them to swap dealers and, where appropriate, to major swap participants will promote regulatory consistency. As such, the discretionary rules reflect existing business conduct standards that are time-tested, appropriate for swap dealers and major swap participants, and are well within the Commission's broad discretionary rulemaking authority under Section 4s(h). As a result, the final rules strike an appropriate balance between protecting the public interest and providing a workable compliance framework for market participants. With regard to the comments that suggest the Commission should implement any discretionary rules as SRO rules, the Commission declines to take such an approach. The Commission has relied in the past on SROs to fulfill a number of important functions in the derivatives market, and it will continue to do so in the future. Moreover, the Commission will consider SRO guidance, where relevant and appropriate, in interpreting the Commission's final rules that are based on SRO rules.[108] If, in the future, it becomes beneficial to delegate certain functions regarding the business conduct standards to SROs, the Commission will do so at that time. Delegating all discretionary rules to the SROs now, however, is premature and not consistent with the regulatory scheme that was mandated by Congress.[109]

iii. Different Rules for Swap Dealers and Major Swap Participants

Some commenters recommended that there be different business conduct standards rules for swap dealers and major swap participants.[110] Another commenter stated that the rules concerning ''know your counterparty,'' treatment of confidential information, trading ahead and front running, the requirement to provide a daily mark, fair dealing, and the determination of counterparty suitability should not apply to major swap participants.[111] This commenter believed that major swap participants, however, should receive the benefits of those rules when acting as counterparties to swap dealers. They argued that major swap participants, regardless of their size, cannot be presumed to possess a level of market or product information equal to that of swap dealers and are less likely than swap dealers to be members of a swap execution facility (''SEF''), a designated contract market (''DCM'') or a derivatives clearing organization (''DCO''). The commenter believed that major swap participants are unlikely to have systems and personnel comparable to that of a swap dealer to allow them to model and value complex instruments.[112] As a result, they argued that major swap participants, when dealing with swap dealers, should be able to: (1) Elect where to clear trades; (2) receive risk disclosure, the required scenario analyses for complex high-risk bilateral swaps, information about incentives or compensation the dealer is getting, and any new product analysis that the swap dealer does for its risk management purposes; and (3) receive the protection from the suitability provision the same as any other counterparty would receive.

The statutory business conduct standards requirements, generally, do not distinguish between swap dealers and major swap participants. However, the Commission has considered the definitions of swap dealer and major swap participant, which are based on the nature of their swap related businesses, including marketing activities, and has determined, where appropriate, not to apply certain discretionary rules to major swap participants. The final rules for major swap participants do not include the suitability duty, pay-to-play, ''know your counterparty'' and scenario analysis provisions. Removing these requirements alleviates some of the regulatory burden on major swap participants without materially impacting the protections for counterparties envisioned by Congress. This is discussed further in the sections below that address these relevant rules.

With respect to one commenter's request that major swap participants be the beneficiaries of the business conduct standards rules,[113] Congress appears to have made a contrary determination as indicated, for example, in Section 4s(h)(3), which explicitly relieves swap dealers from the duty to provide disclosures to major swap participants. Following this approach in the statute, the Commission has determined not to require that swap dealers provide major swap participants with the same protections afforded to other counterparties. Nor is the Commission requiring swap dealers to allow major swap participants to opt in to receive certain protections, such as a daily mark, suitability or scenario analysis, that are afforded to counterparties generally. That would impose a burden on swap dealers that is not contemplated by the statutory scheme. Of course, major swap participants are free to negotiate with swap dealers for such protections on a contractual basis.

[104] CEF Feb. 22 Letter, at 4–5.

[105] SIFMA/ISDA Feb. 17 Letter, at 3 and 25–26.

[106] CFA/AFR Feb. 22 Letter, at 19.

[107] *See also* Sections 4s(h)(1)(D), 4s(h)(5)(B) and 4s(h)(6).

[108] For further discussions of SRO guidance *see* Section III.A.3.b. of this release at fn. 188 discussing final § 23.402(b) (know your counterparty), Section III.F.3. of this release at fn. 500 discussing final § 23.433 (communications-fair dealing), and Section III.G.3. of this release at fn. 542 discussing final § 23.434 (recommendations to counterparties—institutional suitability).

[109] The SEC has taken a consistent approach in its proposed business conduct standards rules. For example, the SEC's ''know your counterparty,'' suitability and fair communications rules are based on similar requirements under the rules of the Financial Industry Regulatory Authority (''FINRA''). *See* SEC's proposed rules, 76 FR at 42414 fn. 125, 42415 fn. 128, and 42418 fn. 151. *See also* FINRA Rule 2090 (know your customer), FINRA Rule 2111 (suitability), and NASD Rule 2210 (communications with the public).

[110] *See* AMG–SIFMA Jan. 18 Letter, at 2–3; MFA Feb. 22 Letter, at 1–4; CEF Feb. 22 Letter, at 5–6; BlackRock Apr. 12 Letter, at 1–5; BlackRock June 3 Medero and Prager Letter, at 4–5.

[111] MetLife Feb. 22 Letter, at 4–5, *contra* CFA/AFR Nov. 3 Letter, at 7.

[112] MetLife Feb. 22 Letter, at 4–5.

[113] *Id.*

iv. Opt In or Opt Out for Certain Classes of Counterparties

Some commenters suggested that the Commission should (1) provide an exemption from the external business conduct standards for swap dealers when they transact with certain sophisticated investors, which might include certain Special Entities, or (2) narrowly tailor the external business conduct standards to make them elective for the counterparty.[114] These commenters suggested that the Commission should set the threshold for parties that decide to opt out to include ''qualified institutional buyers'' as defined in Rule 144A [115] under the Securities Act of 1933 (''Securities Act'') [116] and corporations having assets under management of $100 million or more.

Another commenter suggested that the Special Entity provisions should not be applicable to certain not-for-profit electricity and natural gas providers because of their sophistication in dealing with swaps concerning such commodities.[117] One commenter believed that the business conduct standards rules should not apply to sophisticated Special Entities,[118] and another commenter suggested that they should not apply to non-ERISA pension plans.[119] According to these commenters, many of the protections in place for Special Entities will slow down the process for entering into swaps and make it more difficult for Special Entities to do business. Two other commenters believed that the rules will increase the price of swaps without any material benefit.[120] One of them suggested that the Commission instead should (1) provide an exemption from the external business conduct standards rules for swap dealers when transacting with certain sophisticated investors, which would include certain government plans such as the commenter, or (2) narrowly tailor the rules to make them elective for the counterparty.[121]

That is not the approach that Congress took in Section 4s(h) of the CEA. With a few exceptions not relevant here, the statute does not distinguish among counterparties or types of transactions.[122] Nevertheless, as discussed below in connection with the relevant rules, the Commission has determined to permit means of compliance with the final rules that should promote efficiency and reduce costs and, where appropriate, allow the parties to take into account the sophistication of the counterparty.[123] The final rules grant swap dealers and major swap participants, with approval of their counterparties, discretion in selecting a reliable, cost-effective means for providing required information, including using Web sites with password protection.[124] Additionally, the Commission adopted approaches for swap dealers and major swap participants dealing with Special Entities to streamline the process for complying with the Special Entity provisions without undermining the intent of Congress in enacting those provisions.

In addition, an opt in or opt out regime for counterparties could create incentives for swap dealers and major swap participants that would be inconsistent with congressional intent in enacting the business conduct standards. Rather than raising standards, pressure from swap dealers or major swap participants could discourage counterparties from electing to receive such protections and could effectively force counterparties to waive their rights or be shut out of many swaps transactions.[125] Moreover, the Commission generally frowns on attempts to get customers to waive protections under its rules.[126] As a result, the Commission declines to adopt such an opt in or opt out regime.

v. SEF Transactions

Some commenters stated that certain business conduct standards rules should not apply to SEF transactions where the swap dealer or major swap participant learns the identity of the counterparty only immediately prior to the execution of the swap such as in a request for quote (''RFQ'') system.[127] Another commenter opined that Section 4s(h)(7) is intended to exclude certain transactions from all of the requirements of the Commission's business conduct standards rules.[128] The commenter stated that, because the Commission only mentions the exemption with respect to verification of counterparty eligibility [129] and the requirements for swap dealers acting as counterparties to Special Entities,[130] the exclusion could be read as applying only to those rules. The commenter believed that the proper reading of Section 4s(h)(7) requires that all transactions initiated by a Special

[114] *See* VRS Feb. 22 Letter, at 4; SIFMA/ISDA Feb. 17 Letter, at 26; NACUBO Feb. 22 Letter, at 3–4.

[115] 17 CFR 230.144A.

[116] 15 U.S.C. 77a *et seq.* All references to the Securities Act are to the Securities Act, as amended by the Dodd-Frank Act.

[117] *See* NFP Energy End Users, Ex Parte Communication, Jan. 19, 2011 (citing NFP Energy End Users Sept. 20, 2010 Letter, at 14–15).

[118] VRS Feb. 22 Letter, at 3 (business conduct standards rules should not apply to sophisticated Special Entities).

[119] HOOPP Feb. 22 Letter, at 3 (business conduct standards rules should not apply to sophisticated non-ERISA plans such as HOOPP).

[120] VRS Feb. 22 Letter, at 3–4; EEI June 3 Letter, at 6.

[121] VRS Feb. 22 Letter, at 3–4.

[122] Section 4s(h) distinguishes among counterparties in the Special Entity provisions (Sections 4s(h)(4) and (5)), and among swaps transactions where the counterparty to the swap dealer or major swap participant is a swap dealer, major swap participant, or SBS Entity (Section 4s(h)(3)).

[123] For example, swap dealers will be able to rely on counterparty representations with respect to sophistication, among other things, to tailor their compliance with the suitability rule—§ 23.434. To promote efficiency and lower costs, the rules allow swap dealers and major swap participants to incorporate, as appropriate, material information covered by the disclosure requirements in counterparty relationship documentation or other standardized formats to avoid having to make repetitious disclosures on a transaction-by-transaction basis.

[124] Section 23.402(e)—Manner of disclosure. The Commission notes, however, that the disclosure rules are principles based and set standards for required disclosures. The standards apply to each swap covered by the rules. Therefore, whether any particular disclosure or format (*e.g.,* custom tailored or standardized in counterparty relationship documentation) meets the standard in connection with any particular swap will depend on the facts and circumstances. Swap dealers and major swap participants will be responsible for complying with the disclosure standards for each swap.

[125] One commenter suggested that the Commission should impose a minimum comprehension requirement on counterparties. *See* Copping Jan. 12 Submission. The Commission declines to do so as it is beyond the scope of the business conduct standards rules, which govern swap dealer and major swap participant behavior and not counterparties. Moreover, Congress determined to limit swaps trading, except on a DCM, to ECPs, implicitly finding ECPs to be qualified to engage in such transactions. Nevertheless, the final rules follow the statutory scheme, which establishes a robust disclosure regime and Special Entity protections, among others. The Commission has determined to use its discretionary rulemaking authority to provide for suitability and scenario analysis, in particular. Taken together, the final rules materially enhance the ability of counterparties to assess the merits of entering into any particular swap transaction and reduce information asymmetries between swap dealers and major swap participants and their counterparties.

[126] *See, e.g., First American Discount Corp.* v. *CFTC,* 222 F. 3d 1008, 1016–17 (D.C. Cir. 2000) (the Commission contended that permitting introducing brokers to waive the required guarantee agreement with its FCM would undermine the protections provided by Commission Regulation § 1.10(j) (17 CFR 1.10(j))).

[127] *See* SIFMA/ISDA Feb. 17 Letter, at 7 (asserting that the Commission should clarify that the following proposed exceptions would be available to a swap dealer or major swap participant in an RFQ system where the counterparty's identity is known only immediately prior to the execution of the swap: § 23.430(c)—Verification of counterparty eligibility, § 23.431(b)—Disclosures of material information, § 23.450(g)—Acting as counterparties to Special Entities, and § 23.451(b)(2)(iii)—Pay-to-play prohibitions); State Street Feb. 22 Letter, at 2–3; SWIB Feb. 22 Letter, at 2.

[128] ABC/CIEBA June 3 Letter, at 6–7.

[129] *See* proposed § 23.430(c).

[130] *See* proposed § 23.450(g).

Entity on a SEF or DCM are excluded from the business conduct standards rules, not merely those that are initiated by a Special Entity where the identity of the counterparty is not known.[131] The commenter believed the two prongs are intended to be disjunctive and carve out from the business conduct standards rules (1) any transaction a Special Entity enters into on a SEF or DCM, or (2) all SEF or DCM transactions where the swap dealer or major swap participant does not know the identity of the counterparty.[132]

Based on the statutory language, the Commission's view is that Section 4s(h)(7) creates an exclusion that applies when two conditions are met: (1) When a transaction is initiated by a Special Entity on a DCM or SEF; and (2) the swap dealer or major swap participant does not know the identity of the counterparty to the transaction. Consistent with Section 4s(h)(7), the Commission has determined that certain of the business conduct standards rules will apply only where the swap dealer or major swap participant knows the identity of the counterparty prior to execution. These are the provisions for ''know your counterparty,'' true name and owner, verification of eligibility, disclosures, suitability, and the Special Entity rules.[133]

For uncleared swaps executed on a SEF, swap dealers and major swap participants have ongoing duties to counterparties the same as they would in uncleared non-SEF transactions. For example, the duties to provide a daily mark, engage in fair dealing, and maintain confidentiality of counterparty information will continue to apply.

For swaps where the identity of the counterparty is known just prior to execution on a SEF, the Commission has determined that the business conduct standards rules, including the disclosure duties, will apply. Section 4s(h)(7), which limits application of the Special Entity provisions of the business conduct standards in anonymous DCM and SEF transactions, informs the applicability of other business conduct standards that are also anonymous DCM or SEF transactions. It would be inconsistent with the statutory language and blur the line of when disclosures are required, for example, to exempt swaps from the business conduct standards duties where the identity of the counterparty is known just prior to execution on a SEF. Under the final rules, swap dealers and major swap participants will have to develop mechanisms for making disclosures in connection with such transactions on a SEF, which may include working with the SEF itself, to develop functionality to facilitate disclosures.[134]

vi. Extraterritoriality

A few commenters addressed the international reach of the proposed rules. Some commenters stated that the business conduct standards rules should apply only to swaps with a U.S. customer and a U.S. based salesperson.[135] For other swaps, the commenters stated the Commission should defer to foreign regulators [136] and exercise supervision through memoranda of understanding.[137] One commenter also recommended a new registration category for foreign dealers.[138]

The Commission expects to address extraterritorial issues under the Dodd-Frank Act in a separate release, which will include the issues raised by these commenters concerning the application of the business conduct standards rules to foreign customers and dealers.

vii. Private Rights of Action

Several commenters voiced concerns over the potential for litigation that could arise because of the business conduct standards rules.[139] They are concerned that litigation costs will increase as a result and be passed on to counterparties. Commenters noted that the proposed rules may indirectly subject swap dealers and major swap participants to private rights of action because of the statutory language in Section 4s(h).[140] While the Commission cannot exempt swap dealers and major swap participants from private rights of action under Section 22 of the CEA, and issues related to private rights of action are beyond the scope of this rulemaking, in this adopting release and in the rule text, the Commission has provided guidance to swap dealers and major swap participants for complying with the final rules. In addition, in the absence of fraud, the Commission will consider good faith compliance with policies and procedures reasonably designed to comply with the business conduct standards rules as a mitigating factor when exercising its prosecutorial discretion for violation of the rules.

viii. Inter-Affiliate Transactions

One commenter suggested that the Commission clarify that certain of the requirements applicable to swap transactions and swap dealing activities do not apply to transactions among affiliated entities because such inter-affiliate transactions do not implicate the concerns for systemic risk and market integrity that the Dodd-Frank Act is intended to address and there is very limited potential for fraudulent conduct.[141] Another commenter suggested that, with regard to banks, the Commission should provide relief from the business conduct standards with respect to transactions among bank group members when the transaction is with a group member that is a registered swap dealer or major swap participant.[142]

The Commission confirms that swap dealers and major swap participants need not comply with the subpart H external business conduct standards rules for swaps entered into with their affiliates where the transactions would not be ''publicly reportable swap transactions.'' Under § 43.2, recently adopted in the real time reporting rulemaking, a publicly reportable swap transaction means, among other things, any executed swap that is an arm's length transaction between two parties that results in a corresponding change in the market risk position between the two parties.[143] The definition of a publicly reportable swap transaction provides, by way of example, that

[131] ABC/CIEBA June 3 Letter, at 6–7.

[132] *Id.*

[133] Swap market participants should be aware that the Commission's anti-evasion rule in § 23.402(a) requires swap dealers or major swap participants to have policies and procedures to prevent them from evading or facilitating an evasion of any provision of the Act or Commission Regulation. The Commission expects such policies and procedures to preclude routing pre-arranged trades through a SEF or DCM for the purpose of avoiding compliance with the business conduct standards rules. For example, where a swap dealer or major swap participant has a relationship with a counterparty and has discussed a transaction prior to ''anonymous'' execution on a SEF, the Commission will consider whether the transaction was structured to avoid compliance with the business conduct standards rules in determining whether to bring an action for failure to have or comply with written policies and procedures to prevent evasion under § 23.402(a).

[134] Providing required disclosures under § 23.431 through such mechanisms will not be considered evasion under § 23.402(a).

[135] *See, e.g.,* Societe Generale Feb. 18 Letter, at 8–13; Barclays Jan. 11 Letter, at 5; Bank of Tokyo May 6 Letter, at 5–6; Barclays Feb. 17 Letter, at 8–9.

[136] *See* Bank of Tokyo May 6 Letter, at 6.

[137] *See* Societe Generale Feb. 18 Letter, at 8.

[138] *Id.*

[139] *See* VRS Feb. 22 Letter, at 3; ABC/CIEBA Feb. 22 Letter, at 9–10; SIFMA/ISDA Feb. 17 Letter, at 4, 5–6, 10 and 34–35; FHLBanks June 3 Letter, at 6 and 8; AMG–SIFMA Feb. 22 Letter, at 4–5 and 7–8; CEF Feb. 22 Letter, at 3–4 and 9–10; Exelon Feb. 22 Letter, at 3.

[140] For example, Section 22 of the CEA provides a private right of action for any violation of the CEA, and Section 4s(h)(l) states that ''[e]ach registered swap dealer and major swap participant shall conform with such business conduct standards * * * as may be prescribed by the Commission by rule or regulation. * * *''

[141] Shell June 3 Letter, at 1.

[142] Bank of Tokyo May 3 Letter, at 4–5.

[143] Real Time Public Reporting, 77 FR 1182 at 1187, Jan. 9, 2012.

internal transactions to move risk between wholly-owned subsidiaries of the same parent, without having credit exposure to the other party would not require public dissemination because such swaps are not arm's-length transactions. Such transactions, however, are subject to the anti-evasion requirements of § 23.402(a) and the anti-fraud provisions in § 23.410.

2. Section 23.401—Definitions

a. Proposed § 23.401

Proposed § 23.401 contained definitions for several terms that are relevant to the Commission's proposed business conduct standards rules. These include the terms ''counterparty,'' ''major swap participant,'' ''Special Entity'' [144] and ''swap dealer.'' The term counterparty was defined to include prospective counterparties. The proposed definitions of ''swap dealer'' and ''major swap participant'' incorporated by reference the proposed definitions in the Commission's entity definitions rulemaking.[145] In addition, these terms included, as appropriate under this subpart, anyone acting for or on behalf of such persons, including associated persons as defined in Section 1a(4) of the CEA.

b. Comments

The Commission did not receive any comments regarding the proposed definitions of swap dealer or major swap participant.[146] One commenter stated that the Commission should revise the proposed definition of counterparty to exclude swap dealers and major swap participants.[147] The commenter asserted that the Commission should revise the definition of counterparty and clarify that none of the business conduct standards rules applies where swap dealers or major swap participants transact with another swap dealer or major swap participant.[148]

c. Final § 23.401

The Commission has determined to adopt the definitions of counterparty, swap dealer and major swap participant as proposed (renumbered as § 23.401(a)—Counterparty, § 23.401(b)—Major swap participant and § 23.401(d)—Swap dealer). The Commission declines to revise the definition of counterparty to exclude swap dealers and major swap participants. Certain rules by their terms, such as § 23.431—Disclosures of Material Information and § 23.434—Institutional Suitability, do not apply to transactions among swap dealers or major swap participants. However, the Commission has determined that it would be inappropriate and inconsistent with the statute to exclude such transactions from other rules, such as § 23.433–Communications—fair dealing.

3. Section 23.402—General Provisions [149]

a. Section 23.402(a)—Policies and Procedures To Ensure Compliance and Prevent Evasion

i. Proposed § 23.402(a)

Proposed § 23.402(a) required swap dealers and major swap participants to have policies and procedures reasonably designed to ensure compliance and prevent evasion of any provision of the CEA or any Commission Regulation, and to implement and monitor compliance with such policies and procedures as part of their supervision and risk requirements under subpart J of part 23.[150]

ii. Comments

One commenter directly addressed proposed § 23.402(a) and asserted that the rule would require a swap dealer or major swap participant to have a policy with respect to each statutory provision or regulation that potentially applies to a swap dealer or major swap participant.[151] According to the commenter, because many regulations only apply in limited circumstances, the scope of a swap dealer or major swap participant's policies and procedures should be limited to material provisions of the CEA and Commission Regulations.[152]

Another commenter, while not directly addressing proposed § 23.402(a), recommended that the Commission convert certain prescriptive requirements of the proposed rules and permit swap dealers and major swap participants to comply by establishing and enforcing policies and procedures.[153] Conversely, another commenter opposed an approach that would deem swap dealers or major swap participants to be in compliance with the business conduct standards for complying with policies and procedures.[154]

iii. Final § 23.402(a)

The Commission has considered the comments and has determined to adopt § 23.402(a) as proposed. The Commission clarifies, however, that a swap dealer or major swap participant may consider the nature of its particular business in developing its policies and procedures and tailor such policies and procedures accordingly.[155] A swap dealer or major swap participant, however, remains responsible for complying with all applicable provisions of the CEA and Commission

[144] *See* Section IV.A. of this adopting release for a discussion of the comment letters received and the Commission's determination regarding the definition of the term ''Special Entity.''

[145] *See* Further Definition of ''Swap Dealer,'' ''Security-Based Swap Dealer,'' Major Swap Participant,'' ''Major Security-Based Swap Participant,'' and ''Eligible Contract Participant,'' 75 FR 80174, Dec. 21, 2010.

[146] A commenter urged the Commission to refine the definition of ECP so that the discretionary rules would provide protections only for a subset of unsophisticated ECPs. Alternatively, this commenter asked the Commission to exempt swap dealers and major swap participants from compliance with the external business conduct standards when they face counterparties who are sophisticated enough to evaluate swap transactions without support from the swap dealer or major swap participant. CEF Feb. 22 Letter, at 4–5, *see also* Wells Fargo May 11 Letter, at *passim. See* Section III.A.1. of this adopting release for a discussion of § 23.400–Scope, including how the Commission addressed these issues.

[147] CEF Feb. 22 Letter, at 7–8.

[148] *Id.*

[149] The Commission proposed § 23.402(b)—Diligent supervision, but has determined not to adopt it as a final rule. *See* fn. 21. As a result, the paragraphs in final § 23.402 have been renumbered as reflected in the final rules.

[150] The Commission has proposed that swap dealers and major swap participants adopt policies and procedures regarding compliance with the CEA and Commission Regulations. *See, e.g.,* Governing the Duties of Swap Dealers, 75 FR 71397; Designation of a Chief Compliance Officer, Required Compliance Policies, and Annual Report of a Futures Commission Merchant, Swap Dealer, Major Swap Participant, 75 FR 70881, Nov. 19, 2010 (''CCO proposed rules''); Implementation of Conflict-of-Interest Standards by Swap Dealers and Major Swap Participants, 75 FR 71391, Nov. 23, 2010 (''Conflict-of-Interest Standards by Swap Dealers'').

[151] CEF Feb. 22 Letter, at 19 (Appendix A).

[152] *Id.*

[153] SIFMA/ISDA Feb. 17 Letter, at 11 (discussing proposed § 23.410(b)—Confidential Treatment of Counterparty Information); *see also* FIA/ISDA/SIFMA Aug. 26 Letter, at 17 (discussing the SEC's proposed institutional suitability requirements and supporting the implementation of the SEC's proposed ''know your counterparty'' rule through policies and procedures).

[154] CFA/AFR Aug. 29 Letter, at 12 (also noting, however, ''it is certainly appropriate for the [SEC] to require SBS Entities to establish, maintain, document and enforce policies and procedures reasonably designed to achieve compliance with business conduct rules'').

[155] As part of the materials submitted in an application for registration as a swap dealer or major swap participant, an applicant may submit its written policies and procedures to ''demonstrate, concurrently with or subsequent to the filing of their Form 7–R with the National Futures Association, compliance with regulations adopted by the Commission pursuant to section[] * * * 4s(h) * * * of the [CEA] * * *'' The Commission adopted final registration rules on the same day as these business conduct standards rules. *See also* proposed § 3.10(a)(1)(v)(A), Proposed Rules for Registration of Swap Dealers and Major Swap Participants, 75 FR 71379, Nov. 23, 2010.

Regulations, including subpart H of part 23.

A swap dealer or major swap participant will be expected to have policies and procedures reasonably designed both to ensure compliance and avoid evasion of the applicable requirements of the CEA and Commission Regulations, including subpart H of part 23. Good faith compliance with such policies and procedures will be considered by the Commission in exercising its prosecutorial discretion in connection with violations of the CEA and Commission Regulations. To be considered good faith compliance, the Commission will consider, among other things, whether the swap dealer or major swap participant made reasonable inquiry and took appropriate action where the swap dealer or major swap participant had information that would cause a reasonable person to believe that any person acting for or on behalf of the swap dealer, major swap participant or any counterparty was violating the CEA or the Commission's Regulations in connection with the swaps related business of the swap dealer or major swap participant.

b. Section 23.402(b)—Know Your Counterparty

i. Proposed § 23.402(c)

Among the Commission's proposed business conduct rules was a ''know your counterparty'' requirement.[156] Proposed § 23.402(c) (renumbered as final § 23.402(b)) required swap dealers and major swap participants to use reasonable due diligence to know and retain a record of the essential facts concerning each counterparty and the authority of any person acting for such counterparty, including facts necessary to: (1) Comply with applicable laws, regulations and rules; (2) effectively service the counterparty; (3) implement any special instructions from the counterparty; and (4) evaluate the previous swaps experience, financial wherewithal and flexibility, trading objectives and purposes of the counterparty.[157]

The Commission stated that, among other purposes, proposed § 23.402(c) would assist swap dealers and major swap participants in avoiding violations of Section 4c(a)(7) of the CEA, which makes it ''unlawful for any person to enter into a swap knowing, or acting in reckless disregard of the fact, that its counterparty will use the swap as part of a device, scheme, or artifice to defraud any third party.'' [158] In proposing § 23.402(c), the Commission noted that it was guided by NFA Compliance Rule 2–30, Customer Information and Risk Disclosure, which NFA has interpreted to impose ''know your customer'' duties and has been a key component of NFA's customer protection regime.[159]

ii. Comments

The Commission received several comments representing a diversity of views on proposed § 23.402(c). As a general matter, some commenters believed the ''know your counterparty'' rule should not be adopted because it was not mandated by the Dodd-Frank Act.[160] These commenters expressed concern about a number of specific issues as well.

One commenter stated that the application of proposed § 23.402(c) and certain other proposed rules to major swap participants in connection with their trading with swap dealers and other registered market intermediaries is inappropriate because they are customers of swap dealers or registered market intermediaries and should be treated as such rather than as dealers or quasi-dealers.[161]

Commenters stated that proposed § 23.402(c) seemed to transform swap dealers and major swap participants into ''service providers,'' which they contend is a departure from their actual status as counterparties.[162] In this regard, these commenters believed the Commission erred by misapplying principles of agency to arm's length, principal-to-principal relationships.[163] These commenters contend that, to the extent swap dealers and major swap participants are transacting with counterparties at arm's length, the Commission should clarify that the ''know your counterparty'' and corresponding recordkeeping requirements do not apply.[164] Similarly, these commenters expressed concern that requiring swap dealers and major swap participants to obtain financial information from their counterparties would be inconsistent with ordinary business practice and would place the counterparties at a severe negotiating and informational disadvantage to the swap dealer or major swap participant.[165]

Commenters opposed to proposed § 23.402(c) also took issue with the Commission's reference to NFA Compliance Rule 2–30 (Customer Information and Risk Disclosure).[166] In their view, the Commission's proposal to require a swap dealer or major swap participant to conduct an independent investigation in order to obtain information necessary to evaluate a counterparty's flexibility is unclear and a costly departure from NFA Compliance Rule 2–30 and FINRA Rule 2090 (Know Your Customer).[167] The commenters stated that the SRO rules are intended to protect retail customers and are ill-suited to a sophisticated institutional market.[168] By transforming an SRO rule into a Commission regulation, these commenters believed that the Commission's proposal exposes swap dealers and major swap participants to unnecessary and significant private litigation risk and associated costs.[169]

The concern regarding the proposal's potential to increase legal risk and transaction costs extended to those commenters who were generally supportive of the requirement in proposed § 23.402(c) that swap dealers and major swap participants use reasonable due diligence to know and retain a record of the essential facts concerning each counterparty.[170] As one commenter stated, ''if the derivatives markets are unduly constrained on account of increased legal risk, the intended benefits of the external business conduct rules will not be realized.'' [171]

Another commenter strongly supported proposed § 23.402(c) as an essential component of an effective business conduct standards rule regime and urged the Commission to strengthen the recordkeeping requirements associated with the proposed ''know your counterparty'' rule.[172] However, the commenter agreed with those generally opposed to the proposal on one point: That it may be appropriate to scale any ''know your counterparty'' requirements according to the nature of

[156] Proposing release, 75 FR at 80641.

[157] *Id.,* at 80657.

[158] *Id.,* at 80641; 7 U.S.C. 6c(a)(7).

[159] Proposing release, 75 FR at 80641 fn. 25 (citing NFA Interpretive Notice 9013—NFA Compliance Rule 2–30: Customer Information and Risk Disclosure (Staff, Nov. 30, 1990; revised Jul. 1, 2000)).

[160] *See, e.g.,* ABC/CIEBA Feb. 22 Letter, at 13–14; SIFMA/ISDA Feb. 17 Letter, at 8–9.

[161] MetLife Feb. 22 Letter, at 4–5.

[162] *See, e.g.,* ABC/CIEBA Feb. 22 Letter, at 14; SIFMA/ISDA Feb. 17 Letter, at 9; HOOPP Feb. 22 Letter, at 3; BlackRock June 3 Medero and Prager Letter, at 5.

[163] *See, e.g.,* SIFMA/ISDA Feb. 17 Letter, at 9.

[164] *See, e.g.,* MFA Feb. 22 Letter, at 5.

[165] *See, e.g.,* ABC/CIEBA Feb. 22 Letter, at 14; AMG–SIFMA Feb. 22 Letter, at 10.

[166] *See, e.g.,* SIFMA/ISDA Feb. 17 Letter, at 8; MFA Feb. 22 Letter, at 3.

[167] *Id.*

[168] *Id.*

[169] *Id.*

[170] *See, e.g.,* FHLBanks June 3 Letter, at 6.

[171] *Id.*

[172] CFA/AFR Feb. 22 Letter, at 6 and 19.

the relationship between the counterparties. Accordingly, the commenter agreed that, where a truly arm's length relationship exists, for example, it may be appropriate to limit the ''know your counterparty'' obligation to information necessary to comply with the law.[173]

In connection with the ''know your counterparty'' rule, commenters urged the Commission to harmonize its rules with those proposed by the SEC.[174] These commenters stated their belief that Congress sought to assure through Section 712(a) of the Dodd-Frank Act that the CFTC and SEC adopt comparable and consistent regulations.[175] These commenters also highlighted that, from a cost-benefit perspective, inconsistent or conflicting requirements would increase the costs to market participants of implementing the measures necessary to comply with the CEA.[176]

iii. Final § 23.402(b)

The Commission has determined to adopt proposed § 23.402(c) (renumbered as § 23.402(b)) with changes to reflect certain of the comments it received. In making this determination, the Commission concluded that final § 23.402(b) is fully authorized by the discretionary rulemaking authority vested in the Commission by Section 4s(h). In Section 4s(h), Congress granted the Commission broad discretionary authority to promulgate business conduct requirements, as appropriate in the public interest, for the protection of investors or otherwise in furtherance of the purposes of the CEA.[177] The Commission considers the rule to be an appropriate exercise of its discretionary authority because a ''know your counterparty'' requirement is an integral component of, and consistent with, sound principles of legal and regulatory compliance and operational and credit risk management.[178] Many of the entities that will be subject to this requirement should already have in place, as a matter of normal business practices, ''know your counterparty'' policies and procedures by way of their membership in an SRO [179] or, for banks, compliance with standards set forth by their prudential regulators.[180] Given this fact, the Commission believes the additional costs of complying with this requirement, if any, will be minimal.

Final § 23.402(b) seeks to harmonize the Commission's approach with the SEC's proposed rules.[181] As one commenter noted, the SEC's ''know your counterparty'' proposal benefited from the comments the Commission received on proposed § 23.402(c).[182] This same commenter highlighted the congressional mandate in Section 712(a) of the Dodd-Frank Act that the Commission and the SEC consult for the purposes of assuring regulatory consistency and comparability, to the extent possible. The Commission believes that the ''know your counterparty'' rule is an area where the Commission and the SEC can achieve consistency. At the same time, there will be some variation to account for the comments received on the Commission's proposal and the fact that the Commission regulates different products, participants, and markets.

The Commission agrees with comments calling for the exclusion of major swap participants from the ''know your counterparty'' requirements. In most cases, major swap participants will themselves be counterparties to or customers of swap dealers. By definition, their business will not be dealing in or making a market in swaps.[183] Accordingly, the Commission is deleting major swap participants from final § 23.402(b).

With respect to the requirement in proposed § 23.402(c) that the swap dealer evaluate the previous swap experience, financial wherewithal and flexibility, trading objectives and purposes of the counterparty, commenters expressed several objections. Rather than fostering counterparty protections, commenters asserted, this requirement could actually place counterparties at a negotiating and information disadvantage relative to swap dealers.[184] Further, commenters claimed that such protections are unnecessary when swap dealers and counterparties are dealing in arm's length transactions and are more appropriate when swap dealers make recommendations to counterparties.[185]

In light of the foregoing comments, the Commission believes that certain of the protections provided for in proposed § 23.402(c) are better addressed in connection with § 23.434—Recommendations to counterparties—institutional suitability.[186] Accordingly, the Commission is removing from final § 23.402(b) the requirements in proposed § 23.402(c) to ''effectively service the counterparty'' and ''implement any special instructions from the counterparty.'' Through these changes, the Commission clarifies that the final ''know your counterparty'' rule does not, by itself, create an ''advisor'' status or impose a fiduciary duty on a swap dealer.

The Commission believes comments opposing proposed § 23.402(c) on the basis that it transforms NFA Compliance Rule 2–30 (Customer Information and Risk Disclosure) from an SRO rule to a Commission regulation are misplaced. The Commission was guided by NFA Compliance Rule 2–30 as a model for the proposal, with modification where appropriate to achieve the Commission's policy objectives, including assisting swap dealers to avoid violations of Section 4c(a)(7) of the CEA.[187] The Commission believes that NFA Compliance Rule 2–30 and the precedent developed under it will serve as useful guidance to the Commission and the public in the application of the final rule.[188] However, as stated above, final § 23.402(b), which essentially codifies sound business practices,[189] is an important component of the Commission's overall business conduct standards framework. The Commission views NFA's and the Commission's ''know your counterparty'' requirements as complementary.

Given the changes from the proposal to final § 23.402(b), the Commission believes it has ameliorated much of the burden commenters attributed to compliance risk associated with the ''know your counterparty'' requirements. Based on the foregoing, the Commission is promulgating final § 23.402(b) with modification from the

[173] *Compare* CFA/AFR Feb. 22 Letter, at 19, *with* SIFMA/ISDA Feb. 17 Letter, at 8–9.

[174] *See, e.g.,* FIA/ISDA/SIFMA Sept. 14 Letter, at 2–3.

[175] *Id.,* at 2.

[176] *Id.*

[177] Section 4s(h)(3)(D); *see also* Sections 4s(h)(1)(D), 4s(h)(5)(B) and 4s(h)(6).

[178] *See* Derivatives Policy Group, ''Framework for Voluntary Oversight,'' at Section V.III.B. (Mar. 1995) (''DPG Framework'').

[179] *See, e.g.,* NFA Compliance Rule 2–30; *see also* FINRA Rule 2090.

[180] *See also* Trading & Capital-Markets Activities Manual, sections 2050.3, 2050.4, 2060.3, 2060.4, 3030.1, and 3030.3 (Bd. of Gov. Fed. Reserve Sys. Jan. 2009).

[181] SEC's proposed rules, 76 FR at 42414.

[182] *See* FIA/ISDA/SIFMA Aug. 26 Letter, at 3.

[183] The definition of ''major swap participant'' states that the term ''means any person who is not a swap dealer.'' Section 1a(33) of the CEA (7 U.S.C. 1a(33)).

[184] *See, e.g.,* ABC/CIEBA Feb. 22 Letter, at 14.

[185] *See, e.g.,* MFA Feb. 22 Letter, at 4.

[186] *See* Section III.G. of this adopting release for a discussion of § 23.434.

[187] Section 4c(a)(7) of the CEA makes it ''unlawful for any person to enter into a swap knowing, or acting in reckless disregard of the fact, that its counterparty will use the swap as part of a device, scheme or artifice to defraud any third party.'' *See also* discussion at fn. 158.

[188] *See, e.g.,* NFA Interpretive Notice 9004—NFA Compliance Rule 2–30: Customer Information and Risk Disclosure (Board of Directors, effective June 1, 1986; revised January 3, 2011).

[189] *See* DPG Framework, at Section V.III.B.

proposal to account for the specific comments received and to conform, where appropriate, to the SEC's proposed ''know your counterparty'' rule. Accordingly, final § 23.402(b) requires that each swap dealer shall implement policies and procedures reasonably designed to obtain and retain a record of the essential facts concerning each counterparty whose identity is known to the swap dealer that are necessary for conducting business with such counterparty.[190] For purposes of final § 23.402(b), the essential facts concerning a counterparty are: (1) Facts required to comply with applicable laws, regulations and rules; (2) facts required to implement the swap dealer's credit and operational risk management policies in connection with transactions entered into with such counterparty; and (3) information regarding the authority of any person acting for such counterparty.

In adopting this final rule, the Commission makes clear that recordkeeping, in accordance with final § 23.402(g), must be sufficient so as to enable the Commission to determine compliance with final § 23.402(b). Unlike the SEC proposed rule, the Commission has determined not to include the following as an essential fact in final § 23.402(b): ''If the counterparty is a Special Entity, such background information regarding the independent representative as the swap dealer reasonably deems appropriate.'' [191] This requirement is specifically addressed in Section 4s(h)(5) of the CEA as well as in the final rules that address the independent representative requirement.[192]

As with other business conduct standards rules, final § 23.402(b) does not allow counterparties to opt out. However, swap dealers will be able to reduce the costs of compliance by receiving written representations from their counterparties at the outset of the relationship rather than on a transaction-by-transaction basis, where appropriate, and in accordance with the requirements of final § 23.402(d)—Reasonable Reliance on Representations.

c. Section 23.402(c)—True Name and Owner

i. Proposed § 23.402(d)

Proposed § 23.402(d) (renumbered as final § 23.402(c)) required swap dealers and major swap participants to keep records that show the true name, address, and principal occupation or business of each counterparty, as well as the name and address of any other person guaranteeing the performance of such counterparty and any person exercising any control with respect to the positions of such counterparty.[193] This rule was proposed under the Commission's discretionary rulemaking authority in Section 4s(h).

ii. Comments

The Commission did not receive any comments regarding proposed § 23.402(d).

iii. Final § 23.402(c)

As stated in the proposing release, proposed § 23.402(d) was based on existing Commission Regulation § 1.37(a)(1),[194] which applies to FCMs, introducing brokers, and members of a DCM. The Commission has determined that it is in the public interest to hold swap dealers and major swap participants to this same standard. Further, the Commission has determined that the recordkeeping requirements under this rule will assist swap dealers and major swap participants in meeting their other duties pursuant to the business conduct standards in subpart H of part 23 (*e.g.,* the ''verification of counterparty eligibility'' requirement of final § 23.430). Accordingly, the Commission is adopting proposed § 23.402(d) (renumbered as § 23.402(c)).

d. Section 23.402(d)—Reasonable Reliance on Representations

i. Proposed § 23.402(e)

Proposed § 23.402(e) (renumbered as final § 23.402(d)) stated that swap dealers and major swap participants that seek to rely on counterparty representations to satisfy any of the business conduct standards rules must have a reasonable basis to believe that the representations are reliable under the circumstances.[195] In other words, proposed § 23.402(e) would have allowed swap dealers and major swap participants, as appropriate, to reasonably rely, absent red flags, on representations of counterparties to meet due diligence obligations. The counterparty's representations must have included information that was sufficiently detailed for the swap dealer or major swap participant to form a reasonable conclusion that the relevant requirement was satisfied.

ii. Comments

The Commission did not receive comments directly addressing proposed § 23.402(e). However, many commenters addressed the concept in proposed § 23.402(e) of reasonable reliance on representations in connection with the due diligence requirements under certain other proposed rules, such as proposed § 23.430—Verification of Counterparty Eligibility, proposed § 23.434—Recommendations to Counterparties—Institutional Suitability, and proposed § 23.450(d)—Requirements for Swap Dealers and Major Swap Participants Acting as Counterparties to Special Entities.[196] Commenters were particularly concerned with the language in these proposed rules that the representations be reliable ''taking into consideration the facts and circumstances of a particular relationship, assessed in the context of a particular transaction'' and that the representations be ''sufficiently detailed.'' [197] According to some commenters, the proposed rules that permitted reliance on representations, including proposed § 23.402(e), would require transaction-by-transaction diligence that would delay execution and increase costs for swap dealers, major swap participants and their counterparties.[198] Several commenters also asserted that a swap dealer or major swap participant should not have an affirmative duty to investigate the counterparty's representations.[199]

[190] Final § 23.402(b) will not apply to swaps that are executed on a SEF or DCM where the swap dealer does not know the identity of the counterparty to the transaction.

[191] SEC's proposed rules, 76 FR at 42414.

[192] *See* Section IV.C.3. of this adopting release for a discussion of final § 23.450.

[193] Proposing release, 75 FR at 80641.

[194] 17 CFR 1.37(a)(1).

[195] Proposing release, 75 FR at 80641.

[196] *See, e.g.,* ABA/ABC Feb. 22 Letter, at 2–3; ABC/CIEBA Feb. 22 Letter, at *passim;* AMG–SIFMA Feb. 22 Letter, at 9–11; APGA Feb. 22 Letter, at 2–3 and 6–7; APPA/LPPC Feb. 22 Letter, at 4; BlackRock Feb. 22 Letter, at 3; CalPERS Oct. 4 Letter, at 1; CEF Feb. 22 Letter, at 12, 16, 19–20, and 23; CFA/AFR Feb. 22 Letter, at 6, 8 and 13; Comm. Cap. Mkts. May 3 Letter, at 2; Davis & Harman Mar. 25 Letter, at 5–6; FHLBanks Feb. 22 Letter, at 4–5; Ropes & Gray Feb. 22 Letter, at 3–4; SIFMA/ISDA Feb. 17 Letter, at 12, 15–16, 27, 27 fn. 59, 35–36 and 36 fn. 85; SWIB Feb. 22 Letter, at 4–5; VRS Feb. 22 Letter, at 5. *See also* NFA Aug. 25, 2010 Letter, at 2.

[197] *See, e.g.,* SIFMA/ISDA Feb. 17 Letter, at 36; proposing release, 75 FR at 80660.

[198] *See, e.g.,* SIFMA/ISDA Feb. 17 Letter, at 35–36; ABC/CIEBA Feb. 22 Letter, at 9–10; BlackRock Feb. 22 Letter, at 3; *see also* SIFMA/ISDA Feb. 17 Letter, at 15–16 (discussing proposed § 23.430, Verification of Counterparty Eligibility, ''an SD/MSP must conduct affirmative diligence in order to determine whether it is reasonable to rely on provided representations. Such an approach effectively makes the relevant representation(s) superfluous.'').

[199] *See, e.g.,* SIFMA/ISDA Feb. 17 Letter, at 15–16 (''[swap dealers] should be permitted to * * * rely[] on a written representation by the counterparty * * * absent actual notice of countervailing facts (or facts that reasonably should have put the [swap dealer or major swap participant] on notice), which would trigger a

iii. Final § 23.402(d)

The Commission has considered the comments discussed above and, as a result, has determined to refine the language in proposed § 23.402(e) (renumbered as § 23.402(d)). The revised language permits a swap dealer or major swap participant to rely on the written representations of a counterparty to satisfy its due diligence requirements under subpart H of part 23. The Commission has determined, however, that a swap dealer or major swap participant cannot rely on a representation if the swap dealer or major swap participant has information that would cause a reasonable person to question the accuracy of the representation. In other words, a swap dealer or major swap participant cannot ignore red flags when relying on representations to satisfy its due diligence obligations.

The nature and specificity of the representations required under subpart H of part 23 vary depending on the specific rule. Therefore, the Commission has separately described in the discussion of the relevant provisions the content and level of detail a particular representation must have to satisfy the due diligence obligation of a particular rule.[200]

The Commission reaffirms that, if agreed to by the counterparty, counterparty representations may be contained in counterparty relationship documentation and may be deemed renewed with each subsequent offer or transaction. However, a swap dealer or major swap participant may only rely on representations in the counterparty relationship documentation if the counterparty agrees to timely update any material changes to the representations.[201] In addition, the Commission expects swap dealers and major swap participants to review the representations on a periodic basis to ensure that they remain appropriate for the intended purpose. The Commission believes that ''best practice'' would be at least an annual review in connection with the required annual compliance review by the chief compliance officer pursuant to proposed § 3.3.[202]

e. Section 23.402(e)—Manner of Disclosure

i. Proposed § 23.402(f)

Proposed § 23.402(f) (renumbered as final § 23.402(e)) provided flexibility to swap dealers and major swap participants by allowing them to provide information required by subpart H of part 23, including required disclosures, by any reliable means agreed to in writing by the counterparty.[203]

ii. Comments

One commenter suggested that the Commission establish minimum requirements defining ''reliable means'' within the rule.[204] In addition, the use of password protected web pages to satisfy the daily mark obligation was identified as a potential area of concern. The commenter recommended that permitted interfaces should provide counterparties with tools to initiate, track and close valuation disputes and the interfaces should be designed to prevent any unintentional or fraudulent addition, modification, or deletion of a valuation record.[205] Another commenter opposed permitting pre-transaction oral disclosures to satisfy a disclosure obligation, even where such disclosures are supplemented by post-transaction written documentation.[206]

iii. Final § 23.402(e)

The Commission is adopting proposed § 23.402(f) (renumbered as § 23.402(e)) with a change to account for disclosures for certain swaps initiated on a SEF or DCM. For such swaps, no written agreement by the counterparty regarding the manner of disclosure is necessary, but the manner of disclosure must be reliable. Otherwise, for swaps executed bilaterally and not on a SEF or DCM, the rule requires counterparties to agree, in writing, to the manner of disclosure.

In addition, the Commission is clarifying in this adopting release that oral disclosures are permitted if agreed to by the counterparty and the disclosures are confirmed in writing. To avoid confusion and misunderstanding among the parties, however, written disclosures are the preferred manner of disclosure. Written disclosures also facilitate diligent supervision and auditing of compliance with the disclosure duties and record retention rule.

In response to comments received prior to the publication of the proposing release, daily marks may be provided by password protected web pages.[207] This approach is consistent with industry suggestions and reflects cost of compliance concerns.[208] Regarding the concerns raised by the commenter,[209] the Commission's internal business conduct rules in new subpart J of part 23 of the Commission's Regulations [210] require swap dealers and major swap participants to have policies and procedures in place that ensure communications, including the daily mark, are reliable and timely.

Final § 23.402(e) provides flexibility to swap dealers and major swap participants to take advantage of technological innovations while accommodating industry practice and counterparty preferences. The Commission anticipates that technology will be adapted to expedite and reduce the costs associated with satisfying the disclosure requirements in the Commission's business conduct standards generally.

f. Section 23.402(f)—Disclosures in a Standard Format

i. Proposed § 23.402(g)

Proposed § 23.402(g) (renumbered as final § 23.402(f)) allowed swap dealers and major swap participants to use, where appropriate, standardized formats to make certain required disclosures of material information to their counterparties and to include such standardized disclosures in a master or

consequent duty to inquire further''); ABC/CIEBA Feb. 22 Letter, at 10–11 fn. 3 (asserting the Commission should adopt a standard used under Rule 144A of the federal securities laws, which would not impose a duty to inquire further ''unless circumstances existed giving reason to question the veracity of a certification''); AMG–SIFMA Feb. 22 Letter, at 10–11 (''A swap dealer or [major swap participant] should be able to rely on an investment adviser's representation unless the swap dealer or [major swap participant] has information to the contrary.''); Comm. Cap. Mkts. May 3 Letter, at 2 (''The dealer should be required to probe beyond that representation only if it has reason to believe that the Special Entity's representations with respect to its independent representative are inaccurate.''); BlackRock Feb. 22 Letter, at 3 (''The CFTC should specifically permit the [swap dealer] to rely, absent notice of facts that would require further inquiry * * *.'').

[200] *See* Sections III.A.3.b., III.C., III.G., IV.B., and IV.C. in this adopting release for a discussion of the following final rules, respectively: § 23.402(b)—Know your counterparty; § 23.430—Verification of counterparty eligibility; § 23.434—Institutional suitability; § 23.440—Requirements for swap dealers acting as advisors to Special Entities; and § 23.450—Requirements for swap dealers and major swap participants acting as counterparties to Special Entities.

[201] Such an agreement to update representations contained in counterparty relationship documentation is only with respect to subsequent (*i.e.,* new) swaps offered or entered into. The requirement to update representations is in the context of the execution of the subsequent swap. The Commission does not intend to require an ongoing duty to update representations except in connection with a new transaction.

[202] CCO proposed rules, 75 FR at 70887.

[203] Proposing release, 75 FR at 80642.

[204] Markit Feb. 22 Letter, at 3.

[205] *Id.*

[206] CFA/AFR Nov. 3 Letter, at 6.

[207] *See* proposing release, 75 FR at 80646 fn. 62.

[208] *Id.*

[209] Markit Feb. 22 Letter, at 3.

[210] *See* proposed §§ 3.3, 23.600, 23.602 and 23.606, Governing the Duties of Swap Dealers, 75 FR 71397.

other written agreement between the parties, if agreed to by the parties.[211]

ii. Comments

The Commission received letters from several commenters regarding proposed § 23.402(g).[212] Generally, the commenters endorsed the proposed rule, but raised a variety of concerns, including the scope, substance, timing, frequency and cost of the standardized disclosures. Regarding scope and substance, some commenters suggested that the Commission promote or develop standardized disclosures to ensure adequate and consistent information, which would streamline the disclosure process, foster legal certainty and reduce costs.[213] One commenter proposed, as an alternative to disclosing material information, limiting the required disclosure to the provision of robust market risk scenario analyses, defined in scope, in advance of all swaps.[214] Several commenters requested that the form of disclosure be specified by the Commission as it has done for futures trading under § 1.55.[215] One commenter suggested that DCOs prepare certain standardized disclosures for cleared swaps.[216]

Regarding the timing and frequency of standard form disclosures, virtually all commenters agreed that, for standardized swaps, disclosures by swap dealers and major swap participants to counterparties should be allowed on a relationship basis and not required on a transaction-by-transaction basis.[217] For non-standardized swaps, one commenter challenged the statement in the proposing release that ''the Commission believes that most bespoke transactions * * * will require some combination of standardized and particularized disclosures[ ]''[218] asserting that bespoke issues can be anticipated and included in standardized disclosures as part of counterparty relationship documentation or other written agreements.[219] A different commenter commended the Commission for recognizing that standardized disclosures alone would not be adequate to elucidate the risks in customized swaps.[220] Another commenter acknowledged that there are certain instances in which standardized disclosures may not provide adequate information and requested that the Commission clarify that counterparties may require additional disclosure from swap dealers and major swap participants.[221]

In addition, a commenter requested guidance regarding the required disclosures and customary non-reliance language in swap documents.[222] This commenter stated: ''It is anomalous to require swap dealers and major swap participants to make certain disclosures to their end-user counterparties pursuant to the proposed rule while those swap dealers and major swap participants continue to include non-reliance agreements in swap transaction documentation providing their end-user counterparties may not rely on disclosures.''[223] The commenter requested that the Commission clarify that any non-reliance provisions contained in swap transaction documentation must exclude any disclosure mandated by the Dodd-Frank Act and the rules promulgated thereunder.[224]

iii. Final § 23.402(f)

The Commission is adopting proposed § 23.402(g) (renumbered as § 23.402(f)) with a slight modification for clarity purposes. The language referencing ''a standard format, including in a master * * * agreement * * *'' was changed to ''counterparty relationship documentation.''

Regarding comments related to scope and substance and the request that the Commission develop a standardized disclosure form for swaps, the Commission has determined that a § 1.55[225] type disclosure form for swaps would be inconsistent with the requirements of Section 4s(h)(3). Because the types of swaps covered by the disclosure duties will not be limited to standardized products and will include negotiated, bilateral transactions, swap dealers and major swap participants are required to develop the disclosures appropriate to the transactions that they offer to and enter into with counterparties. Unlike standardized exchange traded futures and options, swaps can be bespoke instruments with a wide range of non-standardized economic features that materially influence cash flows, which do not lend themselves to a single form, futures-style risk disclosure statement developed by the Commission.[226]

In addition, commenters suggested that the Commission provide standardized disclosure to promote legal certainty. On the contrary, such a disclosure could increase uncertainty because it would necessarily have to be general enough to cover all conceivable swaps, to such an extent that the purpose of disclosure would not be served. Congress enacted this robust disclosure regime to reduce information asymmetry and give counterparties the material information to make an informed and reasoned decision before placing assets at risk. A Commission generated standard disclosure also runs the risk of offering a roadmap for evasion, or it would require constant updates to maintain pace with innovations that are engineered and may not be covered by the standard language.

To address legal certainty concerns, the Commission is clarifying in this adopting release that, in the absence of fraud, it will consider good faith compliance with policies and procedures reasonably designed to comply with the business conduct standards rules as a mitigating factor when exercising its prosecutorial discretion for violation of the rules.

The Commission expects that swap dealers and major swap participants will develop their own standard disclosures to meet certain aspects of the disclosure requirements, where appropriate, that will be tailored to the types of swaps that they offer and will be provided to counterparties in counterparty relationship documentation or through other reliable means. Such an approach will help to minimize costs without diminishing the quality of risk disclosures provided to

[211] Proposing release, 75 FR at 80642.

[212] *See* FHLBanks Feb. 22 Letter, at 3–4; ABC/CIEBA Feb. 22 Letter, at 13; ABC Aug. 29 Letter, at 2 and 10–11; CEF Feb. 22 Letter, at 13; BlackRock Feb. 22 Letter, at 6–7; APGA Feb. 22 Letter, at 3; ATA Feb. 22 Letter, at 3; State Street Feb. 22 Letter, at 3–4; SIFMA/ISDA Feb. 17 Letter, at 16–18; NY City Bar Feb. 22 Letter, at 2–3; CFA/AFR Feb. 22 Letter, at 8.

[213] *See, e.g.,* FHLBanks Feb. 22 Letter, at 3–4.

[214] NY City Bar Feb. 22 Letter, at 2–3.

[215] *See, e.g.,* APGA Feb. 22 Letter, at 3; ATA Feb. 22 Letter, at 3; State Street Feb. 22 Letter, at 3–4; CEF Feb. 22 Letter, at 13. In addition, the NY City Bar recommended standardized disclosures similar to those currently used for listed options rather than the federal securities law model, which is directed at retail investors and not sophisticated ECPs in the swaps market. NY City Bar Feb. 22 Letter, at 2. *See also* 17 CFR 1.55.

[216] CEF Feb. 22 Letter, at 13.

[217] *See, e.g.,* FHLBanks Feb. 22 Letter, at 3; ABC/CIEBA Feb. 22 Letter, at 13; ABC Aug. 29 Letter, at 2 and 10–11; CEF Feb. 22 Letter, at 4; BlackRock Feb. 22 Letter, at 6–7.

[218] Proposing release, 75 FR at 80643.

[219] SIFMA/ISDA Feb. 17 Letter, at 18.

[220] CFA/AFR Feb. 22 Letter, at 8.

[221] FHLBanks Feb. 22 Letter, at 4.

[222] *Id.*

[223] *Id.*

[224] *Id.*

[225] 17 CFR 1.55.

[226] The Commission has proposed a swap risk disclosure statement for commodity pool operators (''CPOs'') and CTAs. *See* Commodity Pool Operators and Commodity Trading Advisors: Amendments to Compliance Obligations, 76 FR 7976, Feb. 11, 2011. The proposed swap risk disclosure statement for CPOs and CTAs does not affect the swap disclosure requirements under Section 4s(h)(3)(B) or any rules promulgated pursuant to that statutory provision.

counterparties. Where such standardized disclosures are inadequate to meet the requirements of final § 23.402(f), swap dealers and major swap participants will have to make particularized disclosures in a timely manner that are sufficient to allow the counterparty to assess the material risks and characteristics of the swap. In addition, swap dealers and major swap participants will need to have policies and procedures to address when and how disclosures will be provided to counterparties, including particularized disclosures in connection with complex swaps. Factors that would be relevant include, but are not limited to, the complexity of the transaction, the degree and nature of any leverage,[227] the potential for periods of significantly reduced liquidity, and the lack of price transparency.[228] This approach is consistent with over-the-counter (''OTC'') industry best practice recommendations for high-risk, complex financial instruments.[229]

With respect to scenario analysis, counterparties will be able to opt in to receive scenario analysis for swaps that are not ''made available for trading'' on a DCM or SEF.[230] The Commission declines, however, to determine, as suggested by commenters, that standard form scenario analysis is sufficient to meet all business conduct standards disclosure requirements, which include material risks, characteristics, incentives and conflicts of interest.[231]

Regarding the suggestion that DCOs be required to provide certain standardized disclosures (other than the daily mark) for cleared swaps, the Commission is not mandating such a rule in this rulemaking because Section 4s(h) of the CEA and subpart H of part 23 only govern swap dealers and major swap participants. Swap dealers and major swap participants will be permitted, however, to arrange with third parties, including DCOs and SEFs, to provide disclosures to a counterparty to satisfy the swap dealer's or major swap participant's obligation under § 23.431. The Commission expects that a DCO or SEF may make available certain information, such as the material economic terms of cleared swaps, similar to the contract specifications provided by DCMs today. Swap dealers and major swap participants may make arrangements so that such information from the DCO or SEF satisfies certain disclosure obligations (*e.g.,* material characteristics of the swap). Regardless, the swap dealer or major swap participant will remain responsible for compliance with § 23.431. Lastly, the Commission is providing guidance that non-reliance provisions routinely included in counterparty relationship documentation will not relieve swap dealers and major swap participants of their duty to comply in good faith with the business conduct standards requirements. It will be up to the adjudicator in a particular case to determine the extent of any liability of the swap dealer or major swap participant to a counterparty under the business conduct standards rules, depending on the facts and circumstances.

g. Section 23.402(g)—Record Retention

i. Proposed § 23.402(h)

Proposed § 23.402(h) (renumbered as final § 23.402(g)) required swap dealers and major swap participants to create and retain a written record of their compliance with the requirements of the external business conduct rules in subpart H. Such requirements would be (1) part of the overall recordkeeping obligations imposed on swap dealers and major swap participants in the CEA and subpart F of part 23 of the Commission's Regulations, (2) maintained in accordance with § 1.31[232] of the Commission's Regulations, and (3) accessible to applicable prudential regulators.[233]

ii. Comments

A commenter requested clarification regarding the requirement to create a written record of compliance with the external business conduct rules. In particular, guidance was requested regarding whether master agreements, which contain certain counterparty representations, qualify as a ''written record of compliance'' within the rule.[234] Another commenter suggested that the Commission strengthen the recordkeeping requirements throughout to ensure that records are detailed enough to allow regulators to easily determine compliance.[235]

iii. Final § 23.402(g)

After considering the comments, the Commission has determined to adopt § 23.402(h) as proposed (renumbered as § 23.402(g)). In addition, the Commission confirms that counterparty relationship documentation containing standard form disclosures, other material information and counterparty representations may be part of the written record of compliance with the external business conduct rules that require certain disclosures and due diligence. Further, swap dealers and major swap participants may choose to use internet based applications to provide disclosures and daily marks.[236] Swap dealers and major swap participants are required to have policies and procedures for documenting disclosures and due diligence. Recordkeeping policies and procedures should ensure that records are sufficiently detailed to allow compliance officers and regulators to determine compliance.

B. Section 23.410—Prohibition on Fraud, Manipulation and Other Abusive Practices

1. Sections 23.410(a) and (b)

a. Proposed § 23.410(a)

Section 4s(h)(1) grants the Commission discretionary authority to promulgate rules applicable to swap dealers and major swap participants related to, among other things, fraud, manipulation and abusive practices.[237] To implement this provision, the Commission proposed several rules, including proposed § 23.410(a), which incorporated the statutory text in

[227] The leverage characteristic is particularly relevant when the swap includes an embedded option, including one in which the counterparty has sold an option to the dealer or the dealer retains the option to alter the terms of the swap under certain circumstances. Such features can significantly increase counterparty risk exposure in ways that are not transparent.

[228] ''The aforementioned characteristics are neither an exhaustive list nor should they be assumed to provide a strict definition of high-risk, complex instruments, which the Policy Group believes should be avoided. Instead, market participants should establish procedures for determining, based on the key characteristics discussed above, whether an instrument is to be considered high-risk and complex and thus require the special treatment outlined in this section.'' The Counterparty Risk Management Policy Group, ''Containing Systemic Risk: The Road to Reform, The Report of the CRMPG III,'' at 56 (Aug. 6, 2008) (''CRMPG III Report'').

[229] *Id.*

[230] *See* Section III.D.3.b. of this adopting release for a discussion of final § 23.431(b); *see also* discussion of Section 2(h)(8) of the CEA and swaps ''made available for trading'' on a DCM or SEF at *infra* fn. 394.

[231] *See* NY City Bar Feb. 22 Letter, at 2–3.

[232] 17 CFR 1.31.

[233] Proposing release, 75 FR at 80642.

[234] CEF Feb. 22 Letter, at 19.

[235] CFA/AFR Feb. 22 Letter, at 6, 7, 13, 18 and 20.

[236] Swap dealers and major swap participants will have to retain a record of all required information irrespective of the method used to convey such information.

[237] In addition, Section 753 of the Dodd-Frank Act provided the Commission with expanded anti-manipulative and deceptive practices authority by amending Section 6(c) of the CEA. (7 U.S.C. 9). On July 14, 2011, the Commission published in the **Federal Register** final rules to implement the new anti-manipulative and deceptive practices authority. Prohibition on the Employment, or Attempted Employment, of Manipulative and Deceptive Devices and Prohibition on Price Manipulation, 76 FR 41398, Jul. 14, 2011 (''Prohibition on Manipulative and Deceptive Devices'') (to be codified at 17 CFR part 180).

Section 4s(h)(4)(A).[238] The statutory provision prohibits fraudulent, deceptive and manipulative practices by swap dealers and major swap participants.[239] While the heading of Section 4s(h)(4) reads ''Special Requirements for Swap Dealers Acting as Advisors,'' the plain language of the statutory text within that section includes both more general and more specific restrictions. The fraudulent, deceptive and manipulative practices provision in Section 4s(h)(4)(A), by its own terms, is not limited to the advisory context or to swap dealers.[240]

Proposed § 23.410(a) followed the statutory text and applied to swap dealers and major swap participants acting in any capacity, *e.g.,* as an advisor or counterparty.[241] The first two paragraphs of the proposed rule focused on Special Entities and prohibited swap dealers and major swap participants from (1) employing any device, scheme or artifice to defraud any Special Entity, and (2) engaging in any transaction, practice or course of business that operates as a fraud or deceit on any Special Entity. The third paragraph of the proposed rule was not limited to conduct with Special Entities and prohibited swap dealers and major swap participants from engaging in any act, practice or course of business that is fraudulent, deceptive or manipulative.[242]

b. Comments

The Commission received a number of comments both supporting and opposing aspects of proposed § 23.410(a). One commenter urged that the fraud prohibition in Section 4s(h)(4) should apply only when a swap dealer is acting as an advisor to a Special Entity.[243] The commenter asserted that, while the prohibitions of Section 4s(h)(4)(A) do not themselves contain language limiting them to instances where a swap dealer is an advisor, the title ''Special Requirements for Swap Dealers Acting as Advisors'' should be read as limiting the scope of any rules promulgated thereunder.[244] The commenter further asserted that the lack of scienter in proposed § 23.410(a)(3) is particularly misplaced as the language of Section 4s(h)(4)(A)(iii) mirrors Section 206(4) of the Investment Advisers Act of 1940 (''Advisers Act''),[245] which is in the context of an advisor relationship, and that in cases where there is not an advisor relationship, the scienter standards of Rule 10b–5 [246] under the Exchange Act should prevail.[247] This commenter stated that the Commission should adopt a scienter requirement when a swap dealer or major swap participant acts merely as a counterparty to a non-Special Entity and does not act as an advisor as it would be unfair to subject swap dealers or major swap participants, not acting as advisors, to liability without a showing of bad faith.[248] The Commission also received comments urging that proposed § 23.410(a) not be adopted as it is redundant of the rules promulgated in part 180.[249]

Other commenters supported proposed § 23.410(a). One commenter asserted that the rule prohibiting fraud and manipulation by swap dealers and major swap participants is appropriate as long as these principles are properly applied to swap markets.[250] Another commenter supported the proposed rule because it believed the rule was largely consistent with the recommendations contained in the July 2009 report of the Investors' Working Group,[251] and another commenter believed it would strengthen the protection of market participants, encourage investor confidence and promote integrity within the financial system.[252] One commenter asserted that the title ''Special Requirements for Swap Dealers Acting as Advisors'' should not limit the scope of the rule where the statutory language is broad, applying to ''any device, scheme or artifice to defraud,'' and that Congress intended to apply these principles to the broad range of conduct engaged in by swap dealers and major swap participants with regard to counterparties generally and Special Entities in particular.[253] This commenter believed that, under the proposed rule, it should be considered an abusive practice to recommend a swap or trading strategy that achieves the counterparty's aim in a way that includes risks to the counterparty greater than those it seeks to hedge and to recommend customized swaps where the counterparty could achieve the same result at a lower cost through standardized swaps.[254]

c. Final § 23.410(a) and (b)

After considering the comments, the Commission decided to adopt § 23.410(a) as proposed. Inclusion of the rule in subpart H of part 23 of the Commission's Regulations provides swap dealers, major swap participants and counterparties with easy reference to the business conduct requirements under Section 4s(h) of the CEA without any additional cost to market participants.

With respect to the concern regarding the rule's protections for counterparties other than Special Entities, § 23.410(a) mirrors the language of the statute. In addition, the prohibition against engaging in ''any act, practice, or course of business that is fraudulent, deceptive, or manipulative'' has been interpreted by the courts as imposing a non-scienter standard under the Advisers Act.[255] Even if the Commission were to limit the rule to require proof of scienter and apply the rule only when a swap dealer is acting as an advisor to a Special Entity, that would not restrict a court from taking a plain meaning approach to the language in Section 4s(h)(4) in a private action under Section 22 of the CEA.[256] In addition, because comparable non-scienter fraudulent and

[238] The Commission also proposed §§ 23.410(b) and 23.410(c), which prohibited swap dealers and major swap participants from disclosing confidential counterparty information and trading ahead and front running counterparty orders, respectively. *See* proposing release, 75 FR at 80642.

[239] In addition to the proposed antifraud rule, swap dealers and major swap participants are subject to all other applicable provisions of the CEA and Commission Regulations, including those dealing with fraud and manipulation (*e.g.,* Sections 4b, 6(c)(1) and (3), and 9(a)(2) of the CEA (7 U.S.C. 6b, 9(c)(1) and (3), and 13(a)(2)), and §§ 180.1 and 180.2 (17 CFR 180.1 and 180.2)).

[240] Section 4s(h)(4)(A) states: (A) In general. It shall be unlawful for a swap dealer or major swap participant—(i) to employ any device, scheme, or artifice to defraud any Special Entity or prospective customer who is a Special Entity; (ii) to engage in any transaction, practice, or course of business that operates as a fraud or deceit on any Special Entity or prospective customer who is a Special Entity; or (iii) to engage in any act, practice, or course of business that is fraudulent, deceptive or manipulative.

[241] Proposing release, 75 FR at 80642.

[242] This language mirrored the language in Section 206(4) of the Investment Advisers Act of 1940 (''Advisers Act'') (15 U.S.C. 80b–1 *et seq.*), which does not require scienter to prove liability. *See SEC* v. *Steadman,* 967 F.2d 636, 647 (D.C. Cir. 1992) (''[S]ection 206(4) uses the more neutral 'act, practice, or course or business' language. This is similar to [Securities Act] section 17(a)(3)'s 'transaction, practice, or course of business,' which 'quite plainly focuses upon the effect of particular conduct * * * rather than upon the culpability of the person responsible.' Accordingly, scienter is not required under section 206(4), and the SEC did not have to prove it in order to establish the appellants' liability. * * *'') (internal citations omitted).

[243] SIFMA/ISDA Feb. 17 Letter, at 10.

[244] *Id.*

[245] 15 U.S.C. 80b–6.

[246] 17 CFR 240.10b–5.

[247] SIFMA/ISDA Feb. 17 Letter, at 10.

[248] *Id.*

[249] *See* CEF Feb. 22 Letter, at 12; Barnard May 23 Letter, at 2.

[250] Exelon Feb. 22 Letter, at 4.

[251] CII Feb. 10 Letter, at 1 (citing A Report by the Investors' Working Group, An Independent Taskforce Sponsored by CFA Institute Centre for Financial Market Integrity and Council of Institutional Investors, *U.S. Financial Regulatory Reform: The Investors' Perspective* (July 2009)).

[252] CFA/AFR Feb. 22 Letter, at 1.

[253] *Id.,* at 6–7.

[254] *Id.*

[255] *See* discussion at fn. 242.

[256] 7 U.S.C. 25.

manipulative practices provisions will apply to SBS Entities in enforcement actions under Sections 9(j) [257] and 15F(h)(4) [258] of the Exchange Act and Sections 17(a)(2) and (3) of the Securities Act, it would be inconsistent to impose a different intent standard for swap dealers and major swap participants.[259]

Finally, in response to commenters who urged that it would be unfair to subject swap dealers or major swap participants to the non-scienter provision of the rule, the Commission decided to provide an affirmative defense in final § 23.410(b) for swap dealers and major swap participants in cases alleging non-scienter violations of § 23.410(a)(2) and (3) based solely on violations of the business conduct standards rules in subpart H. The affirmative defense enables swap dealers and major swap participants to defend against such claims by establishing that they complied in good faith with written policies and procedures reasonably designed to meet the requirements of the particular rule that is the basis for the alleged § 23.410(a)(2) or (3) violation. Whether the affirmative defense is established will depend on the facts and circumstances of the case. However, by way of non-exclusive example, a swap dealer or major swap participant would be unable to establish that it acted in good faith if the evidence showed that it acted intentionally or recklessly in connection with the violation. Similarly, policies and procedures that were outdated or failed to address the scope of swap business conducted by the swap dealer or major swap participant would not be considered reasonable.

With respect to whether any particular type of conduct would be abusive within the prohibitions under final § 23.410(a) as urged by commenters, the Commission will evaluate the facts and circumstances of any particular case in light of the elements of an offense under the final rule. This is consistent with the approach that the Commission took in adopting § 180.1.[260]

2. Section 23.410(c)—Confidential Treatment of Counterparty Information

a. Proposed § 23.410(b)

The Commission proposed § 23.410(b) (renumbered as final § 23.410(c)), which prohibited swap dealers and major swap participants from disclosing confidential counterparty information,[261] using its discretionary rulemaking authority under Section 4s(h)(1)(A).[262] The proposed rule extended existing Commission standards that protect the confidentiality of customer orders.

b. Comments

The Commission received comments regarding the proposed prohibition against disclosing confidential counterparty information. One commenter stated that the confidentiality of counterparty information should be left to private negotiation rather than imposed by Commission rule.[263] The commenter urged that if the Commission determines to promulgate a rule protecting the confidentiality of such information, the Commission should alternatively require swap dealers and major swap participants to establish, maintain and enforce policies and procedures reasonably designed to prevent the improper use or disclosure of any counterparty information that the swap dealer or major swap participant has agreed with the counterparty to keep confidential.[264] The commenter also stated that the confidentiality rule should be implemented as an SRO rule and should allow sophisticated counterparties to opt out of heightened protections they may not want or need.[265] The commenter expressed concern that the proposed rule would restrict swap dealers and major swap participants in properly servicing counterparties through discussions with the swap dealer's or major swap participant's affiliates.[266] Further, the commenter asserted that there would be facts and circumstances that would warrant particular disclosures in certain contexts.[267]

Another commenter asserted that the confidential treatment and trading ahead rules should not apply to major swap participants because they are customers of swap dealers and should be treated as such, rather than as dealers or quasi-dealers.[268] Another commenter stated that the Commission should avoid specifying in detail the conduct that would violate the rule because doing so could have unintended consequences of limiting its scope. This commenter stated that a broad, enforceable principles based approach is the best approach for promoting market integrity.[269]

c. Final § 23.410(c)

Upon consideration, the Commission has determined to adopt proposed § 23.410(b) (renumbered as § 23.410(c)) with several changes. First, the final rule has been changed to also permit swap dealers and major swap participants [270] to disclose confidential information to an SRO designated by the Commission or as required by law. The proposed rule addressed disclosure only to the CFTC, Department of Justice (''DOJ'') and applicable prudential regulators. Second, the Commission has clarified that the final rule will protect confidential counterparty information from disclosure to third parties, as well as from improper use by the swap dealer

[257] Section 763(g) of the Dodd-Frank Act amended the Exchange Act by adding Section 9(j), which states in relevant part that ''It shall be unlawful for any person * * * to effect any transaction in * * * any security-based swap, in connection with which such person * * * engages in any transaction, practice, or course of business which operates as a fraud or deceit upon any person.'' Courts have interpreted ''operates as a fraud'' provisions under a non-scienter standard. On November 8, 2010, the SEC published proposed rule 17 CFR 240.9j–1 in the **Federal Register** to clarify that the provisions of Section 9(j) apply to fraud in connection with (1) entering into a security-based swap and (2) the exercise of any right or performance of any obligation under a security-based swap. Prohibition Against Fraud, Manipulation, and Deception in Connection With Security-Based Swaps, 75 FR 68560, Nov. 8, 2010.

[258] This provision mirrors Section 4s(h)(4) of the CEA.

[259] One commenter stated that that the CFTC and SEC should harmonize their regulatory structures for combating disruptive and manipulative activities. SIFMA/ISDA Feb. 17 Letter, at 10.

[260] In the release promulgating Commission Regulation § 180.1, the Commission stated: ''In response to commenters requesting that front running and similar misuse of customer information be considered a form of fraud-based manipulation under final Rule 180.1, the Commission declines to adopt any per se rule in this regard, but clarifies that final Rule 180.1 reaches all manner of fraud and manipulation within the scope of the statute it implements, CEA section 6(c)(1).'' Prohibition on Manipulative and Deceptive Devices, 76 FR at 41401.

[261] Proposing release, 75 FR at 80642.

[262] Senator Lincoln noted in a colloquy that the Commission should adopt rules to ensure that swap dealers maintain the confidentiality of hedging and portfolio information provided by Special Entities, and prohibit swap dealers from using information received from a Special Entity to engage in trades that would take advantage of the Special Entity's positions or strategies. 156 Cong. Rec. S5923 (daily ed. July 15, 2010) (statement of Sen. Lincoln). In consultations with stakeholders, Commission staff learned that these concerns are shared by counterparties more generally. As a result, the Commission proposed that the business conduct rules include prohibitions on these types of activities in all transactions between swap dealers or major swap participants and their counterparties. *See* proposing release, 75 FR at 80658.

[263] SIFMA/ISDA Feb. 17 Letter, at 11.

[264] *Id.*

[265] *Id.*

[266] *Id.*, at 10–11.

[267] *Id.*, at 11.

[268] MetLife Feb. 22 Letter, at 4–5.

[269] CFA/AFR Feb. 22 Letter, at 12.

[270] The Commission has determined to impose the final rule on both swap dealers and major swap participants, which is consistent with the application of Section 4s(h)(4)(A), prohibiting manipulative, deceptive and fraudulent practices, to both swap dealers and major swap participants.

or major swap participant. It is not intended to restrict the necessary and appropriate use of the information by the swap dealer or major swap participant, but is intended to address material conflicts of interest that must be identified and managed to avoid trading or other activities on the basis of confidential counterparty information that would tend to be materially adverse to the interests of the counterparty.[271] By promulgating final § 23.410(c), the Commission does not intend to prohibit legitimate trading activities, which, depending on the facts and circumstances, would include, among other things, (1) bona fide risk-mitigating and hedging activities in connection with the swap, (2) purchases or sales of the same or similar types of swaps consistent with commitments of the swap dealer or major swap participant to provide liquidity for the swap, or (3) bona-fide market-making in the swap.[272]

The final rule requires swap dealers and major swap participants to have written policies and procedures reasonably designed to protect material confidential information provided by or on behalf of a counterparty from disclosure and use by any person acting for or on behalf of the swap dealer or major swap participant. Such policies and procedures should be designed to identify and manage material conflicts of interest between a swap dealer or major swap participant and a counterparty through, for example, information barriers and restrictions on access to confidential counterparty information on a ''need-to-know'' basis.[273] Information barriers can be used to restrict the dissemination of information within a complex organization and to prevent material conflicts by limiting knowledge and coordination of specific business activities among different units of the entity. Examples of information barriers include restrictions on information sharing, limits on types of trading and greater separation between various functions of the firm. Such information barriers have been recognized in the federal securities laws and rules as a means to address or mitigate potential conflicts of interest or other inappropriate activities within an organization.

Depending on the facts and circumstances, the Commission would consider it to be an abuse of confidential counterparty information for a swap dealer or major swap participant to disclose or use such information for its own benefit if such use or disclosure would tend to be materially adverse to the interests of the counterparty.[274] Final § 23.410(c) does not prohibit disclosure or use that is necessary for the effective execution of any swap for or with the counterparty, to hedge or mitigate any exposure created by such swap or to comply with a request of the Commission, DOJ, any SRO designated by the Commission, or applicable prudential regulator, or is otherwise required by law.

In response to the commenter that expressed concern that the proposed rule would restrict swap dealers and major swap participants in properly servicing counterparties through discussions with the swap dealer's or major swap participant's affiliates,[275] it is not the intent of the rule to prohibit certain interactions needed to execute the swap but is to ensure that the counterparty's confidential information is disseminated only on a ''need to know'' basis. Further, in response to a commenter that stated that there may be facts or circumstances that would warrant particular disclosures or uses in certain contexts,[276] the Commission included a provision in the rule that allows for use or disclosure of confidential counterparty information if authorized in writing by the counterparty.

The Commission decided it is appropriate to establish an explicit confidential treatment duty for swap dealers and major swap participants with respect to confidential counterparty information. Because swap dealers and major swap participants principally act as counterparties rather than as agents or brokers (unlike FCMs), in the absence of such an explicit duty, it could be more difficult to establish that disclosure or misuse of confidential counterparty information is fraudulent, deceptive or manipulative. Depending on the facts and circumstances, however, as set forth in final § 23.410(b), good faith compliance with reasonably designed policies and procedures will constitute an affirmative defense to a non-scienter violation of final § 23.410(a)(2) or (3) for improper disclosure or abuse of counterparty information.

The Commission considered the commenter's suggestion that confidential treatment of counterparty information should be left to negotiation between counterparties or, alternatively, be implemented as an SRO rule or on an opt in or opt out basis.[277] The Commission determined that such alternatives would be inconsistent with Congress' intent that the Commission promulgate rules that raise business conduct standards for the protection of all counterparties.[278] The final rule is in accordance with current industry practices where confidential treatment is routinely part of negotiations among the parties that is then incorporated into the counterparty relationship documentation.[279]

Adopting a confidential treatment rule will ensure that all counterparties, irrespective of their negotiating power, will be able to protect their confidential

[271] The final rule is aimed at improper disclosure of the counterparty's position, the transaction and the counterparty's intentions to enter or exit the market, which may be detrimental to the interests of the counterparty.

[272] The Commission notes by analogy that Section 621 of the Dodd-Frank Act, to be codified at Section 27B of the Securities Act (15 U.S.C. 77z–2a), provides for exceptions to the conflict of interest prohibitions in that section for risk-mitigating hedging activities in connection with an asset-backed security, purchases or sales made consistent with commitments to the underwriter or others to provide liquidity for the asset-backed security, or bona-fide market making in the asset-backed security. The Commission's final § 23.410(c) provides for exceptions for disclosure and use for effective execution of the order, risk mitigation and hedging, and when authorized in writing by the counterparty.

[273] For example, the Commission expects that the swap dealer would generally have information barriers between its sales desk and proprietary trading desk.

[274] The financial industry has long-held standards relating to confidential treatment of counterparty information similar to those set forth in the final rule. While not endorsing any particular industry practice, the Commission notes, for example, that one industry group has recommended that financial institutions ''have internal written policies and procedures in place governing the use of and access to proprietary information provided to them by trading counterparties as a basis for credit evaluations.'' Improving Counterparty Risk Management Practices, Counterparty Risk Management Policy Group (June 1999) (''CRMPG I Report''), at 5; *see also* Toward a Greater Financial Stability: A Private Sector Perspective, Counterparty Risk Management Policy Group (July 2005) (''CRMPG II Report''), at 47 (recommending that firms evaluate operational risks with customized legal documents that deviate from a firm's existing procedures for handing confidential counterparty information). Also without endorsement by the Commission, one firm's code of conduct states that employees ''must maintain the confidentiality of the information with which you are entrusted, including complying with information barriers procedures applicable to your business. The only exception is when disclosure is authorized or legally mandated. * * * Confidential or proprietary information * * * provided by a third party [is provided with] the expectation that the information will be kept confidential and used solely for the business purpose for which it was conveyed.'' *Goldman Sachs Code of Business Conduct and Ethics* (amended, effective January 11, 2011).

[275] *See* SIFMA/ISDA Feb. 17 Letter, at 10–11.

[276] *See id.,* at 11.

[277] *See* SIFMA/ISDA Feb. 17 Letter, at 11.

[278] *See* Section III.A.1. of this adopting release for a discussion of ''Discretionary Rules'' and ''Opt in or Opt out for Certain Classes of Counterparties.''

[279] *See* SIFMA/ISDA Feb. 17 Letter, at 11 (stating that the definition, treatment, use and disclosure of confidential information are routinely the subject of negotiation between the parties).

information from disclosure and abuse by swap dealers and major swap participants. Counterparties will continue to be free to negotiate additional protections based on their individual needs. By establishing such a duty, the Commission is not changing the ''counterparty'' nature of the relationship between a swap dealer or major swap participant and a counterparty. Nor is the Commission imposing a general fiduciary duty on swap dealers or major swap participants. Violation of the confidential treatment duty, however, depending on the facts and circumstances, could constitute a fraudulent, deceptive or manipulative practice.

3. Proposed § 23.410(c)—Trading Ahead and Front Running Prohibited—Not Adopted as Final Rule

a. Proposed § 23.410(c)

The Commission proposed § 23.410(c), which prohibited swap dealers and major swap participants from front running or trading ahead of counterparty swap transactions.[280] The proposed rule was based on trading standards applicable to FCMs and introducing brokers that prohibit trading ahead of customer orders.[281]

b. Comments

One commenter urged that the Commission not adopt the trading ahead and front running rule or, in the alternative, apply the rule only when the swap dealer or major swap participant has an executable order and not when a swap is still under negotiation.[282] The commenter asserted that the prohibition on trading during the negotiation of a swap fails to appreciate the distinction between bilateral swaps and orders for standardized products, as bilateral swap terms must be negotiated, which can take weeks or months, and counterparties may negotiate with multiple dealers to obtain the best price.[283] The commenter further asserted that enforcement of a front running ban would be untenable, disruptive to the market and prevent hedging activity related either to the pending transaction or the other liabilities of the swap dealer or major swap participant.[284] The commenter urged that, if the Commission were to adopt the proposed rule, then it should prohibit only a transaction (1) that is entered into for a non-hedging purpose on the basis of actual knowledge of a non-public, executable order of a counterparty, (2) that exhibits consistent and estimable positive price correlation to the pending executable counterparty swap transaction, and (3) whose execution is substantially likely to materially affect the price of that pending executable swap transaction.[285] The commenter asserted that, without an actual knowledge standard, the proposed rule would prohibit transactions by other parts of an organization not privy to the order.[286] Finally, the commenter urged the Commission to clarify its proposed ''specific'' consent standard and the duration of the prohibition.[287]

In addition, the commenter urged the Commission to clarify that the following trades would not be considered front running under proposed § 23.410(c): (1) When a swap dealer or major swap participant enters a trade at the request of another customer; (2) when the specifics of a pending counterparty transaction are as yet undefined; (3) when a swap dealer or major swap participant trades in the ordinary course of hedging other transactions, assets or liabilities; (4) when there is not a clear price-related nexus to the pending swap transaction; (5) if the transaction would not affect the counterparty; and (6) if the transaction is an anticipatory hedge of the subject transaction and disclosed to the counterparty.[288] The commenter also urged that the prohibition should only exist until the transaction is executed or cancelled, or the relevant information ceases to be material, non-public information, and the proposed rule should not require further specific consent to trade with respect to specific transactions at specific times.[289]

Another commenter stated that it did not object to applying the front running prohibition to trades executable on a DCM and for which a swap dealer or major swap participant is merely an intermediary.[290] However, the commenter believed proprietary trading desks should be able to trade freely as long as they are unaware of the counterparty's order.[291] Without such a limitation, the commenter asserted, swap dealers may have little incentive to accept swap orders that can be executed electronically or may refuse to accept orders for such transactions altogether.[292]

Further, the commenter urged that the proposed front running prohibition should not apply to bilaterally negotiated and settled swaps. Since some swaps take months to negotiate, the commenter believed front running rules would severely limit a swap dealer's ability to be in the market.[293] The commenter stated that front running should be defined in a manner more appropriate for the swaps markets as the present definition could be interpreted to force a swap dealer to stop, or severely limit, physical trading related to the swap.[294] The commenter urged the Commission to eliminate the front running rules or to exclude swap markets with actual physical underlying commodities from such rules.[295]

Another commenter stated that the proposed rule is tailored to a securities broker-dealer model and is not suited to the commodities market.[296] The commenter asserted that instruments relating to derivatives of an underlying physical market are not susceptible to insider trading or broker-dealer abuses, and that the disclosures required in proposed § 23.410(c) would chill the open interaction that occurs between counterparties in a competitive swaps market.[297]

Another commenter stated that prohibiting front running would have unintended consequences that would, along with other proposed rules, increase the administrative and compliance burden on swap dealers.[298] The combined effect of the proposed rules, the commenter asserted, would slow the process of swap trading and increase costs by requiring additional time, effort, and risks taken in trading swaps.[299]

One commenter that generally supported the proposed rule recommended imposing a time limit on the trading ahead prohibition for swaps under negotiation and believed swap dealers should be required to disclose the time limit to counterparties.[300] Alternatively, the commenter urged that swap dealers should have reasonable grounds for believing the counterparty does not intend to enter into the transaction in the near future.[301]

[280] Proposing release, 75 FR at 80642.
[281] *See, e.g.,* 17 CFR 155.3–4.
[282] SIFMA/ISDA Feb. 17 Letter, at 13.
[283] *Id.,* at 12.
[284] *Id.*
[285] *Id.,* at 13.
[286] *Id.*
[287] *Id.*
[288] *Id.,* at 13–14.
[289] *Id.*
[290] CEF Feb. 22 Letter, at 10–11.
[291] *Id.*
[292] *Id.,* at 11.
[293] *Id.*
[294] *Id.*
[295] *Id.*
[296] Exelon Feb. 22 Letter, at 3.
[297] *Id.*
[298] HOOPP Feb. 22 Letter, at 2.
[299] *Id.*
[300] CFA/AFR Feb. 22 Letter, at 7.
[301] *Id.*

Another commenter that supported the proposed rule urged that the entire front running section be removed because it is duplicative of the rules promulgated by the Commission under Section 6(c)(1) of the CEA (the new general fraudulent, deceptive and manipulative practices provision).[302]

c. Commission Determination

The Commission has considered the comments and has determined not to promulgate proposed § 23.410(c). The fraudulent, deceptive and manipulative practices rule in final § 23.410(a), coupled with the confidential treatment rule in final § 23.410(c), should effectively protect counterparties from abuse of their material confidential information by swap dealers and major swap participants.[303] The Commission agrees with the commenter that stated that, depending on the facts and circumstances, improperly trading ahead or front running counterparty orders would constitute fraudulent, deceptive or manipulative conduct under final § 23.410(a) and § 180.1, among other fraudulent, deceptive and manipulative practices protections under the CEA and Commission Regulations.

In response to commenters seeking clarity as to the types of transactions that would constitute illegal trading ahead or front running by a swap dealer or major swap participant, the Commission declines to adopt the request of certain commenters to list the trades or specific situations that would not be considered illegal trading ahead or front running in violation of the anti-fraud and confidential treatment rules in final § 23.410(a) and final § 23.410(c), respectively. The Commission expects swap dealers and major swap participants to implement policies and procedures, including establishing appropriate information barriers and other means to protect material confidential counterparty information, that would allow the swap dealer or major swap participant to continue to provide liquidity in the swap or engage in bona-fide market-making in the swap. The Commission states, however, that use of confidential counterparty information to trade ahead of or front run a counterparty's order would tend to be materially adverse to the interests of the counterparty, depending on the facts and circumstances, and would be considered an abuse of final §§ 23.410(a) and (c), among other similar protections under the CEA and Commission Regulations.

The Commission's decision not to adopt proposed § 23.410(c) was informed by commenters who stated that the proposed rule would have unintended consequences of severely hampering the ability of swap dealers and major swap participants to conduct swaps business and would have the potential to impose additional costs on swap transactions. While abuse of counterparty information, including trading ahead, will still be prohibited under the manipulative, deceptive and fraudulent practices rule in final § 23.410(a) and the confidential treatment rule in final § 23.410(c), among other provisions, the approach adopted by the Commission should eliminate the uncertainties identified by commenters in the proposed trading ahead and front running rule, and allow legitimate trading by swap dealers and major swap participants. The Commission, however, will continue to monitor market conduct to determine whether, in the future, there is a need to address explicitly abuses related to trading ahead and front running of counterparty swap transactions.

C. Section 23.430—Verification of Counterparty Eligibility

1. Proposed § 23.430

The Dodd-Frank Act makes it unlawful for any person, other than an ECP,[304] to enter into a swap unless it is executed on or subject to the rules of a DCM.[305] Section 4s(h)(3)(A) also requires the Commission to establish a duty for swap dealers and major swap participants to verify that any counterparty meets the eligibility standards for an ECP. Proposed § 23.430 required swap dealers and major swap participants to verify that a counterparty meets the definition of an ECP prior to offering to enter into or entering into a swap and to determine whether the counterparty is a Special Entity as defined in Section 4s(h)(2)(C) and proposed § 23.401.[306]

The Commission contemplated that, in the absence of ''red flags,'' and as provided in proposed § 23.402(e), a swap dealer or major swap participant would be permitted to rely on reasonable written representations of a potential counterparty to establish its eligibility as an ECP. In addition, under proposed § 23.402(g), such written representations could be expressed in a master agreement or other written agreement and, if agreed to by the parties, could be deemed to be renewed with each subsequent swap transaction, absent any facts or circumstances to the contrary. Finally, as set forth in proposed § 23.430(c), a swap dealer or major swap participant would not be required to verify the ECP or Special Entity status of the counterparty for any swap initiated on a SEF where the swap dealer or major swap participant does not know the identity of the counterparty.[307]

2. Comments

The Commission received several comments regarding proposed § 23.430.[308] Two commenters recommended that swap dealers and major swap participants be able to rely principally on counterparty representations regarding eligibility.[309] It was asserted that only actual notice of countervailing facts or facts that reasonably put the swap dealer or major swap participant on notice should trigger a duty to inquire further, consistent with industry practice.[310] One commenter supported sufficiently detailed representations to facilitate eligibility determinations and regulatory compliance audits.[311] Other commenters requested that the proposed rule be amended to specifically allow counterparties to make eligibility representations in master agreements.[312] A different commenter recommended that the Commission sponsor and promote standardized due diligence documentation to facilitate compliance, reduce costs and promote legal certainty.[313] Certain commenters questioned whether the verification duty was an ongoing duty throughout the life of the swap.[314] Two commenters

[302] CEF Feb 22 Letter, at 12; *see also* Prohibition on Manipulative and Deceptive Devices, 76 FR 41398.

[303] The Commission's other deceptive and manipulative practices provisions, including Sections 4b and 6(c)(1) of the CEA and § 180.1 of the Commission's Regulations also prohibit trading ahead and front running.

[304] ''Eligible contract participant'' is a defined term in Section 1a(18) of the CEA. (7 U.S.C. 1a(18)).

[305] *See* Section 2(e) of the CEA. (7 U.S.C. 2(e)).

[306] Proposing release, 75 FR at 80643.

[307] This provision was informed by the statutory language in Sections 2(e) and 4s(h)(7).

[308] *See* SIFMA/ISDA Feb. 17 Letter, at 15–16; CFA/AFR Feb. 22 Letter, at 8; CEF Feb. 22 Letter, at 12, 19 and 20; FHLBanks Feb. 22 Letter, at 4–5; APGA Feb. 22 Letter, at 2–3.

[309] *See* SIFMA/ISDA Feb. 17 Letter, at 16 (recommending no affirmative duty to investigate representations or obtain detailed factual representations). *Accord* CEF Feb. 22 Letter, at 12, 19 and 20.

[310] SIFMA/ISDA Feb. 17 Letter, at 16 fn. 35 (citing Regulation D (17 CFR 230.501–508) and Rule 144A (17 CFR 230.144A) transactional practice under the federal securities laws).

[311] CFA/AFR Feb. 22 Letter, at 8.

[312] *See, e.g.,* NFA Aug. 25, 2010 Letter, at 2; SIFMA/ISDA Feb. 17 Letter, at 16; APGA Feb. 22 Letter, at 2–3.

[313] FHLBanks Feb. 22 Letter, at 4.

[314] SIFMA/ISDA Feb. 17 Letter, at 16. In addition, the commenter questioned whether the loss of ECP status would limit the counterparty's ability to terminate, modify or novate the swap.

suggested amending the rule to require an update whenever there is a change impacting a counterparty's eligibility or status.[315] A commenter recommended additional guidance regarding red flags and the nature and timing of evidence necessary to establish ECP status.[316] Lastly, a commenter supported the proposed exemption from the verification duty for SEF and DCM transactions.[317]

3. Final § 23.430

After considering the comments, the Commission has determined to adopt the rule with three changes. First, the Commission is adding a new § 23.430(c), Special Entity election, which will require a swap dealer or major swap participant to determine whether a counterparty is eligible to elect to be a Special Entity and notify such counterparty as provided for in the Special Entity definition in final § 23.401(c)(6).[318] Second, the Commission has added a new safe harbor, § 23.430(d), to clarify that a swap dealer or major swap participant may rely on written representations of counterparties to meet the requirements in the rule. Third, the Commission is clarifying that the exemption from verification applies to all transactions on a DCM and to anonymous transactions on a SEF.

In addition, the Commission is providing the following guidance in response to the comments it received. A swap dealer or major swap participant must determine ECP and Special Entity status before offering to enter into or entering into a swap.[319] Counterparties will be able to make representations about their status at the outset of a transaction or in counterparty relationship documentation and update that representation if there is a change in status.[320] Parties will not be required to terminate a swap based solely on a change in the counterparty's ECP status during the term of the swap.

In addition, swap dealers and major swap participants may rely on the written representations of counterparties in the absence of red flags. With respect to the level of detail required in the representation, a swap dealer or major swap participant will be deemed to have a ''reasonable basis'' to rely on a representation that a counterparty is eligible under the rule if the counterparty identifies the paragraph of the ECP definition plus, in the case of a Special Entity, the paragraph of the Special Entity definition that applies to it, and the swap dealer or major swap participant does not have a reason to believe the representation is inaccurate. In the absence of counterparty representations, the swap dealer or major swap participant will have to engage in sufficient due diligence to have a reasonable basis to believe that the counterparty meets the eligibility standards for an ECP and whether it is a Special Entity.

Further, the Commission is not adopting standardized due diligence documentation at this time. The rule is principles based and allows the parties flexibility in developing efficient means to address the requirements of the rule. By providing non-exclusive guidance as to the types of representations that will meet the ''reasonable basis'' standard, the Commission believes that the parties will be able to comply with the rule without incurring undue cost. Lastly, the Commission is confirming that, with respect to transactions initiated on a SEF, the verification exemption is only applicable to anonymous transactions consistent with Section 4s(h)(7). The proposed exemption from the verification duty did not mention DCM transactions, unlike Section 4s(h)(7) of the CEA, because Section 2(e) of the CEA does not limit participation in DCM swap transactions to ECPs. However, for the sake of clarity, the Commission has added language to final § 23.430 that confirms that swap dealers and major swap participants do not have to verify ECP status for DCM transactions, whether anonymous or otherwise.

D. Section 23.431—Disclosure of Material Risks, Characteristics, Material Incentives and Conflicts of Interest Regarding a Swap

Proposed § 23.431 is a multipart rule that tracks Section 4s(h)(3)(B) of the CEA. Based on the structure of and comments relating to proposed § 23.431, the following discussion is divided into six sections: Proposed § 23.431—generally; material risk disclosure; scenario analysis; material characteristics; material incentives and conflicts of interest; and daily mark. Each of the six sections includes a summary of the proposed subsections of § 23.431, public comments, and a description of the final rule and Commission guidance.

1. Proposed § 23.431—Generally

Section 4s(h)(3)(B) of the CEA requires swap dealers and major swap participants to disclose to their counterparties material information about the risks, characteristics, incentives and conflicts of interest regarding the swap. The requirements do not apply if both counterparties are any of the following: Swap dealer; major swap participant; or SBS Entities. Proposed § 23.431 implemented the statutory disclosure requirements and provided specificity with respect to certain types of material information that must be disclosed under the rule. The Commission stated that information is material if there is a substantial likelihood that a reasonable counterparty would consider it important in making a swap-related decision.[321] The Dodd-Frank Act does not address the timing and form of the required disclosures. To satisfy its disclosure obligation, swap dealers and major swap participants would be required to make such disclosures at a time prior to entering into the swap and in a manner that was reasonably sufficient to allow the counterparty to assess the disclosures.[322] Swap dealers and major swap participants would have flexibility to make these disclosures using reliable means agreed to by the counterparties, as provided in proposed § 23.402(f).[323] The proposed rules allowed standardized disclosure of

[315] CFA/AFR Feb. 22 Letter, at 8; SIFMA/ISDA Feb. 17 Letter, at 16 (asserting that swap dealers and major swap participants should be able to rely on eligibility representations deemed to be made at the inception of each swap transaction and covenant to notify if ECP status ceases).

[316] CFA/AFR Feb. 22 Letter, at 8.

[317] CEF Feb. 22 Letter, at 12.

[318] This addition is related to the Commission's determinations regarding the final Special Entity definition relating to certain Special Entities defined in Section 3 of ERISA. *See* Section IV.A. of this adopting release.

[319] OTC derivatives industry best practice advises professional intermediaries, prior to entering into any transaction, to evaluate the counterparty's legal capacity, transactional authority and credit. *See* DPG Framework, at Section V.III.B.

[320] The Commission expects swap dealers and major swap participants to have policies and procedures in place that require the review of counterparty relationship documentation to ensure that representations and disclosures under subpart H of part 23 remain accurate. Such review should be part of its annual compliance review in accordance with subpart J of part 23. *See* proposed §§ 23.600 and 23.602, Governing Duties of Swap Dealers, 75 FR 71397.

[321] Proposing release, 75 FR at 80643; *cf. CFTC* v. *R.J. Fitzgerald & Co.,* 310 F.3d 1321, 1328–29 (11th Cir. 2002) (''A representation or omission is 'material' if a reasonable investor would consider it important in deciding whether to make an investment.) (citing *Affiliated Ute Citizens of Utah* v. *United States,* 406 U.S. 128, 153–54 (1972)).

[322] Proposing release, 75 FR at 80643.

[323] Additionally, under proposed § 23.402(h), swap dealers and major swap participants were required to maintain a record of their compliance with the proposed rules.

some required information, where appropriate, if the information is applicable to multiple swaps of a particular type or class.[324] The Commission noted, however, that most bespoke transactions would require some combination of standardized and particularized disclosures.[325]

2. Comments—Generally

Commenters had a variety of general concerns with the disclosure rules including: (1) The proposed rules should be tailored to the institutional swaps market, not retail futures or securities markets;[326] (2) the proposed rules should not apply when a counterparty is a certain size and level of sophistication;[327] (3) counterparties should be able to opt in to or opt out of the proposed rules;[328] (4) the proposed rules alter the relationship between counterparties and swap dealers or major swap participants;[329] (5) the Commission should coordinate with the SEC and DOL to ensure that the proposed rules do not trigger ERISA fiduciary status or municipal advisor status;[330] (6) only mandatory statutory rules should be promulgated at this time and discretionary rules (*e.g.,* scenario analysis) should be delayed;[331] (7) the statute does not require the same rules for both swap dealers and major swap participants; different, less burdensome rules consistent with the statute should be drawn for major swap participants;[332] (8) uncertainty regarding compliance with principles based disclosure rules;[333] and (9) the costs outweigh the benefits of the proposed rule.[334]

3. Final § 23.431—Generally

Regarding the comment that the proposed rule should be tailored to the institutional swaps market, not retail futures or securities market, as indicated in the proposing release, the disclosure rules follow the statute and are informed by industry practices and best practice recommendations. The Commission reviewed OTC derivatives industry reports, as well as futures and securities regulations and related SRO business conduct rules, prior to drafting the rule.[335] In particular, reports by the Derivatives Policy Group (''DPG'') and Counterparty Risk Management Policy Group (''CRMPG'') included industry best practice recommendations regarding product disclosures.[336] These OTC derivatives industry reports confirmed that the industry is familiar with product disclosure. In addition, a commenter reported that:

> Swap dealers also generally distribute to their end-user counterparties at the outset of a new swap relationship standardized documentation setting forth the material characteristics, risks and conflicts of interest with respect to the swaps to be entered into with such end-user counterparty under an ISDA Master Agreement or other master documentation.[337]

Moreover, the plain language of Section 4s(h)(3)(B) requires disclosure of the material risks, characteristics, incentives and conflicts of interest relating to the swap. Based on the statutory language, industry practice and industry best practice recommendations, the Commission believes that the final rule is tailored appropriately to the swaps market.

With respect to whether the disclosure duties should apply when a counterparty is a certain size and level of sophistication, and whether counterparties should be able to opt in to or opt out of the protections of the disclosure rule, the Commission notes that Section 4s(h)(3)(B) only limits the disclosure duty when a swap transaction is between swap dealers, major swap participants, and/or SBS Entities. The only exception in Section 4s(h)(3)(B) allows counterparties to obtain the daily mark for cleared swaps upon request.[338] Given that the statute provides such limited opt in/opt out for disclosures, the final rule is consistent with the plain language of the statute by not allowing counterparties to opt in to or opt out of the disclosure rule other than as provided by the statute.[339]

Commenters claimed that the proposed disclosure rule alters the relationship between counterparties and swap dealers or major swap participants from arm's length dealings to advisory relationships.[340] The Commission disagrees and confirms that the business conduct standards rules alone do not cause a swap dealer or major swap participant to assume advisory responsibilities or become a fiduciary.[341] The final rule tracks the statute and includes explanatory language regarding the timing and content of the statutory, principles based disclosure duty, and was informed by industry practices[342] and industry best practice recommendations.[343] The statute and

[324] *Cf.* SIFMA/ISDA Oct. 22, 2010 Letter, at 12 (recommending the use of standard disclosure templates that could be adopted on an industry-wide basis, with disclosure requirements satisfied by a registrant on a relationship (rather than a transaction-by-transaction) basis in cases where prior disclosures apply to and adequately address the relevant transaction).

[325] Proposing release, 75 FR at 80643.

[326] *See* SIFMA/ISDA Feb. 17 Letter, at 3–4 and 18; COPE Feb. 22 Letter, at 3–5; VRS Feb. 22 Letter, at 3–4; Exelon Feb. 22 Letter, at 2–4; CEF Feb. 22 Letter, at 2–4; NY City Bar Feb. 22 Letter, at 2.

[327] *See* VRS Feb. 22 Letter, at 1 and 4; NACUBO Feb. 22 Letter, at 3–4; HOOPP Feb. 22 Letter, at 3; CEF Feb. 22 Letter, at 4–5.

[328] *See* VRS Feb. 22 Letter, at 4; NACUBO Feb. 22 Letter, at 3–4; ABC/CIEBA Feb. 22 Letter, at 13.

[329] *See* BlackRock Feb. 22 Letter, at 2; CEF Feb. 22 Letter, at 3–4 and 8.

[330] *See* Rep. Bachus Mar 15 Letter, at 1–3; SIFMA/ISDA Feb. 17 Letter, at 9; BlackRock Feb. 22 Letter, at 2 and 6; ABC/CIEBA Feb. 22 Letter, at 2–3; ERIC Feb. 22 Letter, at 2–3; AFSCME Feb. 22 Letter, at 4–5; AMG–SIFMA Feb. 22 Letter, at 8–9.

[331] *See* BlackRock Feb. 22 Letter, at 2; SIFMA/ISDA Feb. 17 Letter, at 3; CEF Feb. 22 Letter, at 8.

[332] *See* MFA Feb. 22 Letter, at 1–3; BlackRock Feb. 22 Letter, at 2; MetLife Feb. 22 Letter, at 1 and 4–5; CEF Feb. 22 Letter, at 5–6.

[333] *See, e.g.,* FHLBanks Feb. 22 Letter, at 3–4; FHLBanks June 3 Letter, at 8–9; NY City Bar Feb. 22 Letter, at 2; SIFMA/ISDA Feb. 17 Letter, at 4 and 16–18. *Contra* CFA/AFR Feb. 22 Letter, at 18.

[334] *See* BlackRock Feb. 22 Letter, at 6–7; VRS Feb. 22 Letter, at 3–4; MFA Feb. 22 Letter, at 5–6; HOOPP Feb. 22 Letter, at 2–3; ABC/CIEBA Feb. 22 Letter, at 13; COPE Feb. 22 Letter, at 2–4; COPE June 3 Letter, at 5–6; Exelon Feb. 22 Letter, at 2–3; ETA June 3 Letter, at 20–21; CalPERS Feb. 18 Letter, at 3–4; CEF Feb. 22 Letter, at 2.

[335] Proposing release, 75 FR at 80639.

[336] *See* DPG Framework, *supra* fn. 178; CRMPG I Report, *supra* fn. 274; CRMPG II Report, *supra* fn. 274; CRMPG III Report, *supra* fn. 228.

[337] *See* FHLBanks Feb. 22 Letter, at 2.

[338] The Commission also has clarified that the § 23.431 disclosure obligations do not apply to transactions that are initiated on a SEF or DCM where the swap dealer or major swap participant does not know the identity of the counterparty to the transaction. *See* final § 23.431(c) (previously numbered as proposed § 23.431(b)). *See also* Section 4s(h)(7) of the CEA with respect to the Special Entity provisions.

[339] *See* Section III.A.1. of this adopting release for a discussion of ''Opt in or Opt out for Certain Classes of Counterparties.''

[340] Several commenters urged the Commission to coordinate with the SEC and DOL to ensure that the final rule does not trigger ERISA fiduciary or municipal advisor status. The Commission confirms that it continues to coordinate with both agencies on these issues. *See* Section II of this adopting release for a discussion of ''Regulatory Intersections.'' *See also* Section III.A.1. of this adopting release for a discussion of ''Discretionary Rules'' and ''Different Rules for Swap Dealers and Major Swap Participants.'' Regarding the relative costs and benefits of the disclosure rules, *see* Section VI.C.4. of this adopting release for a discussion of § 23.431.

[341] The Commission is amending § 4.6 to exclude swap dealers from the CTA definition, which the Dodd-Frank Act amended to include swaps, when their advice is solely incidental to its business as a swap dealer. *See* Section II.D. of this adopting release. *See also* Section II.B. of this adopting release for a discussion of how compliance with the business conduct standards rules, including the disclosure duties, will be considered by DOL.

[342] *See supra* at fn. 336 and accompanying text.

[343] The CRMPG III Report provides the following best practice guidance regarding disclosure:

> [I]t is critical that participants in the markets for high-risk complex instruments must understand the risks that they face. An investor or derivative counterparty should have the information needed to make informed decisions. While the Policy Group has recommended that each participant must develop a degree of independence in decision-making, large integrated financial intermediaries have a responsibility to provide their counterparties with appropriate documentation and disclosures. Disclosures must meet the standards established by the relevant regulatory jurisdiction. The Policy

the disclosure rules are intended to level the information playing field by requiring swap dealers and major swap participants to provide sufficient information about a swap to enable counterparties to make their own informed decisions about the appropriateness of entering into the swap. The additional language in the rule, including ''at a reasonably sufficient time prior to entering into a swap'' and ''information reasonably designed to allow a counterparty to assess,'' along with the material risks and characteristics standards in the rule, is intended to provide guidance to swap dealers and major swap participants in complying with the rule. This guidance will assist swap dealers and major swap participants in designing reasonable policies and procedures to comply with the requirements of the statute and the final rule.

The Commission has promoted efficiency and reduced costs by allowing swap dealers and major swap participants to use standardized formats to make required disclosures, as appropriate, in counterparty relationship documentation.[344] Depending on the facts and circumstances, disclosures in a standard format may be appropriate if the information is applicable to multiple swaps of a particular type and class, particularly standardized swaps. Similarly, whether standard form disclosures are appropriate for certain bespoke swaps will depend on the facts and circumstances. Factors that would be relevant are the complexity of the transaction, including, but not limited to, the degree and nature of any leverage,[345] the potential for periods of significantly reduced liquidity, and the lack of price transparency.[346] This approach is consistent with OTC derivatives industry best practice recommendations for high-risk, complex financial instruments.[347] Given the evolutionary nature of swaps, and especially bespoke swaps, swap dealers and major swap participants will be required to have and implement reasonably designed policies and procedures concerning when and how to make particularized disclosures on a transactional basis to account for changing characteristics, as well as different and newly identified risks, incentives and conflicts of interest. The statute is unequivocal regarding the duty to provide disclosures of the material risks, characteristics, incentives and conflicts of interest for each swap.

Regarding commenters' recommendations to delay discretionary rules and urging different rules for major swap participants, the Commission has addressed those issues above.[348] In response to commenters concerns about compliance with principles based disclosure duties, the Commission will, in the absence of fraud, consider good faith compliance with policies and procedures reasonably designed to comply with the disclosure rules as a mitigating factor when exercising its prosecutorial discretion for violation of the disclosure rule.

a. Section 23.431(a)(1)—Material Risk Disclosure

i. Proposed § 23.431(a)(1)

The proposed rule tracked the statutory obligations under Section 4s(h)(3)(B)(i) and required the swap dealer or major swap participant to disclose information to enable a counterparty to assess the material risks of a particular swap. The Commission anticipated that swap dealers and major swap participants typically would rely on a combination of standardized disclosures and more particularized disclosures to satisfy this requirement. The proposed rule identified certain types of risks that are associated with swaps generally, including market,[349] credit,[350] operational,[351] and liquidity risks.[352] Required risk disclosure included sufficient information to enable a counterparty to assess its potential exposure during the term of the swap and at expiration or upon early termination. The Commission noted that, consistent with industry ''best practices,'' information regarding specific material risks had to identify the material factors that influence the day-to-day changes in valuation, as well as the factors or events that might lead to significant losses.[353] As described in the proposing release, disclosures under the proposed rule should consider the effect of future economic factors and other material events that could cause the swap to experience such losses. Disclosures also should identify, to the extent possible, the sensitivities of the swap to those factors and conditions, as well as the approximate magnitude of the gains or losses the swap will likely experience. The Commission noted that swap dealers and major swap participants also should consider the unique risks associated with particular types of swaps, asset classes and trading venues, and tailor their disclosures accordingly.

ii. Comments

The Commission received comments on a variety of issues related to proposed § 23.431(a)(1). Comments included claims that disclosures would increase costs, delay execution, expose parties to additional market risk, intrude on counterparty confidential information and result in ever longer lists of hypothetical risks.[354] However, one commenter specifically disagreed, arguing that the statute requires material risk disclosure and not limited utility, generalized disclosure.[355] With respect to the importance of a robust risk disclosure duty, the commenter[356] referenced transactions profiled in the report from the U.S. Senate Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, ''Wall Street and the Financial Crisis: Anatomy of a Financial Collapse,'' issued April 13, 2011 (''Senate Report'').[357]

Another commenter stated that the proposed rule was too vague regarding what material risks must be disclosed, creating legal uncertainty, potential

Group believes that appropriate disclosures should often go beyond those minimum standards, both through enhancement for instruments currently requiring disclosure, and by establishing documentation standards for instruments that currently require little or none.

CRMPG III Report, at 59.

[344] *See* Section III.A.3.f. of this adopting release for a discussion of proposed § 23.402(g)—Disclosures in a standard format (renumbered as final § 23.402(f)).

[345] This characteristic is particularly relevant when the swap includes an embedded option that increases leverage. Such features can significantly increase counterparty risk exposure in ways that are not transparent. *See also* fn. 227.

[346] CRMPG III Report, at 56; *see also* text at fn. 228.

[347] CRMPG III Report, at 56.

[348] *See* Section III.A.1.b.ii. and iii. of this adopting release for a discussion of ''Discretionary Rules'' and ''Different Rules for Swap Dealers and Major Swap Participants.''

[349] Market risk refers to the risk to a counterparty's financial condition resulting from adverse movements in the level or volatility of market prices.

[350] Credit risk refers to the risk that a party to a swap will fail to perform on an obligation under the swap.

[351] Operational risk refers to the risk that deficiencies in information systems or internal controls, including human error, will result in unexpected loss.

[352] Liquidity risk is the risk that a counterparty may not be able to, or cannot easily, unwind or offset a particular position at or near the previous market price because of inadequate market depth, unique trade terms or remaining party characteristics or because of disruptions in the marketplace.

[353] *See* CRMPG III Report, at 60.

[354] *See, e.g.,* SIFMA/ISDA Feb. 17 Letter, at 17.

[355] CFA/AFR Aug. 29 Letter, at 19.

[356] *Id.,* at 2–5 and 12.

[357] The report concludes that transactions involving structured collateralized debt obligations (''CDOs'') were problematic because they were designed to fail and the disclosures omitted and/or misrepresented the material risks, characteristics, incentives and conflicts of interest related to these types of transactions.

hindsight enforcement, and private rights of action.[358] The commenter claimed that, without guidance, swap dealers and major swap participants may over disclose risks and/or limit the number of their swap counterparties.[359] Certain commenters recommended that the Commission clarify that the ''material risks'' of a swap are limited to the economic terms of the product and not risks associated with the underlying asset.[360]

Several commenters supported standardized risk disclosures.[361] However, others were skeptical of the value of mandatory boilerplate disclosures.[362] Other commenters recommended that the Commission specifically require risk disclosures regarding volatility, historic liquidity and value at risk.[363] One commenter recommended that, in lieu of proposed § 23.431, the Commission limit the disclosure duty to a predefined scenario analysis.[364] It was suggested, for example, regarding interest rate sensitivity, that the rule could mandate an analysis of interest rate conditions up to a certain number of standard deviations away from expected interest rate movements based on historical interest rates.[365] It was asserted that such objective standards would promote marketplace and legal certainty.[366]

iii. Final § 23.431(a)(1)

After considering the comments on proposed § 23.431(a)(1), the Commission has determined to adopt the rule as proposed. In addition, the Commission is confirming that the rule will be interpreted consistently with industry best practice regarding the disclosure of material risks.[367] This guidance will assist swap dealers and major swap participants in designing policies and procedures to comply with the final rule. The final rule is tailored to give effect to the plain language of the statute by requiring swap dealers and major swap participants to provide material risk disclosure that allows a counterparty to assess the risks of the swap.

Certain commenters recommended that the Commission clarify that the material risk disclosure requirement under § 23.431(a)(1) is limited to disclosures about the risks associated with the economic terms of the product and not risks associated with the underlying asset.[368] The Commission believes that for most swaps information about the material risks and characteristics of the swap will relate to the risks and characteristics of the economic terms of the swap.[369] For certain swaps, however, where payments or cash-flows are materially affected by the performance of an underlying asset for which there is not publicly available information (or the information is not otherwise accessible to the counterparty), final § 23.431 would require disclosures about the material risks and characteristics that affect the value of the underlying asset to enable a counterparty to assess the material risks of the swap.[370] For example, for a total return swap whose value is based on the performance of a broad-based index consisting of unique assets that it created or acquired, a swap dealer or major swap participant would be required to disclose information about the material risks and characteristics of the broad-based index, unless such information is accessible to the counterparty. Disclosure regarding an underlying asset in such circumstances is consistent with the duty to communicate in a fair and balanced manner based on principles of fair dealing and good faith as required by Section 4s(h)(3)(C) and final § 23.433. In connection with a swap based on the price of oil, for example, a swap dealer or major swap participant would not have to disclose information about the drivers of oil prices because such information is readily available to market participants.[371]

Without commenting on the Senate Report's findings, the Commission considered how the final disclosure rules would address transactions similar to those profiled in the Senate Report, as requested by commenters.[372] The

[358] FHLBanks June 3 Letter, at 8–9.

[359] *Id.*

[360] *See, e.g.,* SIFMA/ISDA Feb. 17 Letter, at 17 (*e.g.,* a particular event in the Middle East that could impact currency markets).

[361] *See, e.g.,* MetLife Feb. 22 Letter, at 5; ATA Feb. 22 Letter, at 3; APGA Feb. 22 Letter, at 3; FHLBanks Feb. 22 Letter, at 1 and 3–4; FHLBanks June 3 Letter, at 8–9; CII Feb. 10 Letter, at 2.

[362] *See* COPE Feb. 22 Letter, at 3–4; Exelon Feb. 22 Letter, at 2–3; BlackRock Feb. 22 Letter, at 7.

[363] *See* Better Markets Feb. 22 Letter, at 3 and 7; Barnard May 23 Letter, at 2.

[364] NY City Bar Feb. 22 Letter, at 2.

[365] *Id.*

[366] *Id.*

[367] As stated in the proposing release, consistent with industry ''best practices,'' information regarding specific material risks must identify the material factors that influence the day-to-day changes in valuation, as well as the factors or events that might lead to significant losses. Proposing release, 75 FR at 80644 (citing CRMPG III Report, at 60). Appropriate disclosures should consider the effect of future economic factors and other material events that could cause the swap to experience such losses. Disclosures should also identify, to the extent possible, the sensitivities of the swap to those factors and conditions, as well as the approximate magnitude of the gains or losses the swap will likely experience. Proposing release, 75 FR at 80644. *See also* proposed 17 CFR 240.15Fh–3(b)(1), SEC's proposed rules, 76 FR at 42454 (SEC rule regarding material risks requires disclosure, including, but not limited to, ''the material factors that influence the day-to-day changes in valuation, the factors or events that might lead to significant losses, the sensitivities of the security-based swap to those factors and conditions, and the approximate magnitude of the gains or losses the security-based swap will experience under specified circumstances''). Accordingly, the Commission's interpretation is consistent with the text of the SEC's proposed risk disclosure rule, which furthers the harmonization goal of the Commission and the SEC.

[368] *See* SIFMA/ISDA Feb. 17 Letter, at 17.

[369] Such economic terms would include payout structures that embed volatility or optionality features into the transaction, including, but not limited to, caps, collars, floors, knock-in or knock-out rights, or range accrual features. As noted above, disclosures concerning these features would need to provide sufficient information about these features to enable counterparties to make their own informed decisions about the appropriateness of entering into the swap.

[370] Such a requirement is not intended to create, and does not create, any general trading prohibition or general disclosure requirement concerning ''inside information'' under the CEA. This guidance addresses circumstances where information concerning the risks of the underlying asset generally are not publicly available. For example, where a swap dealer offered a total return swap on a broad-based index based on unique assets that it created or acquired, any potential counterparty would be unable to evaluate that transaction absent some form of disclosure by the swap dealer. This rule would require such disclosure. In contrast, where a swap dealer offers a swap on an underlying asset for which it has nonpublic information, for example, harvest information about an agricultural commodity or production information about an energy commodity, and the asset is one for which risk information is publicly available, the swap dealer or major swap participant would not be required to disclose the nonpublic information it holds. However, depending on the facts and circumstances, the swap dealer might have to disclose nonpublic information as part of its duty to disclose material incentives and conflicts of interest. *See* Section III.D.3.d.iii. of this release for a discussion of the duty to disclose material incentives and conflicts of interest. In addition, as part of its obligation to disclose the material economic terms of the swap, the swap dealer would have to provide information about the factors that would cause the value of the swap to change including any correlations with the value of the underlying asset. Of course, swap dealers and major swap participants also will be subject to the fair dealing rule and antifraud provisions with respect to their communications with counterparties. *See* Sections III.B. and III.F. of this release for a discussion of § 23.410–Prohibition on Fraud, Manipulation and Other Abusive Practices, and § 23.433–Communications–Fair Dealing, respectively. In addition, as stated in § 23.400, nothing in these rules is intended to limit or restrict the applicability of other applicable laws, rules and regulations, including the federal securities laws.

[371] With respect to the request by certain commenters that the Commission require material risk disclosures regarding volatility, historic liquidity, and value at risk, the Commission declines to prescribe specific parameters for compliance with the risk disclosure rule beyond the explanatory text of the final rule. Nevertheless, the Commission believes that, depending on the facts and circumstances, including whether the counterparty has elected to receive scenario analysis, disclosure of these risk factors may be appropriate.

[372] *See, e.g.,* Sen. Levin Aug. 29 Letter, at *passim;* CFA/AFR Feb. 22 Letter, at 2, 10 and 12; CFA/AFR Aug. 29 Letter, at 3–8, 18 and 20.

final rule addresses the types of concerns raised by the Senate Report and by commenters by requiring the disclosure of material risks, characteristics, incentives and conflicts of interest, as well the duty to communicate in a fair and balanced manner based on principles of fair dealing and good faith. These duties are consistent with longstanding legal, regulatory and industry best practice standards, which are familiar to the financial services industry and the OTC derivatives industry.

The Commission declines to limit the disclosure duty to a predefined scenario analysis as suggested by one commenter. The Commission recognizes the benefits of, and encourages the use of, an analysis such as the one suggested by the commenter [373] to satisfy, in part, the material risk disclosure requirement. In fact, the Commission believes that the use of historical data in tabular form to illustrate specific swap and/or asset prices, volatility, sensitivity, liquidity risks and characteristics is consistent with industry practice.[374] However, the Commission has determined that such analyses may not satisfy all aspects of the principles based disclosure requirement in Section 4s(h)(3)(B) for all swaps. Accordingly, the Commission has determined not to adopt a predefined scenario analysis in lieu of proposed § 23.431.

In response to commenters asking that the Commission develop standardized risk disclosures, the Commission decided not to adopt futures style standard form swap disclosure for the reasons discussed in connection with § 23.402(f)–Disclosures in a standard format.[375]

b. Section 23.431(b)—Scenario Analysis

i. Proposed § 23.431(a)(1)(i)–(v)

The Commission's scenario analysis rule in proposed § 23.431(a)(1)(i)–(v) (renumbered as § 23.431(b)) required swap dealers and major swap participants to provide scenario analyses when offering to enter into a high-risk complex bilateral swap to allow the counterparty to assess its potential exposure in connection with the swap.[376] In addition, the proposed rule allowed counterparties to elect to receive scenario analysis when they were offered bilateral swaps not available for trading on a DCM or SEF. The elective aspect of the rule reflected the expectation that there would be circumstances where scenario analysis would be helpful for certain counterparties, even for swaps that are not high-risk complex. Proposed § 23.431(a)(1) was modeled on the CRMPG III industry best practices recommendation for high-risk complex financial instruments.[377]

Like the CRMPG III industry best practices recommendation, the term ''high-risk complex bilateral swap'' was not defined in the proposed rule; rather, certain flexible characteristics were identified to prevent concerns about over- or under-inclusivity. The characteristics included: The degree and nature of leverage,[378] the potential for periods of significantly reduced liquidity and the lack of price transparency.[379] The proposed rule required swap dealers and major swap participants to establish reasonable policies and procedures to identify high-risk complex bilateral swaps and, in connection with such swaps, provide the additional risk disclosure specified in proposed § 23.431(a)(1).

Scenario analysis, as required by the proposed rule, would be an expression of potential losses to the fair value of the swap in market conditions ranging from normal to severe in terms of stress.[380] Such analyses would be designed to illustrate certain potential economic outcomes that might occur and the effect of these outcomes on the value of the swap. The proposed rule required that these outcomes or scenarios be developed by the swap dealer or major swap participant in consultation with the counterparty. In addition, the proposed rule required that all material assumptions underlying a given scenario and their impact on swap valuation be disclosed.[381] In requiring such disclosures, however, the Commission did not require swap dealers or major swap participants to disclose proprietary information about pricing models.

The Commission did not propose to define the parameters of the scenario analysis in order to provide flexibility to the parties in designing the analyses in accordance with the characteristics of the bespoke swap at issue and any criteria developed in consultations with the counterparty. Further, the proposed rule required swap dealers and major swap participants to consider relevant internal risk analyses, including any new product reviews, when designing the analyses.[382] As for the format, the proposed rule required both narrative and tabular expressions of the analyses.

To ensure fair and balanced communications and to avoid misleading counterparties, swap dealers and major swap participants also were required to state the limitations of the scenario analysis, including cautions about the predictive value of the scenario analysis, and any limitations on the analysis based on the assumptions used to prepare it. The Commission aligned the proposed rule with longstanding industry best practice recommendations.[383]

ii. Comments

The Commission received comments on a broad range of issues regarding the proposed scenario analysis rule. One commenter raised a host of concerns, including: (1) That Section 4s(h)(3)(B) does not require scenario analysis; (2) codifying industry best practice will discourage future private sector initiatives; (3) scenario analysis is a broad concept encompassing many potential analyses that are not relevant for individual transactions and, absent a definition or guidance regarding the parameters of the analysis, it is possible that scenario analysis will be misleading; (4) scenario analysis may cause swap dealers and major swap participants to become ERISA fiduciaries, municipal advisors and/or CTAs; (5) swap dealers and major swap participants may have liability for failing to provide mandatory scenario analysis even though they have reasonable policies and procedures for identifying high-risk complex bilateral swaps; (6) the highly subjective definition of high-risk complex bilateral swap is problematic from a liability perspective, particularly for hindsight enforcement actions and private rights

[373] NY City Bar Feb. 22 Letter, at 2–3.

[374] *See* CRMPG III Report, at 60.

[375] *See* Section III.A.3.f. of this adopting release for a discussion of final § 23.402(f)–Disclosures in a standard format.

[376] Scenario analysis was proposed in addition to required disclosures for swaps that do not qualify as high-risk complex. Such required disclosures included a clear explanation of the economics of the instrument.

[377] CRMPG III Report, at 60–61.

[378] *See* fn. 227 and 345 discussing risks regarding leverage.

[379] CRMPG III Report, at 56; *see also* text at fn. 228.

[380] These value changes originate from changes or shocks to the underlying risk factors affecting the given swap, such as interest rates, foreign currency exchange rates, commodity prices and asset volatilities.

[381] Material assumptions included (1) the assumptions of the valuation model and any parameters applied and (2) a general discussion of the economic state that the scenario is intended to illustrate.

[382] The Commission proposed that swap dealers and major swap participants adopt policies and procedures regarding a new product policy as part of their risk management system. *See* proposed § 23.600(c)(3), Governing the Duties of Swap Dealers, 75 FR at 71405.

[383] *See* DPG Framework, at Section V.II.G.; CRMPG III Report, at 59–61 and Appendix A, Bullet 5; *but see* SIFMA/ISDA Feb. 17 Letter, at 13–14.

of action; (7) the rule mandates delivery of scenario analysis even if the counterparty neither requests nor wants the analysis; and (8) the mandatory delivery of scenario analysis will delay execution, which increases risk to the counterparty.[384]

Other commenters claimed that the scenario analysis rule would increase counterparty dependence on swap dealers and major swap participants thereby raising moral hazard concerns.[385] Another commenter was concerned that scenario analysis, or portions thereof, is often proprietary, which raises confidentiality and liability issues.[386] The commenter also claimed that the proposed scenario analysis rule is resource intensive and will increase the cost of swaps to counterparties.[387]

Certain commenters were in favor of the proposed scenario analysis rule. For example, a commenter said it would like to receive scenario analysis for the swaps covered by the proposed rule.[388] Another commenter believed that scenario analysis should not be expensive in that swap dealers and major swap participants are expected to take the other side of the swap and already do the analysis, which is easily modified to the counterparty's purpose.[389] Moreover, the commenter asserted that swap dealers and major swap participants must do the analysis as part of the suitability or Special Entity ''best interests'' analysis.[390] Another commenter supported the proposed rule, but suggested allowing swap dealers and major swap participants to delegate responsibility for the analysis to appropriately qualified independent third party providers.[391] In addition, this commenter recommended that the scenario analysis be provided on a portfolio basis.[392] Lastly, certain commenters suggested that the proposed scenario analysis only be required at the request of the counterparty.[393]

iii. Final § 23.431(b)

After considering the comments, the Commission has determined to adopt proposed § 23.431(a)(1)(i)–(v) (renumbered as § 23.431(b)) with certain modifications. The Commission revised the proposed rule to eliminate the requirement to provide scenario analysis for ''high-risk complex bilateral swaps.'' Instead, the final rule requires scenario analysis only when requested by the counterparty for any swap not ''made available for trading'' on a DCM or SEF.[394] To comply with the rule, swap dealers will have to disclose to counterparties their right to receive scenario analysis and consult with counterparties regarding design. These changes eliminate both the mandatory element and definitional issues associated with the term ''high-risk complex bilateral swap.'' They also address counterparty concerns about execution delays and costs. In addition, major swap participants will not have to provide scenario analysis. Because modeling and providing scenario analysis is currently an industry best practice for dealers, the Commission is limiting the duty to swap dealers only.

Regarding parameters for scenario analysis, the Commission decided to retain the language in proposed § 23.431(a)(1)(ii), (iv) and (v). The rule is principles based and allows flexibility in designing the analysis. As guidance, the Commission directs swap dealers to industry best practices for scenario analysis for high-risk complex financial instruments.[395] That best practice recommends:

> The analysis should be done over a range of assumptions, including severe downside stress scenarios. Scenario analysis should also include an analysis of what assumptions would result in a significant percentage loss (*e.g.,* 50%) of principal or notional. All implicit and explicit assumptions should be clearly indicated and calculation methodologies should be explained. Significant assumptions should be stress-tested with the results plainly disclosed.[396]

In addition, counterparties may request the type of information and scenario analyses they consider useful. Such flexibility enhances the benefits of scenario analysis to counterparties while limiting the costs of the final rule. The counterparty gets what it needs and the swap dealer has certainty about the type of analysis that will comply with the rule. As noted in the proposing release, swap dealers have informed Commission staff that they currently provide to counterparties scenario analysis upon request and without charge.[397]

Regarding comments that Section 4s(h)(3)(B) does not require scenario analysis, the Commission notes that OTC derivatives industry best practice dating back to 1995 discusses the provision of scenario analysis to illustrate the risks of particular derivative products.[398] In addition, a recent OTC derivatives industry best practice disclosure recommendation for high-risk complex financial instruments calls for ''rigorous scenario analyses and stress tests that prominently illustrate how the instrument will perform in extreme scenarios, in addition to more probable scenarios.'' [399] These industry reports, coupled with letters from commenters,[400] are evidence of the value of scenario analysis in supplementing a counterparty's ability to assess the risks and characteristics of swaps and support the Commission's determination that requiring scenario analysis, as provided for in the final rule, is in the public interest. As discussed above in connection with final § 23.400–Scope, the Commission has ample discretionary authority to adopt the scenario analysis rule.[401]

The Commission is not persuaded by the assertion that codifying industry best practice will discourage future private sector initiatives and enhance the potential for hindsight enforcement actions and private rights of action.[402] By adopting industry best practice recommendations, it can be argued that the Commission is encouraging industry efforts to try to shape regulatory solutions to industry problems. The Commission also is not persuaded that adopting industry best practice recommendations will cause hindsight enforcement actions and private suits

[384] *See* SIFMA/ISDA Feb. 17 Letter, at 18–21.

[385] *See* MFA Feb. 22 Letter, at 6; CEF Feb. 22 Letter, at 9; SIFMA/ISDA Feb. 17 Letter, at 19.

[386] CEF Feb. 22 Letter, at 9–10.

[387] *Id.*

[388] MetLife Feb. 22 Letter, at 5.

[389] CFA/AFR Feb. 22 Letter, at 9.

[390] *Id.*

[391] Markit Feb. 22 Letter, at 3–4; Markit June 3 Letter, at 7.

[392] *Id.*

[393] *See* COPE Feb. 22 Letter, at 4; SIFMA/ISDA Feb. 17 Letter, at 21; Exelon Feb. 22 Letter, at 4; CEF Feb. 22 Letter, at 10.

[394] Under Section 2(h)(8) of the CEA, a swap that is subject to the clearing requirement of Section 2(h)(1) must be executed on a DCM or SEF unless no DCM or SEF ''makes the swap available to trade'' or the swap is subject to the clearing exception under Section 2(h)(7) (*i.e.,* the end-user exception). *See* Proposed Rules, Swap Transaction Compliance and Implementation Schedule: Clearing and Trade Execution Requirements under Section 2(h) of the CEA, 76 FR 58186, 58191, Sept. 20, 2011 (''Trade Execution Requirements''); *see also* Proposed Rules, Process for a Designated Contract Market or Swap Execution Facility to Make a Swap Available to Trade, 76 FR 77728, Dec. 14, 2011 (''Process to Make a Swap Available to Trade''). Therefore, final § 23.431(b) only requires a swap dealer to provide scenario analysis upon request for swaps that are not subject to the trade execution requirement under Section 2(h)(8).

[395] *See* CRMPG III Report, at Appendix A, Bullet 5.

[396] *Id.*

[397] Proposing release, 75 FR at 80645.

[398] *See* DPG Framework, at Section V.II.G.

[399] *See* CRMPG III Report, at 61.

[400] *See* MetLife Feb. 22 Letter, at 5; CFA/AFR Feb. 22 Letter, at 9; Better Markets Feb. 22 Letter, at 3 and 7; Barnard May 23 Letter, at 2; Markit Feb. 22 Letter, at 3–4. *Accord* COPE Feb. 22 Letter, at 4; CEF Feb. 22 Letter, at 10 (suggesting changing the rule from mandatory to elective by the counterparty).

[401] *See* Section III.A.1.ii. of this adopting release for a discussion of ''Discretionary Rules.''

[402] SIFMA/ISDA Feb. 17 Letter, at 18.

filed against swap dealers. The Commission notes that litigation risk is not new to swap dealers. Numerous private and enforcement actions involving derivatives have been filed based on theories that existed prior to the enactment of the Dodd-Frank Act.

With regard to the claim that scenario analysis needs a definition and parameters to avoid potentially misleading counterparties, the Commission notes that the final rule, unlike the proposed rule, will require scenario analysis only as requested by the counterparty.[403] The final rule also will require consultation with the counterparty and disclosure of the material assumptions and calculation methodologies. These aspects of the rule, coupled with the other disclosure and fair dealing duties, should ameliorate the potential for misleading the counterparty. In addition, the Commission has determined to adopt the CRMPG III Report description of scenario analysis, which provides an appropriate, principles based standard for swap dealers under the final rule.[404] This principles based standard should provide sufficient guidance to swap dealers to achieve consistency regarding the minimum parameters of scenario analyses. As indicated in the final rule, counterparties may request additional information and analyses.

The Commission is not persuaded by claims that the scenario analysis rule would increase counterparty dependence on swap dealers thereby raising moral hazard concerns. As discussed above, the scenario analysis rule has been revised to eliminate the mandatory provision in favor of a counterparty election. In addition, the counterparty election covers swaps that are not ''made available for trading'' on a DCM or SEF.[405] This narrowing of the rule reduces both swap dealer and counterparty costs, including potential delays in execution. Only counterparties that want and request the scenario analysis will receive it. This approach is consistent with industry practice, which was confirmed during meetings with swap dealers, that upon request of counterparties scenario analysis is provided and without any additional charge.[406] Therefore, the rule should not significantly change the existing practice by unduly increasing counterparty dependence on swap dealers or creating moral hazard concerns.

With respect to claims that scenario analysis, or portions thereof, are often proprietary, which may raise confidentiality and liability issues,[407] the Commission notes that the final rule does not require the disclosure of ''confidential, proprietary information about any model it may use to prepare the scenario analysis.'' However, the rule does require the disclosure of all material assumptions and an explanation of the calculation methodologies. The Commission does not consider scenario analysis and its material assumptions and calculation methodologies to be confidential, proprietary information. This conclusion is based on several industry reports that confirm that scenario analysis and its material assumptions and calculation methodologies are best practice disclosure.[408] Regarding commenter's concerns relating to liability for the scenario analysis, the Commission believes that forward-looking statements should not unduly expose swap dealers to liability where the scenario analysis is performed consistent with the rule, in consultation with the counterparty and subject to appropriate warnings about the assumptions and limitations underlying the scenario analysis. Such warnings also would be consistent with § 23.433—Communications—fair dealing.[409]

The elective approach in the final rule ameliorates concerns that the proposed scenario analysis rule is resource intensive and will increase the cost of swaps to counterparties. This approach was supported by commenters and should be less burdensome.[410] In addition, the final rule provides for counterparty consultation in the design of a requested scenario analysis. Where the counterparty does not specify the assumptions, the swap dealer will have discretion to design a scenario analysis consistent with the principles established in the rule. This approach should assist the swap dealer in limiting the costs associated with complying with the final scenario analysis rule. The Commission notes that swap dealers are already preparing some form of scenario analysis of the swap for their own purposes, including new product review, daily product pricing, margin analysis and risk management.

The Commission agrees with the commenter that suggested that swap dealers be able to use appropriately qualified independent third party providers to perform the scenario analysis.[411] However, swap dealers will remain responsible for ensuring compliance with the rule. With respect to the suggestion that the rule require that scenario analysis be provided on a portfolio basis,[412] the Commission notes that the final rule is guided by the statute, which requires disclosure of information about the risks of ''the swap.'' As a result, the Commission has determined that it is appropriate to require swap dealers to provide scenario analysis, upon request, with respect to a particular swap. However, nothing in the rule precludes swap dealers from agreeing to provide scenario analysis on a portfolio basis, upon request. The Commission expects some counterparties may request scenario analysis based on a portfolio while others, for a variety of reasons, including confidentiality of portfolio positions, may not request that analysis. Lastly, the Commission addressed the commenters' concern that scenario analysis may cause swap dealers to become ERISA fiduciaries, municipal advisors and/or CTAs elsewhere in this adopting release.[413]

c. Section 23.431(a)(2)—Material Characteristics

i. Proposed § 23.431(a)(2)

Proposed § 23.431(a)(2) required swap dealers and major swap participants to disclose the material characteristics of the swap, including the material economic terms of the swap, the material terms relating to the operation of the swap and the material rights and obligations of the parties during the term of the swap. Under the proposed rule, the material characteristics included the material terms of the swap that would be included in any ''confirmation'' of a swap sent by the swap dealer or major swap participant to the counterparty upon execution.[414]

[403] The final rule does not distinguish between high risk complex swaps and other swaps. This and other changes in the final rule address commenters' concerns about the meaning of ''high-risk complex swap'' and resulting potential liability issues.

[404] *See* CRMPG III Report, at Appendix A, Bullet 5.

[405] *See* discussion of Section 2(h)(8) and swaps ''made available for trading'' on a DCM or SEF at fn. 394.

[406] Proposing release, 75 FR at 80645.

[407] *See* CEF Feb. 22 Letter, at 9–10.

[408] *See* DPG Framework, at Section V.II.G.; CRMPG III Report, at A2.

[409] *See* Section III.F. of this adopting release for a discussion of § 23.433—Communications—fair dealing.

[410] *See, e.g.,* Exelon Feb. 22 Letter, at 4; COPE Feb. 22 Letter, at 4; SIFMA/ISDA Feb. 17 Letter, at 21.

[411] *See* Markit Feb. 22 Letter, at 2–4; Markit June 3 Letter, at 7.

[412] *Id.*

[413] *See* Section II of this adopting release for a discussion of ''Regulatory Intersections,'' including DOL ERISA Fiduciary, SEC Municipal Advisor and CTA status issues.

[414] Proposing release, 75 FR at 80645.

ii. Comments

Commenters raised objections to language in the proposing release concerning delivery of a summary of the material characteristics of the swap to be provided by swap dealers and major swap participants to counterparties prior to entering into a swap.[415] One commenter claimed it would be both unnecessary given the ECP status of the counterparty and potentially confusing due to differences between a pre-execution summary and the post-execution transaction documentation.[416]

Commenters that support the disclosure rule recommended that the rule be interpreted to require for bespoke swaps that disclosures separately detail standardized components of the swap and price of each component, including embedded credit for forgone collateral.[417] In addition, a commenter recommended that the disclosure obligation include the features of the swap that could disadvantage the counterparty.[418]

iii. Final § 23.431(a)(2)

After considering the comments, the Commission has determined to adopt § 23.431(a)(2) as proposed. To address questions about the manner and substance of disclosure that must be provided prior to entering into a swap, and the nature of transaction documentation that will be required post execution, the Commission provides the following guidance. As noted above, for a counterparty to assess the merits of entering into a swap, it will need information about the material risks and characteristics of the swap at a reasonably sufficient time prior to entering into the swap. The disclosure rules grant discretion to swap dealers and major swap participants, consistent with the rules on manner of disclosure, disclosures in a standard format and record retention, to adopt a reliable means of disclosure agreed to by a counterparty.[419]

Disclosures made prior to entering into a swap should not be confused with transaction documentation. The final internal business conduct standards rules in subpart J of part 23 will apply to transaction documentation.[420] The final external business conduct standards rules in subpart H of part 23 establish requirements to make disclosures about the material characteristics, among other information, of the swap. The two sets of rules will work together. To the extent that the final internal business conduct standards rules require that swap dealers and major swap participants provide to counterparties pre-execution information about the characteristics of a swap, such information should be considered by swap dealers and major swap participants in determining what, if any, additional information must be provided to counterparties pre-execution to comply with the material characteristics disclosure duty in § 23.431(a)(2).

One commenter requested that the Commission clarify that the disclosure requirement is satisfied when a counterparty has or is provided a copy of each item of documentation that governs the terms of its swap with the swap dealer or major swap participant.[421] The Commission declines to make such a determination because whether the material characteristics disclosure requirement is met in any particular case will be a facts and circumstances determination, based on the standards set forth in the rule. This will be particularly true when certain features including, but not limited to, caps, collars, floors, knock-ins, knock-outs, range accrual features, embedded optionality or embedded volatility increase the complexity of the swap. The disclosure rule, coupled with § 23.433—Communications—Fair Dealing,[422] requires the swap dealer or major swap participant to provide a sound factual basis for the counterparty to assess how these features and others would impact the value of the swap under various market conditions during the life of the swap.[423]

Swap dealers and major swap participants will be permitted to include certain disclosures about material characteristics (other than information normally contained in a term sheet, such as price and dates) in counterparty relationship documentation, where appropriate, consistent with final § 23.402(f)—Disclosures in a standard format.

Commenters sought guidance on whether the material characteristics disclosure duty requires a swap dealer or major swap participant to determine and then disclose how the terms of a particular swap relate to the circumstances of a particular counterparty.[424] The Commission believes that, for most swaps, information about the material characteristics of the swap will relate to the economic terms of the swap rather than the circumstances of the particular counterparty. However, if a swap dealer or major swap participant has contractually undertaken to do so, or a swap dealer has made a ''recommendation,'' which triggers a suitability duty or is acting as an advisor to a Special Entity, the swap dealer or major swap participant will be required to act consistently with the relevant duty, including exercising reasonable due diligence and making appropriate disclosures. Of course, in all circumstances, swap dealers and major swap participants are required to communicate in a fair and balanced manner based on principles of fair dealing and good faith in accordance with final § 23.433. Additionally, for a Special Entity, the swap dealer or major swap participant will have to have a reasonable basis to believe that the qualified independent representative will act in the Special Entity's best interests and evaluate the appropriateness of each swap based on the needs and characteristics of the Special Entity before the Special Entity enters into the swap with a swap dealer or major swap participant.[425]

[415] *See* Exelon Feb. 22 Letter, at 3; SIFMA/ISDA Feb. 17 Letter, at 21–22.

[416] SIFMA/ISDA Feb. 17 Letter, at 21–22.

[417] *See* CFA/AFR Feb. 22 Letter, at 10; Better Markets Feb. 22 Letter, at 4–6; Better Markets June 3 Letter, at 13; CFA/AFR Nov. 3 Letter, at 6.

[418] CFA/AFR Feb. 22 Letter, at 11 (for example, situations where the proposed swap has basis risk and/or an interest rate mismatch).

[419] *See* Sections III.A.3.e., f. and g. of this adopting release for a discussion of final § 23.402(e)—Manner of disclosure, final § 23.402(f)—Disclosures in a standard format, and final § 23.402(g)—Record retention, respectively. While the rules allow disclosures by any reliable means agreed to by the counterparty, pursuant to § 23.402(f) written disclosures are the preferred method to avoid confusion and counterparty disputes. Written disclosures enhance the ability to monitor compliance and facilitate compliance with the record retention requirements in § 23.402(g).

[420] *See, e.g.,* Confirmation, Portfolio Reconciliation, and Portfolio Compression Requirements for Swap Dealers and Major Swap Participants, 75 FR 81519, Dec. 28, 2010.

[421] SIFMA/ISDA Feb. 17 Letter, at 21–22.

[422] *See* Section III.F. of this adopting release for a discussion of § 23.433—Communications—fair dealing.

[423] Because § 23.431(a)(2) creates a flexible disclosure regime, the Commission declines, at this time, to interpret § 23.431(a)(2) as requiring, with respect to bespoke swaps, a separate detailing of all standardized components of the swap and the pricing of each component, including embedded credit, for forgone collateral, especially where the swap dealer has not made a recommendation to the counterparty. However, nothing in the final rule would preclude the parties from negotiating disclosures of this type. *See* Section III.D.3.d. of this adopting release for a discussion of disclosures in connection with a swap dealer's recommendation.

[424] *See* CFA/AFR Feb. 22 Letter, at 11.

[425] *See* Section IV.C. of this adopting release for a discussion of § 23.450—Requirements for swap dealers and major swap participants acting as counterparties to Special Entities.

d. Section 23.431(a)(3)—Material Incentives and Conflicts of Interest

i. Proposed § 23.431(a)(3)

Proposed § 23.431(a)(3) tracked the statutory language under Section 4s(h)(3)(B)(ii) and required a swap dealer or major swap participant to disclose to any counterparty the material incentives and conflicts of interest that the swap dealer or major swap participant may have in connection with a particular swap. The Commission also proposed that swap dealers and major swap participants be required to include with the price of the swap, the mid-market value of the swap as defined in proposed § 23.431(c)(2). In addition, swap dealers and major swap participants were required to disclose any compensation or benefit that they receive from any third party in connection with the swap. The Commission also stated in the proposing release that, in connection with any recommended swap, swap dealers and major swap participants were expected to disclose whether their compensation related to the recommended swap would be greater than for another instrument with similar economic terms offered by the swap dealer or major swap participant.[426] With respect to conflicts of interest, the Commission stated that it expected such disclosure would include the inherent conflicts in a counterparty relationship, particularly when the swap dealer or major swap participant recommends the transaction. The Commission also indicated it expected that a swap dealer or major swap participant that engages in business with the counterparty in more than one capacity should consider whether acting in multiple capacities creates material incentives or conflicts of interest that require disclosure.[427]

ii. Comments

The Commission received comments addressing a variety of issues. Several commenters generally supported the disclosure requirement.[428] One commenter stated that it wanted to receive information about incentives or compensation that the swap dealer was receiving.[429] Two other commenters said they did not object to swap dealers being required to disclose conflicts of interest because such disclosures would seem to be embedded in the concept of fair dealing.[430] Another commenter recommended allowing the use of standardized disclosures to satisfy conflicts of interest and compensation matters but supported specific disclosure on a transaction-by-transaction basis for any compensation received by the swap dealer or major swap participant in connection with a particular swap.[431]

A commenter approved of the proposed rule and the guidance in the proposing release requiring swap dealers and major swap participants to disclose whether their compensation for a recommended swap would be greater than for another instrument with similar economic terms offered by the swap dealer or major swap participant.[432] However, a different commenter objected to, and requested withdrawal of, that same statement asserting that swap dealers and major swap participants should not be obligated to identify and evaluate comparable instruments on behalf of the counterparty as such a comparative analysis would be an advisory service that is the responsibility of the counterparty and its advisors.[433]

Another commenter urged full disclosure to counterparties of the incentives to swap dealers and major swap participants for use of various market infrastructures (swap data repositories (''SDRs''), DCOs, DCMs, and SEFs).[434] Similarly, the commenter recommended prohibiting fee rebates, discounts, and revenue and profit sharing, which it asserts are substantively the same as preferential access to market infrastructures. The commenter maintained that such practices simply transfer costs to less influential participants who must follow the lead of large liquidity providers.[435]

In addition, certain commenters that supported the rule also would like the Commission to require separate pricing of each ''amalgamated'' standardized component of a customized swap and a comparison of the risks and costs of the customized swap with comparable standardized, listed swaps.[436] The commenters identified, for example, embedded credit for forgone collateral as an amalgamated component that should be priced separately. These commenters also urged the Commission to clarify that the material incentives and conflicts of interest disclosure obligation applies not only to specific alternative instruments but also to alternative strategies.[437]

In addition, a commenter recommended that the Commission issue guidance that the following situations are not conflicts of interest that warrant disclosure because counterparties are aware of or expect these common business practices: (1) Simply taking the opposite side of a swap; (2) swap dealers, major swap participants or affiliates entering into other swaps that take an opposite view from that of the counterparty for reasons unrelated to the swap with the counterparty; and (3) swap dealers and major swap participants having a physical business that would benefit from a price movement that would be adverse to the counterparty's economic position under the swap.[438] This same commenter also requested that the final rules formally recognize that no disclosure obligation exists with respect to knowledge regarding a swap's reference commodity (specifically, swaps referencing energy commodities), the physical markets in which it trades, or any particular entity's positions or business in such commodity.[439]

iii. Final § 23.431(a)(3)

After considering the comments, the Commission has determined to adopt the proposed rule with the following revision. In proposed § 23.431(a)(3)(i), when disclosing the price of a swap, swap dealers and major swap participants would have to disclose the ''mid-market value'' of the swap. In the final rule, the Commission decided to change the term ''mid-market value'' to ''mid-market mark''[440] to more accurately describe the requirement and mitigate concerns that the duty would constitute valuation, appraisal or advisory services or impose a fiduciary status on swap dealers and major swap

[426] Proposing release, 75 FR at 80645.

[427] This may exist, for example, when the swap dealer or major swap participant acts both as an underwriter in a bond offering and as counterparty to the swaps used to hedge such financing. In these circumstances, the swap dealer's or major swap participant's duties to the counterparty would vary depending on the capacities in which it is operating and should be disclosed. With respect to swaps entered into with Special Entities, swap dealers and major swap participants are required to disclose the capacity in which they are acting and, if they engage in multiple capacities, disclose the difference in such capacities in accordance with Section 4s(h)(5) of the CEA and proposed § 23.450(f) (renumbered and adopted as final § 23.450(g)).

[428] *See, e.g.,* MetLife Feb. 22 Letter, at 5; COPE Feb. 22 Letter, at 4; Exelon Feb. 22 Letter, at 4.

[429] MetLife Feb. 22 Letter, at 5.

[430] COPE Feb. 22 Letter, at 4; Exelon Feb. 22 Letter, at 3–4.

[431] CEF Feb. 22 Letter, at 13.

[432] CFA/AFR Feb. 22 Letter, at 11.

[433] SIFMA/ISDA Feb. 17 Letter, at 23.

[434] *See* Better Markets June 3 Letter, at 6–7.

[435] *Id.*

[436] *See* Better Markets June 3 Letter, at 13–17; CFA/AFR Feb. 22 Letter, at 11–12; CFA/AFR Nov. 3 Letter, at 6.

[437] *Id.*

[438] CEF Feb. 22 Letter, at 13.

[439] *Id.*

[440] Further, the Commission confirms that ''mid-market mark'' can be determined through mark-to-model calculations when a liquid market does not exist.

participants.[441] The Commission notes that information about the spread between the quote and mid-market mark is relevant to disclosures regarding material incentives and provides the counterparty with pricing information that facilitates negotiations and balances historical information asymmetry regarding swap pricing.

In addition, the Commission is clarifying certain guidance provided in the proposing release regarding recommended swaps.[442] The proposing release indicated that, in connection with the duty to disclose material incentives and conflicts of interest, swap dealers and major swap participants would be expected to disclose whether their compensation relating to a recommended swap would be greater than for another instrument with ''similar economic terms'' offered by the swap dealer or major swap participant.[443] In response to commenter concerns that such disclosure would constitute advice,[444] the Commission has determined to limit the guidance to instances where more than one swap and/or strategy is recommended to accomplish a particular financial objective.[445] Generally, these multi-product presentations include a comparison of swaps or strategies. In addition, the Commission understands that counterparties often ask dealers for alternatives to a particular swap, which may lead to a comparison. Considering this common industry practice, which facilitates sales, the comparison should include the relative compensation related to the different alternatives. This information is material to the swap dealer's or major swap participant's incentives underlying the recommendations and should assist the counterparty in making an assessment. Lastly, the Commission notes that this guidance does not prevent counterparties from requesting, or swap dealers and major swap participants from providing, comparisons of other swaps or products that may or may not have similar economic terms.

The Commission declines to state categorically that swap dealers and major swap participants will be required to separately price each standardized component of a customized swap, compare the risks and costs of customized swaps with those of standardized swaps, or disclose the embedded cost of credit for forgone collateral. Similarly, the Commission believes that facts and circumstances, including whether the swap dealer or major swap participant recommended the swap, will determine whether a swap dealer or major swap participant is required to disclose that it is trying to move a particular position off its books and that the swap is part of that strategy.[446] Swap dealers and major swap participants will be required to have policies and procedures reasonably designed to identify material incentives and conflicts within the scope of § 23.431(a)(3). The Commission will consider good faith compliance with such policies and procedures when exercising its prosecutorial discretion in connection with any violation of the rule.

With respect to the use of standardized disclosures to satisfy conflicts of interest and incentives disclosures, the Commission reminds swap dealers and major swap participants, as it has with respect to other disclosure obligations, that whether such disclosures will be sufficient to satisfy the disclosure rule in connection with any particular swap will depend on the facts and circumstances.[447] As discussed elsewhere in this adopting release, the statute places the disclosure duty on swap dealers and major swap participants to ensure that all material incentives and conflicts of interest relating to the swap are disclosed.

Concerning disclosure to counterparties of the incentives to swap dealers and major swap participants for use of various market infrastructures (DCOs, SDRs, DCMs, and SEFs), the Commission agrees that incentives paid to swap dealers and major swap participants by various market infrastructures for a swap transaction are a required disclosure within the statute and § 23.431(a)(3).[448] With respect to fee rebates, discounts, and revenue and profit sharing, the Commission has determined not to prohibit these payments at this time, but rather to require disclosure of such payments because the payments would constitute material incentives or conflicts of interest in conjunction with the swap. Such disclosure also is encompassed in the duty to communicate in a fair and balanced manner. Further, the failure to disclose this information or other material disclosures under the rule may be a material omission under the Commission's anti-fraud provisions, including final § 23.410(a).

The Commission declines the commenters' request that the Commission issue guidance that certain enumerated situations are not conflicts of interest that warrant disclosure. The plain language of Section 4s(h)(3)(B)(ii) of the CEA requires disclosure of all material conflicts of interest that a swap dealer or major swap participant has in connection with the swap. Without assessing the list of situations provided by commenters, the Commission notes that the statute does not limit or exempt the disclosure of certain conflicts of interest where counterparties may be aware of or expect certain common business practices.

One commenter requested confirmation that the material incentives and conflicts of interest disclosure obligation does not apply to information known by the swap dealer or major swap participant regarding a swap's reference commodity, the physical markets in which it trades or any particular entity's positions or business in such commodity.[449] Based on the statutory language in Section 4s(h)(3)(B)(ii), the Commission cannot confirm the commenter's point. The statute requires swap dealers and major swap participants to disclose ''any material incentives or conflicts of interest that the swap dealer or major swap participant may have in connection with the swap.'' It is certainly possible, particularly in the energy context mentioned by the commenter, that activities of the swap dealer or major swap participant related to the underlying commodity could create material incentives or conflicts of interest ''in connection with'' the swap offered to a counterparty. In addition, the Commission believes that transactions similar to those described in the Senate Report[450] would warrant disclosures concerning activities related to the underlying commodity. Without commenting on the transactions themselves, the Commission notes that the Senate Report raised concerns

[441] The Commission has made the same change in proposed § 23.431(c)—Daily Mark (renumbered as § 23.431(d)).

[442] Proposing release, 75 FR at 80645.

[443] *Id.*

[444] *See* SIFMA/ISDA Feb. 17 Letter, at 23.

[445] *See also* Section III.G.3. of this adopting release and Appendix A to subpart H of part 23 of the Commission's Regulations for a discussion of what constitutes a ''recommendation.''

[446] *See, e.g.,* the Senate Report, at 518–531 ($2 billion Hudson CDO deal included $1.2 billion in assets from Goldman's balance sheet. The marketing materials did not disclose that $1.2 billion of the assets were from Goldman's balance sheet.).

[447] *See, e.g.,* Section III.A.3.f. of this adopting release for a discussion of final § 23.402(f)—Disclosures in a standard format.

[448] Such payments can be considered both incentives and conflicts of interest within the meaning of the statute and rule and, either way, must be disclosed. *See* Section 4s(h)(3)(C) of the CEA and final § 23.433—Communications-fair dealing.

[449] *See* CEF Feb. 22 Letter, at 13.

[450] Senate Report, at 513–636.

regarding proprietary trading and the limited transparency of underlying assets.[451] Whether such disclosure is required in connection with any particular swap will depend on the facts and circumstances.[452]

e. Section 23.431(d)—Daily Mark

i. Proposed § 23.431(c)

Section 4s(h)(3)(B)(iii) directs the Commission to adopt rules that require: (1) For cleared swaps, upon request of the counterparty, receipt of the daily mark of the transaction from the appropriate DCO; and (2) for uncleared swaps, receipt of the daily mark of the swap transaction from the swap dealer or major swap participant.[453]

For cleared swaps, proposed § 23.431(c)(1) required swap dealers and major swap participants to notify counterparties of their rights to receive, upon request, the daily mark from the appropriate DCO. For uncleared swaps, proposed § 23.431(c)(2) and (3) required swap dealers and major swap participants to provide a daily mark to their counterparties on each business day during the term of the swap as of the close of business, or such other time as the parties agree in writing. The Commission proposed to define daily mark for uncleared swaps as the mid-market value of the swap, which would specifically not include amounts for profit, credit reserve, hedging, funding, liquidity or any other costs or adjustments.[454] Based on consultations with stakeholders, the consensus was that mid-market value was a transparent measure that would assist counterparties in calculating valuations for their own internal risk management purposes. Further, the Commission proposed that swap dealers and major swap participants disclose both the methodology and assumptions used to prepare the daily mark, and any material changes to the methodology or assumptions during the term of the swap. The Commission noted that the daily mark for certain bespoke swaps may be generated using proprietary models. The proposed rule did not require the swap dealer or major swap participant to disclose proprietary information relating to its model.[455]

Lastly, the Commission proposed that swap dealers and major swap participants provide appropriate clarifying statements relating to the daily mark.[456] Such disclosures could include, as appropriate, that the daily mark may not necessarily be: (1) A price at which the swap dealer or major swap participant would agree to replace or terminate the swap; (2) the basis for a variation margin call; nor (3) the value of the swap that is marked on the books of the swap dealer or major swap participant.

ii. Comments

One commenter favored disclosure of a daily mark.[457] The commenter concurred with the Commission's definition of daily mark as the ''mid-market value'' of the swap.[458] The commenter noted that many end-user counterparties already receive daily swap valuations at mid-market as determined under the definition of ''Exposure'' included in the 1994 ISDA Credit Support Annex and requested that the Commission clarify that the daily mark valuations under the rule are to be determined by reference to the same definition.[459] Some commenters recommended that the daily mark be calculated on a portfolio basis rather than for each individual swap because margin calls are based on a net or portfolio basis.[460] Several commenters recommended that the rule be revised from a mandatory daily disclosure to ''upon request'' by the counterparty model.[461] Others asserted that daily mark disclosure should be negotiable, including an opt out alternative.[462]

One commenter recommended revising the rule to allow swap dealers and major swap participants to delegate responsibility for providing the daily mark to appropriately qualified independent third party providers.[463] Another commenter stated that counterparties should not rely on swap dealers or major swap participants, but instead should seek marks from independent third parties.[464] Several commenters expressed concern that requiring swap dealers and major swap participants to provide a daily mark may be considered appraisal services that trigger ERISA fiduciary status, which prohibits principal-to-principal swap transactions.[465]

One commenter recommended revising the rule to require swap dealers and major swap participants, upon request of a counterparty, to provide the mark used for determining either party's mark-to-market margin obligation or entitlement under an outstanding swap because this approach is consistent with statutory text and the daily mark requirement for cleared swaps.[466]

A different commenter recommended deeming the daily mark obligation for cleared swaps satisfied if the counterparty can access the information directly from the DCO or its FCM.[467] In addition, the commenter requested that the final rule provide that swap dealers and major swap participants, absent fraud, have no liability for a counterparty's use of the provided daily mark.[468] Further, the commenter asserted that requiring disclosure of the daily mark methodology and assumptions encourages improper reliance by the counterparty on the swap dealer or major swap participant.[469] Lastly, one commenter suggested that the rule require swap dealers and major swap participants to deliver the daily mark via communication media that are secure, timely and auditable.[470]

iii. Final § 23.431(d)

After considering the comments, the Commission has determined to adopt § 23.431(c) (renumbered as § 23.431(d)) as proposed, but change the term ''mid-market value'' to ''mid-market mark.'' This change more accurately describes the requirement and mitigates concerns that the duty would constitute valuation, appraisal or advisory services or impose a fiduciary status on swap dealers and major swap participants.[471]

[451] *See* Section III.D.3.a. of this adopting release for a discussion of § 23.431(a)(1)—Material risk disclosure.

[452] Such a requirement is not intended to create, and does not create, any general trading prohibition or general disclosure requirement concerning ''inside information.'' *See* discussion at fn. 370; *see also* fn. 499.

[453] The Commission noted that the term ''daily mark'' is not defined in the statute and that the term ''mark'' is used colloquially to refer to various types of valuation information. *See* proposing release, 75 FR at 80645.

[454] Proposing release, 75 FR at 80645–46.

[455] *Id.* at 80646.

[456] *Id.*

[457] FHLBanks Feb. 22 Letter, at 5.

[458] *Id.*

[459] *Id.,* at 6.

[460] *See, e.g.,* Exelon Feb. 22 Letter, at 4; CEF Feb. 22 Letter, at 15.

[461] *See, e.g.,* COPE Feb. 22 Letter, at 4; MFA Feb. 22 Letter, at 6; SIFMA/ISDA Feb. 17 Letter, at 23.

[462] *See, e.g.,* ERIC Feb. 22 Letter, at 16–17; CEF Feb. 22 Letter, at 15; MFA Feb. 22 Letter, at 6.

[463] Markit Feb. 22 Letter, at 2–3; Markit June 3 Letter, at 7.

[464] MFA Feb. 22 Letter, at 6.

[465] *See* BlackRock Feb. 22 Letter, at 6; SIFMA/ISDA Feb. 17 Letter, at 24; ABC/CIEBA Feb. 22 Letter, at 5–6; AMG–SIFMA Feb. 22 Letter, at 7; ERIC Feb. 22 Letter, at 16–17.

[466] SIFMA/ISDA Feb. 17 Letter, at 23–24.

[467] CEF Feb. 22 Letter, at 14.

[468] *Id.,* at 15.

[469] *Id.*

[470] Markit Feb. 22 Letter, at 2–3.

[471] The Commission has made the same change in final § 23.431(a)(3)—Disclosures of material information, which requires disclosures of material incentives and characteristics. The Commission repeats that, with respect to final § 23.431(d), the Dodd-Frank Act disclosures, including the daily mark and mid-market mark, alone do not cause a swap dealer or major swap participant to be an advisor to a counterparty, including a Special Entity. The Commission does not consider the

Continued

The Commission has determined to define the term daily mark as the ''mid-market mark'' using its discretionary authority to define terms under the Dodd-Frank Act.[472] Because ''mid-market'' represents an objective value, it provides counterparties with a baseline to assess swap valuations for other purposes, including margin or terminations. This term has been used by many industry participants since at least 1994.[473]

The Commission notes that certain comments conflict directly with the plain language of Section 4s(h)(3)(B)(iii)(I) and (II) of the CEA. For example, the suggestion that the daily mark be provided on a portfolio basis rather than for each swap conflicts with the plain language of the statute.[474] If counterparties want additional marks (*e.g.,* marks on a portfolio basis or marks used to calculate margin), then they are free to negotiate the receipt of such information with swap dealers and major swap participants.

With respect to the recommendation that a swap dealer or major swap participant be deemed to satisfy the daily mark duty for cleared swaps if the counterparty can access the information directly from the DCO or its FCM, the Commission agrees, provided that the swap dealer or major swap participant apprises the counterparty and the counterparty agrees to such substituted compliance. The Commission notes that the swap dealer's or major swap participant's daily mark obligation for cleared swaps is prompted by the request of the counterparty. As a result, under the statute, it is up to the counterparty to decide whether it wishes to receive the daily mark through access to the DCO or FCM or from the swap dealer or major swap participant.

As to the request to limit the liability of swap dealers or major swap participants in relation to a counterparty's use of a provided daily mark, the Commission considers the request to be beyond the scope of the rulemaking.[475] Nevertheless, the Commission notes that it will consider good faith compliance with policies and procedures reasonably designed to meet the daily mark requirements, including the calculation of mid-market mark under final § 23.431(d), in exercising its prosecutorial discretion for violations of the rule.[476]

The Commission disagrees with the assertion that requiring disclosure of the daily mark methodology and assumptions will encourage improper reliance by the counterparty on the swap dealer or major swap participant. The statutory daily mark requirement is meaningless unless the counterparty knows the methodology and assumptions that were used to calculate the mark. To make its own assessment of the value of the swap for its own purposes, the counterparty has to have information from the swap dealer or major swap participant about how the mid-market mark was calculated. To satisfy the duty to disclose both the methodology and assumptions used to prepare the daily mark, swap dealers and major swap participants may choose to provide to counterparties methodologies and assumptions sufficient to independently validate the output from a model generating the daily mark, collectively referred to as the ''reference model.'' The Commission does not intend that disclosure of the ''reference model'' would require swap dealers and major swap participants to disclose proprietary information. While the Commission does not define what currently constitutes proprietary information, the Commission is aware that, in light of the disclosure requirements relating to the methodology and assumptions used to prepare the daily mark, market participants may aid in the establishment of appropriate ''reference models'' and, in so doing, potentially alter the extent of undisclosed proprietary information in the future. With proper disclosures, counterparties should not be misled or unduly rely on the mid-market mark provided by the swap dealer or major swap participant.[477] Therefore, the Commission's final rule requires disclosure of the methodology and assumptions underlying the daily mark. The Commission's determination is based on the statutory disclosure provisions as well as the duty to communicate in a fair and balanced manner based on principles of fair dealing and good faith.

One commenter asked the Commission to confirm that the daily mark received by counterparties is to be determined by reference to the same mid-market valuations used in connection with the definition of ''Exposure'' under the 1994 ISDA Credit Support Annex. The Commission declines to endorse any particular methodology given the principles based nature of the rule.

Further, the Commission is providing guidance that the term ''mid-market mark'' can be determined through mark-to-model calculations when a liquid market does not exist. In addition, swap dealers and major swap participants can delegate daily mark responsibilities to third party vendors. However, swap dealers and major swap participants will remain responsible for compliance with the rule.

E. Section § 23.432—Clearing Disclosures

1. Proposed § 23.432

The Commission's proposed rule required certain disclosures regarding the counterparty's right to select a DCO and to clear swaps that are not otherwise required to be cleared. For swaps where clearing is mandatory,[478] proposed § 23.432(a) required a swap dealer or major swap participant to notify the counterparty of its right to select the DCO that would clear the swap. For swaps that are not required to be cleared, under proposed § 23.432(b), a swap dealer or major swap participant was required to notify a counterparty that the counterparty may elect to require the swap to be cleared and that it has the sole right to select the DCO for clearing the swap.[479] Neither of

Dodd-Frank Act disclosures to be advice or a recommendation. *See* Section II of this adopting release for further discussion of the intersection of the subpart H requirements with DOL and SEC requirements.

[472] Section 721(b)(2) of the Dodd-Frank Act.

[473] *See* FHLBanks Feb. 22 Letter, at 6–7. In addition, the term ''mid-market value'' is used in CRMPG I Report, at 7. *See also Bank One Corp.* v. *IRS,* 120 T.C. 174 (U.S. Tax Court 2003). For a discussion of mid-market value and costs, *see* ISDA Research Notes, The Value of a New Swap, Issue 3 (2010), available at *http://www.isda.org/researchnotes/pdf/NewSwapRN.pdf.*

[474] Section 4s(h)(3)(B)(iii) of the CEA states: ''(I) for cleared swaps, upon the request of the counterparty, receipt of the daily mark of the transaction from the appropriate derivatives clearing organization; and (II) for uncleared swaps, receipt of the daily mark of the transaction from the swap dealer or major swap participant.''

[475] *See* Section III.A.1. of this adopting release for a discussion of ''Private Rights of Action.''

[476] The Commission agrees with a commenter's suggestion that the rule should require swap dealers and major swap participants to deliver the daily mark via communication media that are secure, timely and auditable. Markit Feb. 22 Letter, at 3. This is consistent with final § 23.431(d)—Daily mark, as well as final § 23.402(e)—Manner of disclosure. *See* Section III.A.3.e. of this adopting release for a discussion of final § 23.402(e).

[477] Without commenting on the findings of the Senate Report, the Commission notes that the Senate Report included descriptions of certain conduct relating to marks where dealers purportedly refused to explain the basis and methodology for the mark. *See* Senate Report, at 509–510.

[478] *See* Section 2(h) of the CEA. (7 U.S.C. 2(h)).

[479] With respect to these proposed disclosure requirements, the Commission noted that, as between the parties, the counterparty is entitled to choose whether and where to clear, but that no DCM or SEF is required to make clearing available through any DCO. In other words, it is up to the parties to take the swap to a DCM or SEF that provides for clearing through the counterparty's

these notification provisions applied where the counterparty was a registered swap dealer, major swap participant, security-based swap dealer or major security-based swap participant.[480]

2. Comments

The comments submitted on proposed § 23.432 were directed at issues related to the substantive rules for swaps not required to be cleared and, as such, were beyond the scope of this rulemaking.[481] The only commenters on the disclosure requirement itself stated that they did not object to the proposed rule.[482]

3. Final § 23.432

The Commission has determined to adopt § 23.432 as proposed.

F. Section 23.433—Communications—Fair Dealing

1. Proposed § 23.433

The Dodd-Frank Act requires that the Commission establish a duty for swap dealers and major swap participants to communicate in a fair and balanced manner based on principles of fair dealing and good faith. Proposed § 23.433 established a duty that, consistent with the statutory language, applies to all swap dealer and major swap participant communications with counterparties. As the Commission noted in the proposing release,[483] these principles are well established in the futures and securities markets, particularly through SRO rules.[484] The duty to communicate in a fair and balanced manner is one of the primary requirements of the NFA customer communications rule[485] and is designed to ensure a balanced treatment of potential benefits and risks. In determining whether a communication with a counterparty is fair and balanced, the Commission stated that it expects a swap dealer or major swap participant to consider factors such as whether the communication: (1) Provides a sound basis for evaluating the facts with respect to any swap;[486] (2) avoids making exaggerated or unwarranted claims, opinions or forecasts;[487] and (3) balances any statement that refers to the potential opportunities or advantages presented by a swap with statements of corresponding risks.[488] The Commission also stated its expectation that to deal fairly requires the swap dealer or major swap participant to treat counterparties in such a way so as not to unfairly advantage a counterparty or group of counterparties over another. Additionally, communications are subject to the anti-fraud provisions of the CEA and Commission Regulations, as well as any applicable SRO rules.[489]

2. Comments

The Commission received several letters from commenters regarding proposed § 23.433. One commenter found the principles based approach to the rule more appropriate than a prescriptive approach.[490] However, a different commenter expressed concern regarding the rule's lack of detail, stating that it could create uncertainty and risk for swap dealers and major swap participants.[491] That commenter recommended that the Commission consider using safe harbors containing objective standards as a means to satisfy the statutory requirements.[492] Another commenter urged the Commission to clarify the communications standards by reference to currently prevailing standards, such as FINRA and NFA standards, subject to appropriate modifications to reflect standards for participation in the swaps market.[493] Another commenter requested that major swap participants not be subject to a good faith and fair dealing rule when transacting with swap dealers.[494] It asserted that major swap participants in this particular context are customers of swap dealers and should not be treated as a dealer or quasi-dealer. Others had little or no concern regarding the fair dealing requirement.[495]

3. Final § 23.433

The Commission has determined to adopt § 23.433 as proposed. In addition, the Commission is providing the following guidance regarding the final fair dealing rule. As discussed above regarding § 23.431—Disclosures, the fair dealing rule works in tandem with both the material disclosure and anti-fraud rules to ensure that counterparties receive material information that is balanced and fair at all times.[496] The Commission intends these rules to address the concerns raised by commenters[497] regarding transactions similar to those profiled in the Senate Report.[498] The Senate Report concludes that those transactions, which involved structured CDOs, were problematic because they were designed to fail and the disclosures omitted and/or misrepresented the material risks, characteristics, incentives and conflicts of interest. Under all circumstances, and particularly those akin to the Senate Report involving complex swaps, the Commission's fair dealing rule will apply and operate as an independent basis for enforcement proceedings.

The fair dealing rule, like the disclosure rules, is principles based and applies flexibly based on the facts and circumstances of a particular swap. For example, when addressing the risks and characteristics of a swap with features including, but not limited to, caps, collars, floors, knock-ins, knock-outs and range accrual features that increase its complexity, the fair dealing rule

preferred DCO. *See* proposing release, 75 FR at 80646.

[480] Proposing release, 75 FR at 80646.

[481] *See* Barclays Jan. 11 Letter, at 8 (clearing requirement should not apply to foreign swap transactions); SIFMA/ISDA Feb. 17 Letter, at 24–25; CEF Feb. 22 Letter, at 22 (the Commission should clarify that the election to clear a swap is meant to be exercised at the swap's inception); *id.* (supporting the proposed clearing disclosure rule, but recommended that the election of the counterparty regarding where to clear that is made at the outset of the transaction should be binding unless both parties agree; to do otherwise might require the swap dealer or major swap participant to transfer a swap from bilateral clearing to central clearing at an economically disadvantageous moment); MetLife Feb. 22 Letter, at 5 (major swap participants should be treated like other customers of a swap dealer, and receive the same rights as other counterparties, including the right to elect where to clear trades).

[482] *See* COPE Feb. 22 Letter, at 4; CEF Feb. 22 Letter, at 22.

[483] Proposing release, 75 FR at 80646.

[484] *See, e.g.,* 17 CFR 170.5 ("A futures association must establish and maintain a program for * * * the adoption of rules * * * to promote fair dealing with the public."); NFA Compliance Rule 2–29—Communications with the Public and Promotional Material; NFA Interpretative Notice 9041—Obligations to Customers and Other Market Participants.

[485] *See, e.g.,* NFA Compliance Rule 2–29(b)(2) and (5); *see also* NFA Interpretive Notice 9043—NFA Compliance Rule 2–29: Use of Past or Projected Performance; Disclosing Conflicts of Interest for Security Futures Products (performance must be presented in a balanced manner).

[486] *See, e.g.,* NFA Interpretive Notice 9041, Obligations to Customers and Other Market Participants ("Members * * * and their Associates should provide a sound basis for evaluating the facts regarding any particular security futures product * * *.").

[487] *See, e.g.,* NFA Compliance Rule 2–29(b)(4)–(5).

[488] Proposing release, 75 FR at 80646.

[489] *Id.*

[490] CFA/AFR Feb. 22 Letter, at 12. In addition, the commenter recognized the need for future guidance, if necessary, after implementation.

[491] NY City Bar Feb. 22 Letter, at 3.

[492] *Id.*

[493] FHLBanks Feb. 22 Letter, at 6.

[494] MetLife Feb. 22 Letter, at 4–5.

[495] *See* COPE Feb. 22 Letter, at 4. *Accord,* Exelon Feb. 22 Letter, at 3–4 (agreeing that holding swap dealers and major swap participants to standards that require fair dealing is appropriate as long as these principles are properly applied to commodity swap market).

[496] The fair dealing communications rule applies to all communications between a counterparty and a swap dealer or major swap participant, including the daily mark and termination. *See* Section III.D. of this adopting release for a discussion of § 23.431.

[497] *See* CFA/AFR Feb. 22 Letter, at 12; Sen. Levin Aug. 29 Letter, at 10–11.

[498] Senate Report, at 376–636.

requires the swap dealer or major swap participant to provide a sound basis for the counterparty to assess how those features would impact the value of the swap under various market conditions during the life of the swap. In a complex swap, where the risks and characteristics associated with an underlying asset are not readily discoverable by the counterparty upon the exercise of reasonable diligence, the swap dealer or major swap participant is expected, under both the disclosure rule and fair dealing rule, to provide a sound basis for the counterparty to assess the swap by providing information about the risks and characteristics of the underlying asset.[499] The fair dealing rule also will supplement requirements to inform counterparties of material incentives and conflicts of interest that would tend to be adverse to the interests of a counterparty in connection with a swap, particularly in situations like those referenced in the Senate Report. In this regard, a swap dealer or major swap participant will have to follow policies and procedures reasonably designed to ensure that the content and context of its disclosures are fair and complete to allow the counterparty to protect itself and make an informed decision.

In addition, in response to the comments it received, the Commission is confirming that it will look to NFA guidance when interpreting § 23.433 and, as appropriate, will consider providing further guidance, if necessary, after implementation.[500] The Commission concludes that the futures and securities industry familiarity with these precedents considerably mitigates concerns about legal certainty as a result of the principles based rule. Also, in the absence of fraud, the Commission will consider good faith compliance with policies and procedures reasonably designed to comply with the business conduct standards rules as a mitigating factor when exercising its prosecutorial discretion in connection with a violation of the rules. Lastly, the Commission is not exempting major swap participants from the fair communication requirement when they transact with swap dealers. Such an exemption would undermine congressional intent to improve transparency and raise the business conduct standards applicable to the market.

G. Section 23.434—Recommendations to Counterparties—Institutional Suitability

1. Proposed § 23.434

In proposed § 23.434, the Commission exercised its discretionary authority under new Section 4s(h) by proposing an institutional suitability obligation for any recommendation a swap dealer or major swap participant makes to a counterparty in connection with a swap or swap trading strategy.[501] More precisely, proposed § 23.434 required a swap dealer or major swap participant to have a reasonable basis to believe that any swap or trading strategy involving swaps that it recommends to a counterparty is suitable for such counterparty.[502] A swap dealer or major swap participant would be required to make this determination based on reasonable due diligence that would include obtaining information regarding the counterparty's financial situation and needs, objectives, tax status, ability to evaluate the recommendation, liquidity needs, risk tolerance, ability to absorb potential losses related to the recommended swap or trading strategy, and any other information known by the swap dealer or major swap participant.[503]

Proposed § 23.434 provided that a swap dealer or major swap participant could fulfill its obligations if the following conditions were satisfied: (1) The swap dealer or major swap participant had a reasonable basis to believe that the counterparty (or a party to whom discretionary authority has been delegated) was capable of evaluating, independently, the risks related to the particular swap or trading strategy recommended; (2) the counterparty (or its discretionary advisor) affirmatively indicated that it was exercising independent judgment in evaluating the recommendations; and (3) the swap dealer or major swap participant had a reasonable basis to believe that the counterparty had the capacity to absorb any potential losses.[504]

Proposed § 23.434 made clear that it would not apply: To any recommendations made to another swap dealer, major swap participant, security-based swap dealer, or major security-based swap participant; where a swap dealer or major swap participant provides information that is general transaction, financial, or market information; or to swap terms in response to a competitive bid request from the counterparty. In proposing § 23.434, the Commission explained that whether a swap dealer or major swap participant has made a recommendation and thus triggered its suitability obligation would depend on the facts and circumstances of the particular case. A recommendation would include any communication by which a swap dealer or major swap participant provides information to a counterparty about a particular swap or trading strategy that is tailored to the needs or characteristics of the counterparty.[505]

While recognizing that futures market professionals have not been subject to an explicit suitability obligation, the Commission stated that such professionals have long been required to meet a variety of related requirements as part of their NFA-imposed obligations.[506] Further, in proposing § 23.434, the Commission considered that a suitability obligation is a common requirement for professionals in other markets and in other jurisdictions, including the banking and securities markets. Thus, to promote regulatory consistency, the Commission proposed to adopt a suitability obligation for swap dealers and major swap participants, modeled, in part, on existing obligations for banks and broker-dealers dealing with institutional clients.[507]

2. Comments

The Commission received several comments representing a diversity of views on proposed § 23.434. As a general matter, some commenters strongly supported the proposal as an important feature of the system of business conduct standards and directly responsive to the concerns raised by members of Congress regarding conflicts of interest, particularly as between investment banks and their customers.[508] For example, one

[499] Such a requirement is not intended to create, and does not create, any general trading prohibition or general disclosure requirement concerning ''inside information.'' *See* discussion at fn. 370; *see also* fn. 452.

[500] *See, e.g.,* NFA Compliance Rule 2–29—Communications with the Public and Promotional Material; NFA Interpretative Notice 9041—Obligations to Customers and Other Market Participants; NFA Interpretive Notice 9043—NFA Compliance Rule 2–29: Use of Past or Projected Performance; Disclosing Conflicts of Interest for Security Futures Products.

[501] Proposing release, 75 FR at 80647.

[502] The proposed rule was proposed based on suitability duties for banks and broker dealers dealing with institutional clients. As such, the proposed rule also implied a general suitability duty such that a swap dealer would have to have a reasonable basis to believe that the recommended swap or swap trading strategy is suitable for at least some counterparties.

[503] Proposing release, 75 FR at 80659.

[504] *Id.*

[505] *Id.,* at 80647.

[506] *See, e.g.,* NFA Compliance Rule 2–30(c) and (j); *see also* NFA Interpretive Notice 9004.

[507] Proposing release, 75 FR at 80647.

[508] *See, e.g.,* CFA/AFR Feb. 22 Letter, at 12–13; Better Markets Feb. 22 Letter, at 4–5; CFA/AFR Nov. 3 Letter, at 6–7.

commenter stated that, for both swap dealers and swap advisors, there should be some suitability standards in place so that those entities with the appropriate expertise and capabilities to engage knowledgeably in these transactions are able to do so, while protecting those entities that should not be engaged in these types of transactions.[509] Other commenters, however, believed that the institutional suitability requirement is unnecessary and inappropriate for the swaps market, which is comprised of institutional market participants, not retail investors, and should remain an SRO rule, if at all.[510]

Of specific concern to some commenters was the proposal's inclusion of major swap participants. These commenters stated that, regardless of size, major swap participants cannot be presumed to possess a level of market or product information equal to that of swap dealers. Further, they expressed concern that proposed § 23.434 would force major swap participants into a position of trust and confidence when, in fact, they are transacting with their counterparties on an arm's length basis.[511] These commenters urged the Commission to treat major swap participants like any other customer of a swap dealer.[512]

Several commenters expressed concern with the use of the term ''recommendation'' in proposed § 23.434.[513] One commenter opined that the term is not defined and, therefore, could be overly broad.[514] Another commenter was concerned that general marketing materials could qualify as a recommendation within the meaning of the proposal.[515] That commenter requested the Commission clarify that such materials, as opposed to the recommendation of specific swaps to a customer based on the individual customer's particular circumstances and needs, does not trigger the requirements of proposed § 23.434.[516] Other commenters stated that unless swaps are disclosed in an understandable, disaggregated form, they cannot be suitable.[517] Similarly, a commenter suggested the Commission strengthen or clarify protections against swap dealers recommending swaps that expose the hedger to risks that are greater than those they seek to hedge, either by identifying this as a violation of fraud standards or clarifying that it would be a violation of the suitability and best interests standards.[518] In contrast, one commenter believed that the complexity associated with collective investment vehicles would make it impracticable to carry out suitability and diligence requirements under proposed § 23.434.[519] Similarly, another commenter stated that, without details of the customer's business, staff, or other risks, it would be difficult for the swap dealer or counterparty to make a suitability determination.[520]

Related to the comments regarding the term ''recommendation'' was the more general concern that proposed § 23.434 would increase costs to, and chill communications and transactions between, swaps market participants.[521] The concern was that the proposal would cut the flow of information and transactional alternatives that fall short of advice and that non-swap dealer and non-major swap participants find beneficial.[522] A related concern was that the term ''recommendation'' would encompass ordinary interactions, and, therefore, swap dealers would always be subject to an explicit fiduciary duty.[523] According to some commenters, imposing such a fiduciary duty on swap dealers would result in either a blanket prohibition on swap dealers transacting with ERISA plans or place such plans at a negotiating disadvantage with swap dealers by operation of other requirements that would require the plans to provide their counterparty with financial information to enter into a swap.[524] Regarding costs, some commenters believed that a suitability determination may be challenged in litigation as a possible defense against enforcement of a swap by a swap dealer, and the costs associated with defending such litigation would be passed on to counterparties and would be disproportionate to the benefits expected from proposed § 23.434.[525]

Several commenters suggested that, if the Commission were to adopt a suitability requirement, it could ameliorate some of the costs associated with such a requirement by permitting swap dealers and major swap participants to rely, absent notice of countervailing facts, upon a counterparty's written representations rather than imposing an independent diligence requirement.[526] These commenters contend that such an approach would prevent any suitability requirement from triggering fiduciary or other advisory status except in circumstances where that status reflects the reality of the parties' relationship.[527] In contrast, at least one commenter expressed reservation about the utility of representations because it could subvert the intent of the suitability standard.[528] This commenter believed there was no value in permitting swap dealers and major swap participants to recommend swaps known to be unsuitable just because the customer is willing to enter into the transaction.[529] For this and other reasons, the commenter urged the Commission to require a suitability analysis, properly documented, whenever the swap dealer or major swap participant is the initiator in recommending the transaction or whenever the swap dealer or major swap participant recommends a customized swap or trading strategy that involves a customized swap.[530]

3. Final § 23.434

The Commission has determined to adopt § 23.434. The final rule text has been changed to harmonize with the SEC's proposed rule and FINRA's final institutional suitability rule.[531] Through these changes, the Commission achieves its proposed regulatory objectives while reducing the cost of compliance associated with reconciliation of the suitability duties imposed by the Commission, the SEC and FINRA.

There are two principal changes from proposed § 23.434. First, major swap

[509] GFOA Feb. 22 Letter, at 2.

[510] *See, e.g.,* Exelon Feb. 22 Letter, at 3; HETCO Feb. 22 Letter, at 1–4; CEF Feb. 22 Letter, at 8–9; SIFMA/ISDA Feb. 17 Letter, at 25; *contra* CFA/AFR Nov. 3 Letter, at 7.

[511] *See, e.g.,* MFA Feb. 22 Letter, at 2 and 4; MetLife Feb. 22 Letter, at 4–5.

[512] *See, e.g.,* MFA Feb. 22 Letter, at 3; MetLife Feb. 22 Letter, at 4–5; *contra* CFA/AFR Nov. 3 Letter, at 7.

[513] *See, e.g.,* SIFMA/ISDA Feb. 17 Letter, at 26 (''The Commission's proposal appears to assume that every 'recommendation' is, in essence, a recommendation to the counterparty that the identified transaction is a transaction that the counterparty should execute based on its circumstances. This is far from accurate.'').

[514] MFA Feb. 22 Letter, at 3.

[515] FHLBanks Feb. 22 Letter, at 5.

[516] *Id.*

[517] *See, e.g.,* CFA/AFR Feb. 22 Letter, at 12; Better Markets Feb. 22 Letter, at 4–5.

[518] CFA/AFR Feb. 22 Letter, at 20.

[519] AMG–SIFMA Feb. 22 Letter, at 12.

[520] HOOPP Feb. 22 Letter, at 2.

[521] *See, e.g.,* SIFMA/ISDA Feb. 17 Letter, at 26–27; HOOPP Feb. 22 Letter, at 2; Exelon Feb. 22 Letter, at 3.

[522] SIFMA/ISDA Feb. 17 Letter, at 27.

[523] *Id.*

[524] *Id.;* ABC/CIEBA Feb. 22 Letter, at 7.

[525] *See, e.g.,* FHLBanks June 3 Letter, at 7; VRS Feb. 22 Letter, at 3; HETCO Feb. 22 Letter, at 2; COPE Feb. 22 Letter, at 4.

[526] *See, e.g.,* SIFMA/ISDA Feb. 17 Letter, at 27; ABC/CIEBA Feb. 22 Letter, at 7; *but see* CFA/AFR Nov. 3 Letter, at 7.

[527] *See* SIFMA/ISDA Feb. 17 Letter, at 27 fn. 59.

[528] CFA/AFR Feb. 22 Letter, at 13; CFA/AFR Nov. 3 Letter, at 7.

[529] CFA/AFR Feb. 22 Letter, at 13.

[530] *Id.*

[531] *See* proposed 17 CFR 240.15Fh–3(f), SEC's proposed rules, 76 FR at 42455; FINRA Rule 2111 (Suitability), 75 FR 71479, Nov. 23, 2010 (Order Approving Proposed Rule Change; File No. SR–FINRA–2010–039).

participants are excluded from the institutional suitability requirement. Second, the final rule clarifies that the suitability duty requires a swap dealer to (1) understand the swap that it is recommending, and (2) make a determination that the recommended swap is suitable for the specific counterparty. Consistent with the institutional suitability requirements of the proposed rule, however, the swap dealer will still be able to satisfy the counterparty-specific suitability duty by complying with the safe harbor in § 23.434(b) through the exchange of written representations. The Commission also deleted paragraph (c)(2), which excluded from the scope of the rule: (1) Information that is general transaction, financial, or market information; and (2) swap terms in response to a competitive bid request from the counterparty. The Commission has determined that, if a swap dealer were to communicate such information to a counterparty, without more, such communication would not be considered making a ''recommendation.'' As a result, such exclusion in proposed § 23.434 was unnecessary and potentially confusing to the extent that it could be read to contain the only types of information that would be outside the scope of the suitability rule. The Commission agrees with the commenters that stated that major swap participants are unlikely, in the normal course of arm's length transactions, to be making recommendations to counterparties and has removed major swap participants from the final rule. This determination is consistent with Section 4s(h)(4), which does not impose on major swap participants the same ''acts as an advisor'' to a Special Entity duty as it does on swap dealers.[532]

In response to the comments it received, the Commission is providing additional guidance as to the meaning of the term ''recommendation'' in the final suitability rule and adding Appendix A to subpart H, which clarifies the term and provides guidance as to compliance with the final rule.[533] Final § 23.434 requires a swap dealer that makes a ''recommendation'' to a counterparty to have a reasonable basis for believing that the recommended swap or trading strategy involving swaps is suitable for the counterparty. While the determination of whether a swap dealer has made a recommendation that triggers a suitability obligation will turn on the facts and circumstances of the particular situation, there are certain factors the Commission will consider in reaching such a determination. The facts and circumstances determination of whether a communication is a ''recommendation'' requires an analysis of the content, context, and presentation of the particular communication or set of communications. The determination of whether a ''recommendation'' has been made, moreover, is an objective rather than a subjective inquiry. An important factor in this regard is whether, given its content, context, and manner of presentation, a particular communication from a swap dealer to a counterparty reasonably would be viewed as a ''call to action,'' or suggestion that the counterparty enter into a swap.[534] An analysis of the content, context, and manner of presentation of a communication requires examination of the underlying substantive information transmitted to the counterparty and consideration of any other facts and circumstances, such as any accompanying explanatory message from the swap dealer.[535]

Additionally, the more individually tailored the communication to a specific counterparty or a targeted group of counterparties about a swap, group of swaps or trading strategy involving the use of a swap, the greater the likelihood that the communication may be viewed as a ''recommendation.'' For example, a ''flip book'' or ''pitch book'' that sets out a customized transaction tailored to the needs or characteristics of a specific counterparty will likely be a recommendation. In contrast, general marketing materials, without more, are unlikely to constitute a recommendation. Further, simply complying with the requirements of the business conduct standards (*e.g.,* verification of ECP or Special Entity status, disclosures of material information, scenario analysis, disclosure of the daily mark, *etc.*), without more, would not cause a swap dealer to be deemed to have made a recommendation.

This formulation of ''recommendation'' is consistent with the institutional suitability obligation imposed on federally regulated banks acting as broker-dealers and making recommendations for government securities to institutional customers, FINRA guidance on determining whether a recommendation has been made in the suitability context for broker-dealers recommending securities, and the SEC's proposed rules and the federal securities laws on suitability requirements.[536] Further, DOL confirms that it does not view compliance with the Commission's business conduct standards rules, including the suitability requirement, to cause swap dealers transacting with ERISA plans to become fiduciaries to those plans.[537] The Commission also confirms that compliance with the suitability duty would not cause a swap dealer to owe fiduciary duties to its counterparty, including a Special Entity.

The Commission has considered commenters' statements about the potential costs of proposed § 23.434. With respect to concerns that the suitability requirement could chill communications or spawn vexatious litigation, the Commission notes that the final rule aims to minimize costs by allowing swap dealers to satisfy their due diligence duty ''to have or obtain information about the counterparty'' including its investment profile, trading objectives, and ability to absorb potential losses by relying on the representations from such counterparty consistent with final § 23.402(d).[538]

[532] One commenter disagreed with removing major swap participants from the suitability requirement. The commenter reasoned that, if a major swap participant makes a recommendation, the rule would provide protection for counterparties, but would not otherwise be burdensome if they do not make recommendations. *See* CFA/AFR Aug. 29 Letter, at 21–25. Notwithstanding the commenter's view, the Commission has determined, in light of the definition of major swap participant and the nature of its business, to remove major swap participants from the suitability requirement.

[533] Appendix A to subpart H provides guidance as to the meaning of the term recommendation as used in § 23.434 and § 23.440(a)—Acts as an Advisor to a Special Entity. The appendix also provides guidance related to the safe harbors for compliance with each final rule.

[534] *Cf.* proposing release, 75 FR at 80647 fn. 81 (citing NASD Notice to Members 01–23 (April 2001) and FINRA Proposed Suitability Rule, 75 FR 52562, 52564–69, Aug. 26, 2010).

[535] For example, if a swap dealer transmitted a research report to a counterparty at the counterparty's request, that communication would not be subject to the suitability obligation; whereas, if the same swap dealer transmitted the very same research report with an accompanying message, either oral or written, that the counterparty should act on the report, the analysis would be different.

[536] *See, e.g.,* 12 CFR 13.4 (Office of the Comptroller of the Currency regulation for banks recommending government securities to customers); FINRA Rule 2111 (Suitability), 75 FR 71479; SEC's proposed rules, 76 FR at 42455.

[537] *See* Section II.B. of this adopting release for a discussion of ''Regulatory Intersections—Department of Labor ERISA Fiduciary Regulations.''

[538] The Commission notes, regarding counterparty-specific suitability, that reasonable diligence would include, for example, assessing whether a recommendation would expose a hedger to risks that are greater than those they seek to hedge. *See* CFA/AFR Feb. 22 Letter, at 20. Reasonable diligence to determine suitability of a bespoke swap might include, as suggested by commenters and depending on the facts and circumstances, consideration of hedge equivalents, evaluations of liquidity, or added price for embedded lines of credit. *See* Better Markets Feb. 22 Letter, at 4–7; Better Markets June 3 Letter, at 13. Depending on the facts and circumstances, a violation of the suitability duty may also violate

Furthermore, the Commission is clarifying in this adopting release and in Appendix A to subpart H that, final § 23.434(b) establishes a safe harbor whereby a swap dealer will satisfy its counterparty-specific duty under § 23.434(a)(2) through the exchange of certain written representations between the swap dealer and the counterparty as provided in § 23.434(c). The Commission further clarifies the types of representations that would satisfy the requirements of final § 23.402(d) (Reasonable Reliance on Representations) in the context of the final suitability rule in § 23.434.

A swap dealer may rely on representations to obtain information about the counterparty when complying with the counterparty-specific suitability obligation in § 23.434(a)(2). For example, to obtain information about the counterparty's ''ability to absorb potential losses associated with the recommended swap or trading strategy,'' the swap dealer could rely on the counterparty's representation that it has a risk management program and/or hedging policy to manage and monitor its ability to absorb potential losses, and that it has complied in good faith with its policies and procedures for diligent review of and compliance with its risk management program and/or hedging policy.

Alternatively, a swap dealer could satisfy the safe harbor requirements in § 23.434(b) to satisfy the counterparty-specific suitability obligation. Final § 23.434(b)(1) requires the swap dealer to assess whether the counterparty is capable of evaluating, independently, the risks related to a particular swap or swap trading strategy. To make its assessment, the swap dealer may rely on a counterparty's representations as provided in § 23.434(c). Final § 23.434(c)(1) describes the types of representations a swap dealer may rely on with respect to any counterparty other than a Special Entity, and § 23.434(c)(2) describes the types of representations a swap dealer may rely on with respect to a Special Entity. Final § 23.434(c)(1) provides that a swap dealer will satisfy § 23.434(b)(1)'s requirement with respect to a counterparty other than a Special Entity if it receives representations that the counterparty has complied in good faith with its policies and procedures that are reasonably designed to ensure that the persons responsible for evaluating the recommendation and making trading decisions on behalf of the counterparty are capable of doing so. Final § 23.434(c)(2) provides that a swap dealer will satisfy § 23.434(b)(1)'s requirement with respect to a Special Entity if it receives representations that satisfy the terms of § 23.450(d) regarding a Special Entity's qualified independent representative.[539]

To satisfy the safe harbor in § 23.434(b), the final rule provides that the swap dealer and counterparty must exchange representations that: (1) The counterparty is capable of independently evaluating investment risks with regard to the recommended swap, (2) the counterparty is exercising independent judgment and is not relying on the recommendation of the swap dealer, (3) the swap dealer is acting as a counterparty and is not undertaking to assess the suitability of the swap or trading strategy involving a swap for the customer, and (4) in the case of a counterparty that is a Special Entity, the swap dealer complies with § 23.440 where the recommendation would cause the swap dealer to act as an advisor to a Special Entity within the meaning of § 23.440(a).[540]

The Commission believes that this approach will lower the costs of compliance that would result from a requirement that a swap dealer must always conduct counterparty-specific due diligence while encouraging counterparties that choose to make representations consistent with the final rule to have policies and procedures to ensure that they have their own advisors that are able to assess recommendations and make appropriate determinations as to suitability. To further address commenters' concerns about the potential burden of compliance on swap dealers, the Commission clarifies that there is no duty to look behind such representations in the absence of ''red flags.'' In this context, the Commission interprets ''red flags'' to mean information known by the swap dealer that would cause a reasonable person to question the accuracy of the representation.

Commenters requested that the Commission allow swap dealers to rely on representations made on a relationship basis (*i.e.,* written representations in counterparty relationship documentation) rather than requiring a representation be made on a transaction-by-transaction basis. The Commission agrees and believes this approach addresses the needs that some market participants have to enter into recommended transactions in short time frames. Where such representations are made in counterparty relationship documentation, the documentation must comply with final § 23.402(d) and may be deemed renewed with each recommendation.

The Commission has determined not to adopt suggestions from commenters that it exclude certain classes of ''sophisticated'' counterparties from the protection of final § 23.434. Nevertheless, with respect to the counterparty-specific suitability duty, the swap dealer will be able to rely on appropriate representations from ''sophisticated'' counterparties to satisfy the duty. The Commission stresses that the representations relied upon by the swap dealer in all cases must be documented in a manner that allows the Commission to assess compliance with the final suitability rule.

In all cases, to meet the requirements of final § 23.434, a swap dealer must undertake reasonable diligence to understand the swap that it is recommending. In general, what constitutes reasonable diligence will vary depending on, among other things, the complexity of, and risks associated with, the swap or swap trading strategy and the swap dealer's familiarity with the swap or swap trading strategy. At a minimum, a swap dealer's reasonable diligence must provide it with an understanding of the potential risks and rewards associated with the recommended swap or swap trading strategy. A swap dealer that lacks this understanding would not be able to meet its obligations under § 23.434(a)(1).

These clarifications regarding how the Commission intends to apply the suitability requirement are designed to address many of commenters' statements, including that the Commission should ensure consistency with the approach proposed by the SEC and the long-standing guidance provided by FINRA.[541] In so doing, the Commission states its intention to be

other rules, including the anti-fraud and fair dealing rules.

[539] *See* Section IV.C.3.e. at fn. 867 and accompanying text for a discussion of § 23.450(d).

[540] Prong (4) of the safe harbor clarifies that § 23.434's application is broader than § 23.440—Requirements for swap dealers acting as advisors to Special Entities. Final § 23.434 is triggered when a swap dealer recommends any swap or trading strategy that involves a swap to any counterparty. However, § 23.440 is limited to a swap dealer's recommendations (1) to a Special Entity (2) of swaps that are tailored to the particular needs or characteristics of the Special Entity. *See* Section IV.B.3.a. at fn. 697 and accompanying text. Thus, a swap dealer that recommends a swap to a Special Entity that is tailored to the particular needs or characteristics of the Special Entity may comply with its suitability obligation by satisfying the safe harbor in § 23.434(b); however, the swap dealer must also comply with § 23.440 in such circumstances.

[541] *See* SEC's proposed rules, 76 FR at 42415 fn. 133.

guided, but not controlled, by precedent arising under analogous SRO rules.[542]

IV. Final Rules for Swap Dealers and Major Swap Participants Dealing With Special Entities

Swap dealers and major swap participants are also subject to certain business conduct standards rules when dealing with particular counterparties that are defined as Special Entities. This section of the adopting release discusses § 23.401(c)–Definition of the term Special Entity; § 23.440–Requirements for swap dealers acting as advisors to Special Entities; § 23.450–Requirements for swap dealers and major swap participants acting as counterparties to Special Entities; and § 23.451–Political contributions by certain swap dealers.

A. Definition of ''Special Entity'' Under Section 4s(h)(2)(C)

1. Section 23.401—Proposed Definition of ''Special Entity''

Section 4s(h)(2)(C) and proposed § 23.401 defined a ''Special Entity'' as: (i) A Federal agency; (ii) a State, State agency, city, county, municipality, or other political subdivision of a State; (iii) any employee benefit plan, as defined in Section 3 of ERISA; (iv) any governmental plan, as defined in Section 3 of ERISA; or (v) any endowment, including an endowment that is an organization described in Section 501(c)(3) of the Internal Revenue Code of 1986.[543]

2. Comments

a. State and Municipal Special Entities

One commenter requested the Commission clarify whether the proposed definition was intended to include instrumentalities of a State or municipality or a public corporation.[544] The commenter noted that proposed § 23.450(b) (Requirements for a Special Entity's representative) and proposed § 23.451 (Political contributions by certain swap dealers and major swap participants) referenced ''municipal entities,'' which included any agency, authority or instrumentality of a State or political subdivision of a State.[545]

b. Employee Benefit Plans and Governmental Plans

Section 4s(h)(2)(C)(iii) refers to any employee benefit plan ''as defined in'' Section 3 of ERISA. Section 3 of ERISA, however, defines ''employee benefit plan'' broadly and also defines several subcategories of employee benefit plans that are excluded from regulation under Title I of ERISA, including ''governmental plans,'' which are referenced in Section 4s(h)(2)(C)(iv).

Some commenters requested that the final rule clarify that prong (iii) of the Special Entity definition only include employee benefit plans that are ''subject to,'' *i.e.,* regulated under, Title I of ERISA.[546] Commenters stated that the ''employee benefit plan'' prong should be read narrowly and only include those plans ''subject to'' ERISA because Congress included a separate prong (iv) for ''governmental plans'' that are ''defined in'' Section 3 of ERISA, but not ''subject to'' ERISA.[547] Commenters also asserted that the Commission should exclude foreign pension plans from the Special Entity definition[548] and that such an exclusion would be consistent with congressional intent and would avoid conflicts with foreign law.[549]

Other commenters asserted that the Commission should not limit or exclude any governmental plans such as retirement and deferred compensation plans.[550] Another commenter stated that church plans and church benefit boards that are ''defined in'' Section 3 of ERISA but not ''subject to'' ERISA should be included within the Special Entity definition.[551] The commenter also asserted that the Commission should avoid legal uncertainty for employee benefit plans that are ''defined in'' but not ''subject to'' ERISA, such as church plans and church benefit boards, and permitting such plans to opt in to the Special Entities provisions of the business conduct standards rules would be a preferable approach.[552]

c. Master Trusts

Two commenters asserted that the Commission should clarify that the definition of ''Special Entity'' should encompass master trusts holding the assets of one or more employee benefit plans of a single employer.[553] Another commenter suggested that the definition apply to any trust that holds the assets of employee benefit plans sponsored by the same employer or related employers.[554] These commenters assert that employers that maintain multiple employee benefit plans often pool their assets into a single trust called a ''master trust'' for efficiency purposes.[555] The commenters also assert that the Special Entity provisions of the business conduct standards rules should apply with respect to the master trust and not on a plan-by-plan basis, which would be burdensome and negate some efficiencies achieved by a master trust.[556]

d. Endowments

Section 4s(h)(2)(C)(v) refers to ''any endowment, including an endowment that is an organization described in Section 501(c)(3)[557] of the Internal Revenue Code of 1986.'' One commenter recommended the Commission err on the side of inclusiveness and include charitable organizations as Special Entities.[558] Other commenters recommended that the Commission clarify that the endowment prong of the Special Entity definition is limited to when an endowment itself enters into swaps, but does not include non-profit or charitable organizations that enter into swaps, even where such an organization has an endowment.[559] One such commenter asserted that the

[542] *See, e.g.,* NASD Notice to Members 01–23 (April 2001) (discussing what constitutes a ''recommendation); *see also* FINRA Rule 2111 (suitability).

[543] Proposing release, 75 FR at 80649 and 80657.

[544] APGA Feb. 22 Letter, at 2.

[545] *Id.; see* proposed §§ 23.450(b)(8) and 23.451(a)(3), proposing release, 75 FR at 80660–61.

[546] *See, e.g.,* SIFMA/ISDA Feb. 17 Letter, at 30 fn. 70 (asserting that other than U.S. governmental plans, the Special Entity definition should exclude (1) unfunded plans for highly compensated employees, (2) foreign pension plans, (3) church plans that have elected not to be subject to ERISA, and (4) Section 403(b) plans that accept only employee contributions).

[547] SIFMA/ISDA Feb. 17 Letter, at 30; CPPIB Feb. 22 Letter, at 3; OTPP Feb. 22 Letter, at 2.

[548] *See* SIFMA/ISDA Feb. 17 Letter, at 30; ASF Feb. 22 Letter, at 2–3; OTPP Feb. 22 Letter, at 2; AMG–SIFMA Feb. 22 Letter, at 13 fn. 44; *see also* Societe Generale Feb. 18 Letter, at 12; Barclays Jan. 11 Letter, at 9 fn. 9.

[549] CPPIB Feb. 22 Letter, at 3–4.

[550] CFA/AFR Feb. 22 Letter, at 14–15; AFSCME Feb. 22 Letter, at 5.

[551] Church Alliance Feb. 22 Letter, at 4–5; Church Alliance Aug. 29 Letter, at 3–4.

[552] Church Alliance Oct. 4 Letter, at 2 (also asserting that a ''church benefit board'' is an organization described in Section 3(33)(C)(i) of ERISA).

[553] BlackRock Feb. 22 Letter, at 7; SIFMA/ISDA Feb. 17 Letter, at 30; *see also* Church Alliance Feb. 22 Letter, at 5 (''Church benefit boards may also be likened to a master trust that is established by several multiple-employer pension plans.'').

[554] ERIC Feb. 22 Letter, at 2 and 4–5 (asserting that the assets of an employee benefit plan subject to ERISA generally must be held in trust and, although the trust is a separate entity from the plan, the trust exists solely to hold and invest the assets of the plan).

[555] *See* ERIC Feb. 22 Letter, at 4–5.

[556] *See, e.g.,* ERIC Feb. 22 Letter, at 5.

[557] Section 501(c)(3) of the Internal Revenue Code of 1986 exempts from federal taxes: ''Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition * * * or for the prevention of cruelty to children or animals, no part of the net earnings of which inure to the benefit of any private shareholder or individual * * *.'' 26 U.S.C. 501(c)(3).

[558] CFA/AFR Feb. 22 Letter, at 14.

[559] SFG Feb. 22 Letter, at 2–3; SIFMA/ISDA Feb. 17 Letter, at 30–31; NACUBO Feb. 22 Letter, at 1 fn. 2.

Commission should clarify that prong (v) does not include non-profit organizations that enter into swaps to hedge operational risks, such as interest rate risk in connection with a bond offering, that is unrelated to its endowment's investment fund.[560] Additionally, one commenter stated that the Special Entity definition should not apply to foreign endowments or foreign entities generally.[561]

e. Collective Investment Vehicles: The ''Look Through'' Issue

DOL has a look through test for entities that have ERISA plan investors, such as collective investment vehicles, to determine whether the person operating the entity will be treated as an ERISA fiduciary with respect to the invested plan assets.[562] Collective investment vehicles, such as commodity pools and hedge funds, typically include a variety of investors and may include organizations that fall within the Special Entity definition set forth in Section 4s(h)(2)(C). Because the statutory definition of Special Entity uses ERISA's definition of ''employee benefit plan,'' commenters requested clarification of whether the Commission will apply a ''look through'' test like DOL's to collective investment vehicles for purposes of the business conduct standards rules.

The Commission also received several comments regarding collective investment vehicles and whether they should be included within the Special Entity definition.[563] The majority of commenters who addressed this issue were opposed to the Commission adopting a DOL-type ''look through'' test for collective investment vehicles.[564] One commenter asserted that investment vehicles that hold plan assets should not be provided relief from the business conduct standards.[565] Certain commenters asserted that the omission of collective investment vehicles from the definition of Special Entity in the text of the Dodd-Frank Act was determinative of congressional intent.[566] Other commenters pointed out that the statute addressed only direct counterparty relationships and not the indirect collective investment vehicle situation.[567] In addition, it was argued that, because collective investment vehicles include non-ERISA investors, extending the definition would inappropriately cover investors who do not want or need Special Entity protection.[568]

Further, from a pragmatic standpoint, one commenter maintained that it would be highly impractical to discharge heightened duties on the broad range of investors that participate in such vehicles and expressed concern that proposed suitability and diligence requirements would be problematic under a ''look through'' regime.[569] The commenter suggested that heightened standards for collective investment vehicles would inappropriately subject those vehicles and their investors to increased costs, decreased efficiency and execution delays, and a ''look through'' provision could limit Special Entities' non-swap investment options.[570] Other commenters believed collective investment vehicle managers would either limit or prohibit investments by Special Entities to avoid limitations on their swap trading activities.[571] Such managers may be concerned that other non-Special Entity investors may redeem or not invest if they believe the fund may be subject to restrictions on trading due to investments by Special Entities.[572]

3. Final § 23.401(c) Special Entity Definitions

The Commission has considered the comments and congressional intent, and has determined to clarify the scope of the Special Entity definitions and further refine prongs (ii) and (iii) of Section 4s(h)(2)(C).[573] For prong (ii), the Commission has determined to clarify that the definition of State and political subdivisions of a State includes instrumentalities, agencies or departments of States or political subdivisions of a State. For prong (iii), the Commission has determined to interpret the statute to apply only to employee benefit plans subject to ERISA rather than those defined in ERISA. For plans defined in ERISA but not otherwise covered by the Special Entity definition, the Commission has determined to permit such plans to opt in to the Special Entity protections under subpart H of part 23.

a. Federal Agency

The Commission did not receive any comments on the Federal agency prong (i) of the Special Entity definition, and thus, the Commission is adopting the definition as proposed (renumbered as § 23.401(c)(1)).[574]

b. State and Municipal Special Entities

The Commission has determined to refine prong (ii) of Section 4s(h)(2)(C), State and municipal Special Entities, to clarify that it also includes ''any instrumentality, agency, department, or a corporation of or established by'' States or political subdivisions of a State (renumbered as § 23.401(c)(2)).[575] This clarification is consistent with the Commission's modifications to § 23.450(b) (requirements for a Special Entity's representative) and § 23.451 (political contributions by certain swap dealers).[576] The Commission also determined that including instrumentalities, agencies, departments or corporations of or established by States or political subdivisions of a State is consistent with congressional intent to provide heightened protections for institutions backed by taxpayers.[577] In

[560] SFG Feb. 22 Letter, at 2–3.

[561] Barclays Jan. 11 Letter, at 9 fn. 9.

[562] 29 CFR 2510.3–101. If plans subject to ERISA own 25% or more of the assets of a collective investment vehicle, any person who exercises authority or control respecting the management or disposition of the vehicle's underlying assets, and any person who provides investment advice with respect to such assets for a fee, is a fiduciary to the investing ERISA plans.

[563] *See, e.g.,* AMG–SIFMA Feb. 22 Letter, at 12–13; BlackRock Feb. 22 Letter, at 7; ABC/CIEBA Feb. 22 Letter, at 14; ASF Feb. 22 Letter, at 3–6; MFA Feb. 22 Letter, at 6–7; SIFMA/ISDA Feb. 17 Letter, at 29–30; AFSCME Feb. 22 Letter, at 5; Church Alliance Feb. 22 Letter, at 4–5. *See also* Church Alliance Oct. 4 Letter, at 3–6 (recommending that church benefit boards be allowed to opt in to Special Entity status).

[564] *See, e.g.,* AMG–SIFMA Feb. 22 Letter, at 12–13; BlackRock Feb. 22 Letter, at 7; ABC/CIEBA Feb. 22 Letter, at 14; ASF Feb. 22 Letter, at 3–6; MFA Feb. 22 Letter, at 6–7; SIFMA/ISDA Feb. 17 Letter, at 29–30.

[565] AFSCME Feb. 22 Letter, at 5.

[566] *See, e.g.,* AMG–SIFMA Letter, at 12; ASF Feb. 22 Letter, at 3–6; BlackRock Feb. 22 Letter, at 7.

[567] MFA Feb. 22 Letter, at 6–7; SIFMA/ISDA Feb. 17 Letter, at 29–30; BlackRock Feb. 22 Letter, at 7.

[568] *See, e.g.,* SIFMA/ISDA Feb. 17 Letter, at 30.

[569] AMG–SIFMA Feb. 22 Letter, at 12.

[570] *Id.,* at 13.

[571] *See, e.g.,* ASF Feb. 22 Letter, at 4; AMG–SIFMA Feb. 22 Letter, at 13; MFA Feb. 22 Letter, at 6–7.

[572] *See* AMG–SIFMA Feb. 22 Letter, at 13.

[573] In addition to the Commission's discretionary rulemaking authority in Section 4s(h), Section 721(b)(2) of the Dodd-Frank Act provides the Commission discretionary rulemaking authority to define terms included in an amendment to the CEA made by Title VII of the Dodd-Frank Act.

[574] The definition of ''swap'' excludes ''any agreement, contract or transaction a counterparty of which is a Federal Reserve bank, the Federal Government, or a Federal agency that is expressly backed by the full faith and credit of the United States.'' Section 1a(47)(B)(ix) of the CEA. Accordingly, the Commission expects that Special Entities that are Federal agencies will be a narrow category for purposes of these rules.

[575] In refining prong (ii), the Commission has considered other provisions of the CEA such as the ECP definition for governmental entities, which includes ''an instrumentality, agency, or department'' of a State or political subdivision of a State. *See* Section 1a(18)(A)(vii)(III) of the CEA.

[576] *See* Sections IV.C. and IV.D. of this adopting release for a discussion of §§ 23.450(b)(1)(vii) and 23.451(a)(3), respectively.

[577] *See* Senator Lincoln floor colloquy stating that the Special Entity provisions in the Dodd-Frank Act ''should help protect both tax payers and plan beneficiaries.'' 156 Cong. Rec. S5923 (daily ed. Jul. 15, 2010) (statement of Sen. Lincoln).

considering commenters' request for clarity on this issue, the Commission views § 23.401(c)(2) to apply broadly to State and local governmental entities that are entrusted with public funds, including public corporations.

c. Employee Benefit Plans and Governmental Plans

As a matter of statutory interpretation, Sections 4s(h)(2)(C)(iii) (employee benefit plans defined in Section 3 of ERISA) and 4s(h)(2)(C)(iv) (governmental plans defined in Section 3 of ERISA) should be construed ''to avoid rendering superfluous'' the statutory language.[578] Section 3(3) of ERISA defines ''employee benefit plan'' broadly to encompass plans, funds, or programs established or maintained by an employer or employee organization for the purpose of providing medical benefits or retirement income.[579] Section 3 of ERISA (the definitional section) also defines specific types of employee benefit plans, including governmental plans, which are excluded from regulation under ERISA by Section 4(b) (the coverage section of ERISA).[580] Therefore, Section 4s(h)(2)(C)(iii) read literally as any employee benefit plan ''defined in'' Section 3 of ERISA would render Section 4s(h)(2)(C)(iv) superfluous because a ''governmental plan defined in section 3 of [ERISA]'' is subsumed by the definition of ''employee benefit plan defined in section 3 of [ERISA].''

To resolve this ambiguity, the Commission is refining the definition of ''any employee benefit plan defined in section 3 of [ERISA]'' in proposed § 23.401 as ''any employee benefit plan subject to Title I of [ERISA]'' (renumbered as § 23.401(c)(3)). This clarifies that employee benefit plans listed in Section 4(b) of ERISA (29 U.S.C. 1003(b)) are not Special Entities within the meaning of 4s(h)(2)(C)(iii) or § 23.401(c)(3). However, any employee benefit plan that is a governmental plan as defined in Section 3 of ERISA is a Special Entity within the meaning of Section 4s(h)(2)(C)(iv) and § 23.401(c)(4).

This refinement of the definition of ''employee benefit plan,'' however, also excludes other types of employee benefit plans described in Section 4(b) of ERISA, including church plans and public and private foreign pension plans. In response to commenters who support providing protections broadly, including those commenters who assert that ''a church plan should be treated as a Special Entity,''[581] the Commission has determined to add a sixth prong to the Special Entity definition. Under the new prong in § 23.401(c)(6), any employee benefit plan defined in Section 3 of ERISA, not otherwise defined as a Special Entity, may elect to be defined as a Special Entity by notifying its swap dealer or major swap participant of its election prior to entering into a swap with the particular swap dealer or major swap participant.[582] Therefore, for example, under § 23.401(c)(6), any church plan defined in Section 3(33) of ERISA, including any plan described in Section 3(33)(C)(i), such as a church benefit board, could elect to be defined as a Special Entity.

The Commission has also considered the comments regarding the treatment of a master trust where the master trust holds the assets of more than one ERISA plan, as defined in § 23.401(c)(3), sponsored by a single employer or by a group of employers under common control.[583] In this regard, the Commission clarifies that it would not find a swap dealer or major swap participant to have failed to comply with the requirements of subpart H of part 23 of the Commission's Regulations with respect to an ERISA plan, if it otherwise complied with such requirements with respect to a master trust that holds the assets of such ERISA plan. The Commission understands that a single employer or a group of employers under common control may sponsor multiple ERISA plans that are combined into a master trust to achieve economies of scale and other efficiencies. In such cases, the Commission does not believe that any individual ERISA plan within the master trust would receive any additional protection if the swap dealer or major swap participant had to separately comply with requirements of subpart H of part 23 with respect to each ERISA plan whose assets are held in the master trust.

d. Endowment

The Commission agrees with commenters that the Special Entity prong with respect to endowments is limited to the endowment itself. Therefore, the endowment prong of the Special Entity definition under Section 4s(h)(2)(C)(v) and § 23.401(c)(5) applies with respect to an endowment that is the counterparty to a swap with respect to its investment funds. The definition would not extend to counterparties that are charitable organizations generally. Additionally, where a charitable organization enters into a swap as a counterparty, the Special Entity definition would not apply where the organization's endowment is contractually or otherwise legally obligated to make payments on the swap. The Commission believes that this determination is consistent with a plain reading of the statute and is consistent with the Commission's determination regarding Special Entities and collective investment vehicles. Finally, the statute does not distinguish between foreign and domestic counterparties in Section 4s(h). Therefore, the Commission has determined that prong (v) of Section 4s(h)(2)(C) and § 23.401(c)(5) will apply to any endowment, whether foreign or domestic.

e. Collective Investment Vehicles: The ''Look Through'' Issue

The Commission has determined as a matter of statutory interpretation of Section 4s(h) that the definition of Special Entity does not include collective investment vehicles that have Special Entity participants. While DOL rules ''look through'' collective investment vehicles to determine

[578] *Astoria Fed. Sav. & Loan Assn.* v. *Solimino,* 501 U.S. 104, 112 (1991).

[579] *See generally* 29 U.S.C. 1002(3) (''employee benefit plan'' means an employee welfare benefit plan or an employee pension benefit plan); 29 U.S.C. 1002(1) (''employee welfare benefit plan'' means a plan, fund, or program established or maintained by an employer or by an employee organization, for the purpose of providing for its participants or their beneficiaries medical, surgical, or hospital care or benefits in the event of sickness, accident, disability, death or unemployment); 29 U.S.C. 1002(2) (''employee pension benefit plan'' means any plan, fund, or program established or maintained by an employer or by an employee organization that provides retirement income to employees).

[580] Section 4(b) of ERISA (29 U.S.C. 1003(b)) states that ERISA shall not apply to any employee benefit plan that is (1) a governmental plan (as defined in Section 3(32) of ERISA (29 U.S.C. 1002(32)); (2) a church plan (as defined in Section 3(33) of ERISA (29 U.S.C. 1002(33)) with respect to which no election has been made to be subject to ERISA under 26 U.S.C. 410(d); (3) plans maintained solely to comply with workmen's compensation, unemployment compensation, or disability insurance laws; (4) plans maintained outside the United States primarily for the benefit of persons substantially all of whom are nonresident aliens (*i.e.,* foreign pension plans); or (5) excess benefit plans (as defined in Section 3(36) of ERISA (29 U.S.C. 1002(36)) that are unfunded.

[581] Church Alliance Feb. 22 Letter, at 4.

[582] This construction is similar to that of Section 4(b)(2) of ERISA, which excludes church plans unless the church plan has elected to be subject to ERISA. (29 U.S.C. 1003(b)(2)).

[583] *See generally* Section 403(a) of ERISA (in general, ''assets of an employee benefit plan shall be held in trust by one or more trustees'') (29 U.S.C. 1103(a)); *see also* DOL Regulation 29 CFR 2520.103–1(e) (requiring the plan administrator of a Plan which participates in a master trust to file an annual report on IRS Form 5500 in accordance with the instructions for the form relating to master trusts); *see also* IRS Form 5500 Instructions, at 9 (''For reporting purposes, a 'master trust' is a trust * * * in which the assets of more than one plan sponsored by a single employer or by a group of employers under common control are held.'').

whether the managers and advisors of those vehicles that received plan assets should be subject to ERISA's fiduciary rules, there is no indication that Congress intended the Commission to ''look through'' collective investment vehicles to apply the Dodd-Frank Act Special Entity protections.[584] Given that the statutory definition of Special Entity does not mention collective investment vehicles, the Commission is not convinced that extending the Dodd-Frank Act definition of Special Entities to collective investment vehicles based on a DOL-type look through test is appropriate or necessary.[585]

Moreover, collective investment vehicles that trade swaps, known as commodity pools,[586] generally are operated by CPOs and traded by CTAs, which some courts have held owe a fiduciary duty to the pool and pool participants.[587] Therefore, treating collective investment vehicles as Special Entities if they receive investment funds from Special Entities would not materially enhance the protections afforded to such pool participants, but likely would create administrative burdens for swap dealers and major swap participants seeking to determine those pool participants' Special Entity status.

B. Section 23.440—Requirements for Swap Dealers Acting as Advisors to Special Entities

1. Proposed § 23.440

Proposed § 23.440 follows the statutory framework in Section 4s(h)(4)(B) of the CEA, which imposes a duty on any swap dealer that ''acts as an advisor to a Special Entity'' to ''act in the best interests of the Special Entity.'' Section 4s(h)(4)(C) also requires any swap dealer that ''acts as an advisor to a Special Entity'' to ''make reasonable efforts to obtain such information as is necessary to make a reasonable determination that any swap recommended by the swap dealer is in the best interests of the Special Entity * * *.'' The terms ''act as an advisor to a Special Entity,'' ''best interests,'' ''make reasonable efforts'' and ''recommended'' are not defined in the statute.

Proposed § 23.440(a) defined the term ''acts as an advisor to a Special Entity'' and stated the term ''shall include where a swap dealer recommends a swap or trading strategy that involves the use of swaps to a Special Entity.'' [588] Under proposed § 23.440(a)(1)–(2), the term does not include where a swap dealer provides (1) information to a Special Entity that is general transaction, financial or market information, or (2) swap terms in response to a competitive bid request from a Special Entity.[589] The Commission also discussed the meaning of the term ''recommendation'' in the preamble to proposed § 23.434—Recommendations to counterparties—institutional suitability.[590]

Proposed § 23.440(b)(1) restated the statutory duty to ''act in the best interests'' but did not define the term ''best interests.'' [591] The proposing release clarified that the meaning of the term would be informed by ''established principles in case law under the CEA with respect to the duties of advisors, which will inform the meaning of the term on a case-by-case basis.'' The ''best interests'' principles, in the context of a recommended swap or swap trading strategy, would impose affirmative duties to act in good faith and make full and fair disclosure of all material facts and conflicts of interest * * *.'' [592] The proposing release also stated that best interests principles would impose affirmative duties ''to employ reasonable care that any recommendation made to a Special Entity is designed to further the purposes of the Special Entity.''[593]

The proposing release explained that the statutory language in Sections 4s(h)(4) and (5) and congressional intent guided the proposal. The proposal would permit a swap dealer to both recommend a swap to a Special Entity, prompting the duty to act in the best interests, and then enter into the same swap with the Special Entity as a counterparty if the Special Entity had a representative independent of the swap dealer on which it could rely.[594] Finally, the proposing release stated that Sections 4s(h)(4) and (5) of the CEA and proposed rules §§ 23.440 and 23.450, together, were ''intended to allow existing business relationships to continue, albeit subject to the new, higher statutory standards of care.'' [595]

The proposed rule restated the duty in Section 4s(h)(4)(C) that ''any swap dealer that acts as an advisor to a Special Entity shall make reasonable efforts to obtain such information as is necessary to make a reasonable determination that any swap recommended by the swap dealer is in the best interests of the Special Entity.'' [596] The statute also states that ''such information'' includes information relating to (1) the financial status, (2) the tax status, and (3) the investment or financing objectives of the Special Entity.[597] The statute also grants the Commission discretionary authority to prescribe additional types of information to satisfy the ''reasonable efforts'' and ''best interests'' standards.[598] As a result, the Commission proposed that the swap dealer also be required to make reasonable efforts to obtain the following information: (1) The authority of the Special Entity to enter into a swap; (2) the experience of the Special Entity with respect to entering into swaps; (3) whether the Special Entity has a representative as provided in

[584] However, nothing in the Dodd-Frank Act or the business conduct standards rules would affect the application of the ERISA look-through requirements.

[585] The Commission clarifies, however, that this analysis is not intended to apply with respect to a master trust that holds the assets of more than one ERISA plan, as defined in § 23.401(c)(3), which includes a master trust in which the assets of more than one plan sponsored by a single employer or by a group of employers under common control are held. This determination is based on the language of Section 4s(h) of the CEA and ERISA's treatment of master trusts as subject to regulation under ERISA, and is consistent with the unanimous position of the comments received. Thus, the Commission would consider such a master trust to be a Special Entity within the meaning of § 23.401(c)(3).

[586] Section 1a(10) of the CEA (7 U.S.C. 1a(10)).

[587] *See, e.g., Commodity Trend Serv., Inc.* v. *CFTC,* 233 F.3d 981 (7th Cir. 2000); *Savage* v. *CFTC,* 548 F.2d 192 (7th Cir. 1977).

[588] Proposing release, 75 FR at 80650 and 80659.

[589] The exclusions in proposed § 23.440(a)(1)–(2) for general transaction, financial or market information and swap terms in response to a competitive bid request are consistent with the exclusions in proposed § 23.434(c)(2)–Recommendations to counterparties-institutional suitability. Proposing release, 75 FR at 80647–48 and 80659.

[590] In the proposing release, the Commission stated that whether a recommendation has been made depends on the facts and circumstances of the particular case, and includes any communication by which a swap dealer provides information to a counterparty about a particular swap or trading strategy that is tailored to the needs or characteristics of the counterparty, but would not include information that is general transaction, financial, or market information, swap terms in response to a competitive bid request from the counterparty. Proposing release, 75 FR at 80647. *See id.* at 80647 and fn. 81 (citing SRO guidance—NASD Notice to Members 01–23 (April 2001)—interpreting the meaning of the term ''recommendation'' in the context of a securities suitability obligation). *See* Sections III.G. and IV.B. of this adopting release for a discussion of final §§ 23.434 and 23.440, respectively, and Appendix A to subpart H of part 23 for clarification of the term ''recommendation.''

[591] Proposing release, 75 FR at 80650 and 80659.

[592] *Id.,* at 80650 fn. 98 (citing similar language in *SEC* v. *Capital Gains Research Bureau, Inc.,* 375 U.S. 180, 191–94 (1963)).

[593] *Id.*

[594] *Id.,* at 80650 fn. 99 (citing 156 Cong. Rec. S5923 (daily ed. Jul. 15, 2010) (statement of Sen. Lincoln)).

[595] *Id.,* at 80650.

[596] Proposed § 23.440(b)(2); proposing release, 75 FR at 80659–60.

[597] Section 4s(h)(4)(C)(i)–(iii) of the CEA.

[598] Section 4s(h)(4)(C)(iv) of the CEA.

proposed § 23.450(b); (4) whether the Special Entity has the financial capability to withstand potential market-related changes in the value of the swap; and (5) such other information as is relevant to the particular facts and circumstances of the Special Entity.[599]

Proposed § 23.440(c) allowed a swap dealer to rely on the Special Entity's written representations to satisfy its duty to ''make reasonable efforts to obtain information'' under proposed § 23.440(b). The proposed rule required a swap dealer to have a reasonable basis to believe that the representations are reliable taking into consideration the facts and circumstances of a particular swap dealer-Special Entity relationship, assessed in the context of a particular transaction.[600] The representations had to be sufficiently detailed.[601]

2. Comments

The Commission received a significant number of comments regarding proposed § 23.440. The commenters raised a range of issues, including: What types of activities should fall within the scope of the rule; the definitions of the terms ''act as an advisor to a Special Entity'' and ''best interests''; whether Special Entities should be allowed to opt out of the protections; safe harbors for compliance; intersections with the CTA, ERISA fiduciary, investment adviser, and municipal advisor statutory and regulatory provisions; and the potential costs and benefits to swap dealers and Special Entities. The Commission also received late-filed comments comparing its proposed approach with the SEC's proposed approach to ''acts as an advisor to a Special Entity'' for SBS Dealers.

A few commenters supported the Commission's proposed interpretation of Section 4s(h)(4)(B)–(C) and proposed § 23.440.[602] The overwhelming majority of commenters, however, raised concerns with the proposed rule and requested that the Commission further clarify the meaning of ''acts as an advisor to a Special Entity.''[603]

a. Scope of the Proposed ''Acts as an Advisor to a Special Entity'' and ''Recommendation'' Definitions

Commenters generally discussed the following issues: (1) Congressional intent regarding the meaning of ''acts as an advisor to a Special Entity''; (2) the definition of ''advice'' or ''recommendation''; (3) whether activities other than advice or recommendations would trigger application of proposed § 23.440; (4) whether compliance with other business conduct standards would trigger proposed § 23.440; and (5) whether to permit an opt out or create a safe harbor for swap dealers dealing with Special Entities that meet certain criteria.

The Commission received several comments discussing whether proposed § 23.440 was consistent with congressional intent and Section 4s(h)(4). Some commenters stated that ''recommendations'' were an appropriate trigger for proposed § 23.440 and consistent with congressional intent.[604] Other commenters stated that proposed § 23.440 was inconsistent with or went beyond congressional intent.[605] One commenter stated that Congress sought to establish a clear, bright line between swap dealers that are advisors under Section 4s(h)(4) and those that are merely counterparties under Section 4s(h)(5).[606] Other commenters asserted that the proposed rule imposed a fiduciary status on swap dealers, a result that Congress expressly rejected in the legislative history of the Dodd-Frank Act.[607]

Several commenters stated that the Commission's description of ''recommendation'' in the proposed rule was too broad and would inappropriately limit communications between swap dealers and Special Entities.[608] Similarly, some commenters stated that the rule creates a very low bar for tripping the ''best interests'' standard and would often apply in the normal course of interactions between swap dealers and Special Entities.[609] Commenters asserted that a swap dealer that prepares a term sheet and recommends a swap for consideration is not necessarily providing advice as to whether or not to enter into the transaction.[610] Another commenter asserted that the term ''recommends'' has the potential to be vastly expansive and should not extend to marketing activities.[611] A number of commenters asserted that the enumerated exclusions from the term ''acts as an advisor to a Special Entity'' are too narrow and overlook circumstances that should not give rise to an advisory relationship.[612]

Several commenters have stated that the Commission should clearly define activities that are recommendations or provide an alternative that clearly establishes when a swap dealer acts as an advisor to a Special Entity.[613] Commenters stated the Commission should issue guidance to clearly define when a swap dealer will be classified as an ''advisor'' to avoid inadvertently

[599] Proposing release, 75 FR at 80650.

[600] *Id.,* at 80660.

[601] *See* proposed § 23.440(c)(2) requiring representations to be sufficiently detailed for the swap dealer to reasonably conclude that the Special Entity is (1) capable of evaluating independently the material risk inherent in the recommendation, (2) exercising independent judgment in evaluating the recommendation, and (3) capable of absorbing potential losses related to the recommended swap. Proposing release, 75 FR at 80660. The criteria in paragraph (c)(2) parallel and were modeled on the three criteria in § 23.434(b)(1)—Recommendations to counterparties—institutional suitability. *Id.,* at 80659.

[602] *See, e.g.,* CFA/AFR Feb. 22 Letter, at 15–16; AFSCME Feb. 22 Letter, at 2–5; CFA/AFR Nov. 3 Letter, at 1.

[603] *See, e.g.,* APGA Feb. 22 Letter, at 3–5; APPA/LPPC Feb. 22 Letter, at 3; CalSTRS Feb. 28 Letter, at 3–5; CEF Feb. 22 Letter, at 16; GFOA Feb. 22 Letter, at 1–2; HOOPP Feb. 22 Letter, at 2–3; NACUBO Feb. 22 Letter, at 2–4; Ropes & Gray Feb. 22 Letter, at 2–3; Russell Feb. 18 Letter, at 1; SIFMA/ISDA Feb. 17 Letter, at 31–35; ERIC Feb. 22 Letter, at 13–16; SWIB Feb. 22 Letter, at 2–4; Texas VLB Feb. 22 Letter, at 1–2; and U. Tex. System Feb. 22 Letter, at 1–3.

[604] *See, e.g.,* AFSCME Feb. 22 Letter, at 2–3; CFA/AFR Feb. 22 Letter, at 14–15 and 19 (the goal of the statute was to ensure that swap dealers would act in the best interest of more vulnerable counterparties when providing advice and making recommendations).

[605] *See, e.g.,* VRS Feb. 22 Letter, at 5 (Congress did not intend for the Commission to impose duties on a relationship that is potentially principal-to-principal); SIFMA/ISDA Feb. 17 Letter, at 4 (Congress intended parties to a swap to clarify the nature of their relationship, and not to transform the nature of their relationship, noting the provision in 4s(h)(5)(A)(ii) that requires a swap dealer that offers to enter or enters into a swap with a Special Entity to disclose its capacity before initiation of the transaction); APPA/LPPC Feb. 22 Letter, at 3 (the Dodd-Frank Act does not mandate a ''recommendation'' standard for the acts as an advisor provision); Ropes & Gray Feb. 22 Letter, at 2 (the statute should be triggered when the dealer assumes a status, rather than simply performing a single act, and the phrase ''acts as an advisor'' intends a more formal relationship than providing advice); CalSTRS Feb. 28 Letter, at 4 (impairing Special Entities' access to derivatives markets was contrary to congressional intent).

[606] SIFMA/ISDA Feb. 17 Letter, at 4 fn. 11.

[607] *See* BlackRock Feb. 22 Letter, at 2; AMG–SIFMA Feb. 22 Letter, at 6 fn. 16.

[608] *See, e.g.,* SIFMA/ISDA Feb. 17 Letter, at 2; SWIB Feb. 22 Letter, at 2–4; NACUBO Feb. 22 Letter, at 2; U. Tex. System Feb. 22 Letter, at 1–2.

[609] *See, e.g.,* U. Tex. System Feb. 22 Letter, at 2; Russell Feb. 18 Letter, at 1; GFOA Feb. 22 Letter, at 1–2; AMG–SIFMA Feb. 22 Letter, at 3; ERIC Feb. 22 Letter, at 15; ABC/CIEBA Feb. 22 Letter, at 7; SIFMA/ISDA Feb. 17 Letter, at 33 (providing specific information while negotiating a swap should not constitute advising others); *cf.* CFA/AFR Feb. 22 Letter, at 19–20.

[610] SIFMA/ISDA Feb. 17 Letter, at 33; *cf.* Russell Feb. 18 Letter, at 1.

[611] Ropes & Gray Feb. 22 Letter, at 2–3.

[612] *See, e.g.,* AFSCME Feb. 22 Letter, at 3; NACUBO Feb. 22 Letter, at 2; U. Tex. System Feb. 22 Letter, at 2; Ropes & Gray Feb. 22 Letter, at 2–3; *cf.* SWIB Feb. 22 Letter, at 2–3 (the exclusion is too narrow because Special Entities do not always issue competitive bid requests); Texas VLB Feb. 22 Letter, at 2.

[613] *See* ERIC Feb. 22 Letter, at 2; CEF Feb. 22 Letter, at 17; AGPA Feb. 22 Letter, at 4; Ropes & Gray Feb. 22 Letter, at 3; Russell Feb. 18 Letter, at 1.

triggering that status.[614] Other commenters stated that the proposed rule uses subjective criteria and is unworkable.[615]

Commenters also suggested that the definition of ''advice'' or ''recommendations'' should be limited to communications that are individualized or tailored to the recipient. One commenter suggested that the ''acts as an advisor to a Special Entity'' definition should be limited to individualized advice based on the particular needs of the Special Entity.[616] Another commenter suggested the Commission adopt a definition of advice as ''recommendations related to a swap or a swap trading strategy that are made to meet the objectives or needs of a specific counterparty after taking into account the counterparty's specific circumstances.''[617] Another commenter stated that the definition of ''recommendation'' should turn on whether the swap dealer suggested or indicated a particular preferred course of action.[618]

Commenters also proposed alternatives to determining when a swap dealer ''acts as an advisor to a Special Entity.'' Some commenters requested the Commission specifically exclude certain activities from the meaning of ''advice'' or ''recommendation.''[619] Commenters also suggested the Commission should look to principles of agency to determine whether a swap dealer is acting as an advisor.[620]

Commenters asserted that broad application of the term ''recommends'' in proposed § 23.440, which imposes a best interests duty on a swap dealer, will chill normal commercial communications, restrict customary commercial interactions, and generally reduce market information shared between swap dealers and Special Entities.[621] Commenters asserted that swap dealers will decline to propose transactions, provide term sheets or transaction-specific information tailored to the Special Entity, and will be discouraged from providing education, suggestions, or other information with respect to a current or potential transaction that is customarily provided in the normal course of the business relationship.[622]

Commenters asserted that swap dealers provide valuable information, but the broad application of the term ''recommends'' will preclude Special Entities from receiving this information. One commenter asserted that such communications serve an important informational function; even where the prospective counterparty's last inclination would be to follow guidance from the swap dealer, such communications can indicate where the dealer might be willing to execute before negotiation and the types of trades that are being circulated in the marketplace.[623] Other commenters added that swap dealers provide valuable information that could not easily be obtained elsewhere, and informal and course-of-business communications where market ideas and structures are presented and discussed is invaluable.[624] Other commenters asserted that the broad application of the term ''recommends'' will make compliance burdensome for swap dealers and will increase costs.[625] Commenters requested the Commission clarify whether activities or conduct other than making a recommendation would cause a swap dealer to ''act as an advisor to a Special Entity'' within the meaning of § 23.440, because language in the proposing release was ambiguous.[626] Several commenters raised concerns that compliance with other business conduct rules could cause a swap dealer to act as an advisor. Commenters identified the following examples: Providing tailored disclosures, scenario analyses, daily marks, assessing the qualifications of a Special Entity's independent representative, the general provisions of proposed § 23.402, and verification of counterparty eligibility.[627]

Several commenters discussed whether the Commission should permit the intention of the parties, rather than a functional test, to determine whether a swap dealer ''acts as an advisor to a Special Entity.''[628] One commenter asserted that it would be impossible under the proposed rules for a swap dealer to confirm to a Special Entity counterparty that it was acting only as a counterparty and not acting as an advisor.[629] Several commenters supported an approach to permit the Special Entity and swap dealer to agree that the swap dealer is not acting as an advisor, and, therefore, not subject to proposed § 23.440.[630] Another

[614] *See* ERIC Feb. 22 Letter, at 15; CEF Feb. 22 Letter, at 17.

[615] *See* Russell Feb. 18 Letter, at 1; VRS Feb. 22 Letter, at 5; *cf.* Ropes & Gray Feb. 22 Letter, at 3 (a bright line test would be more appropriate than a facts-and-circumstances approach to a rule focused on the existence of a specific relationship).

[616] SIFMA/ISDA Feb. 17 Letter, at 31–32.

[617] CFA/AFR Feb. 22 Letter, at 19–20; *cf.* SWIB Feb. 22 Letter, at 2–3 (a swap dealer should not be acting as an advisor where it provides research and recommendations that are not specifically designed for the specific Special Entity).

[618] APGA Feb. 22 Letter, at 4 (a ''recommendation'' should mean a firm indication by the swap dealer of a particular preferred transaction, swap or market strategy).

[619] *See* CEF Feb. 22 Letter, at 17 (''recommending'' a swap should not apply to the negotiation or the marketing of a swap); APGA Feb. 22 Letter, at 5 (providing market color and alerting a Special Entity to a possible strategy or to new products that are being offered, even when based upon knowledge of the Special Entity's hedge positions or market strategy, should not constitute making a recommendation that causes a swap dealer to be deemed an advisor to a Special Entity); SIFMA/ISDA Feb. 17 Letter, at 33–34.

[620] *See* CEF Feb. 22 Letter, at 16; Ropes & Gray Feb. 22 Letter, at 2 (providing advice is a narrower category than making a mere recommendation; therefore, ''acting as an advisor'' should require acknowledged agency, in which the Special Entity places trust, confidence, or reliance on the swap dealer); *but cf.* AFSCME Feb. 22 Letter, at 3 (many non-swap dealer market participants often assume that the swap dealer is a trusted advisor and is accountable for its advice).

[621] *See* SIFMA/ISDA Feb. 17 Letter, at 22; APGA Feb. 22 Letter, at 3; APPA/LPPC Feb. 22 Letter, at 3; NACUBO Feb. 22 Letter, at 2; COPE Feb. 22 Letter, at 2; U. Tex. System Feb. 22 Letter, at 2; VRS Feb. 22 Letter, at 5; Ohio STRS Feb. 18 Letter, at 2–3; MHFA Feb. 22 Letter, at 2; Russell Feb. 18 Letter, at 1; BlackRock Feb. 22 Letter, at 5; AMG–SIFMA Feb. 22 Letter, at 3.

[622] *See, e.g.,* SIFMA/ISDA Feb. 17 Letter, at 6 and 33; VRS Feb. 22 Letter, at 5; U. Tex. System Feb. 22 Letter, at 2; MHFA Feb. 22 Letter, at 2; Russell Feb. 18 Letter, at 1; APPA/LPPC Feb. 22 Letter, at 3; Ohio STRS Feb. 18 Letter, at 2–3; BlackRock Feb. 22 Letter, at 5; AMG–SIFMA Feb. 22 Letter, at 3; Texas VLB Feb. 22 Letter, at 1; NACUBO Feb. 22 Letter, at 2; AMG–SIFMA Feb. 22 Letter, at 3.

[623] Ropes & Gray Feb. 22 Letter, at 3.

[624] U. Tex. System Feb. 22 Letter, at 2; APPA/LPPC Feb. 22 Letter, at 3, APGA Feb. 22 Letter, at 4; SWIB Feb. 22 Letter, at 3; Texas VLB Feb. 22 Letter, at 3; SFG Feb. 22 Letter, at 3; MHFA Feb. 22 Letter, at 3; ERIC Feb. 22 Letter, at 15.

[625] COPE Feb. 22 Letter, at 2–3 (swap dealers may be forced to require personnel to read from an approved script to avoid violations; such compliance will require more compliance personnel and raise swap dealer costs); Ropes & Gray Feb. 22 Letter, at 3 (compliance with the proposed rule would require the swap dealer to make difficult distinctions between general information and specific trade data).

[626] CalSTRS Feb. 28 Letter, at 3 and 5; ERIC Feb. 22 Letter, at 3, 14 and 16; *see* proposing release, 75 FR at 80650 (''The proposed definition does not address what it means to act as an advisor in connection with any other dealings between a swap dealer and a Special Entity.'').

[627] *See* SIFMA/ISDA Feb. 17 Letter, at 4 and 32; AFSCME Feb. 22 Letter, at 3; NACUBO Feb. 22 Letter, at 3; U. Tex. System Feb. 22 Letter, at 2–3; SWIB Feb. 22 Letter, at 3; CalPERS Feb. 18 Letter, at 3 fn. 4; BlackRock Feb. 22 Letter, at 6; ERIC Feb. 22 Letter, at 15–16; ABC/CIEBA Feb. 22 Letter, at 7.

[628] *See, e.g.,* SIFMA/ISDA Feb. 17 Letter, at 5; Ropes & Gray Feb. 22 Letter, at 2; NACUBO Feb. 22 Letter, at 2–3; U. Tex. System Feb. 22 Letter, at 2 and 3; CEF Feb. 22 Letter, at 16; VRS Feb. 22 Letter, at 5; CalSTRS Feb. 28 Letter, at 3; MHFA Feb. 22 Letter, at 2; Russell Feb. 18 Letter, at 1; ERIC Feb. 22 Letter, at 2; ABC/CIEBA Feb. 22 Letter, at 7; ABA/ABC Feb. 22 Letter, at 2; Davis & Harman Mar. 25 Letter, at 4; Rep. Smith July 25 Letter, at 2.

[629] SIFMA/ISDA Feb. 17 Letter, at 5.

[630] *See* Ropes & Gray Feb. 22 Letter, at 2; NACUBO Feb. 22 Letter, at 2–3; CEF Feb. 22 Letter, at 16; VRS Feb. 22 Letter, at 5; CalSTRS Feb. 28

Continued

commenter stated that permitting the swap dealer and Special Entity to determine whether the swap dealer ''acts as an advisor to the Special Entity'' is consistent with the business conduct standards requirement for a swap dealer to ''disclose to the Special Entity in writing the capacity in which the swap dealer is acting.'' [631] By contrast, however, one commenter opposed an approach that would permit a swap dealer to avoid any obligation for giving advice where it discloses that it is not impartial and has an interest in the transaction being recommended.[632]

Many commenters suggested that the Commission consider whether the Special Entity relied or depended on the swap dealer's advice or recommendations to determine whether a swap dealer ''acts as an advisor to a Special Entity.'' [633] Commenters suggested a swap dealer should be deemed to ''act as an advisor to a Special Entity'' only where the advice will serve as a primary basis for the Special Entity's decision to take or refrain from taking a particular action.[634] One commenter asserted that ''[i]mposing a 'best interests' duty based only on recommendations in the context of particular transactions would effectively overturn * * * longstanding [Commission] precedent.'' [635]

Commenters suggested that the Commission permit Special Entities of a certain size or sophistication be exempted or permitted to opt out of the protections under Section 4s(h)(4)(B)–(C) and proposed § 23.440. Commenters suggested that Special Entities be permitted to represent to a swap dealer that an advisory relationship is not intended if the Special Entity meets a minimum threshold of assets under management, net financial assets, debt outstanding, or frequency of executing swaps.[636] Commenters also asserted that the business conduct standards protections generally, and proposed § 23.440 in particular, do not provide any benefit to sophisticated Special Entities.[637] Additionally, one commenter suggested that the final rule should provide that a swap dealer is never an advisor to an ERISA plan.[638]

Many commenters suggested that the Commission create a safe harbor for compliance with proposed § 23.440 if the Special Entity is separately represented by a qualified independent representative as prescribed under Section 4s(h)(5) and proposed § 23.450.[639] Several commenters suggested different refinements for such a safe harbor, for example, if (1) the communications are in response to the advisor's standing solicitation for information, and (2) the advisor certifies to the swap dealer that no advisory relationship is intended.[640] Other commenters suggested the safe harbor should apply if the Special Entity is represented by a sophisticated, professional advisor such as a bank, registered investment adviser, insurance company, qualified professional asset manager [641] (''QPAM''), or in-house asset manager [642] (''INHAM'').[643] Alternatively, the Special Entity's fiduciary could agree to the safe harbor if it is in the Special Entity's best interests, for example, where the Special Entity has the ability to solicit bids and trade with multiple counterparties.[644]

Following the release of SEC's proposed business conduct standards for SBS Entities, the Commission received several comment letters addressing, among other things, a comparison of SEC's proposed § 240.15Fh–2(a) and § 240.15Fh–4,[645] Special Requirements for SBS Dealers Acting as Advisors to Special Entities, and the Commission's proposed § 23.440,[646] Requirements for Swap Dealers Acting as Advisors to Special Entities.

The Commission's proposed § 23.440(a) and the SEC's proposed § 240.15Fh–2(a) both define a swap dealer or SBS Dealer, respectively, that recommends a swap, security-based swap or a trading strategy that uses a swap or security-based swap to a Special Entity to be ''acting as an advisor to a Special Entity.'' Under the Commission's proposed § 23.440, a swap dealer that meets the definition of ''acts as an advisor to a Special Entity'' then has a duty to act in the best interests of the Special Entity. Under the SEC's proposed § 240.15h–2(a), a SBS Dealer that recommends a security-based swap or trading strategy involving the use of a security-based swap meets the definition of ''acts as an advisor to a Special Entity,'' unless (1) the Special Entity represents in writing that: (i) It will not rely on recommendations provided by the SBS Dealer; and (ii) it will rely on advice from a qualified independent representative as defined in § 240.15Fh–5(a); [647] (2) the SBS

Letter, at 3; MHFA Feb. 22 Letter, at 2; Russell Feb. 18 Letter, at 1; ERIC Feb. 22 Letter, at 2; ABC/CIEBA Feb. 22 Letter, at 7; ABA/ABC Feb. 22 Letter, at 2; Davis & Harman Mar. 25 Letter, at 4; Rep. Smith July 25 Letter, at 2; *cf.* U. Tex. System Feb. 22 Letter, at 2–3 (a swap dealer should not be an advisor if (1) any swap dealer communications that would otherwise be deemed a recommendation were only made in response to the Special Entity's solicitation for information, and (2) the Special Entity certifies to the swap dealer that an advisory relationship does not arise).

[631] VRS Feb. 22 Letter, at 5; *see* Section 4s(h)(5)(A)(ii) of the CEA; proposing release, proposed § 23.450(f), 75 FR at 80661.

[632] AFSCME Feb. 22 Letter, at 4.

[633] Ropes & Gray Feb. 22 Letter, at 2 (the definition of ''acts as an advisor'' should require acknowledged agency in which the Special Entity places trust, confidence, or reliance on the swap dealer); SIFMA/ISDA Feb. 17 Letter, at 31–32 fn. 76; APGA Feb. 22 Letter, at 4; ATA Feb. 22 Letter, at 5; AMG–SIFMA Feb. 22 Letter, at 3; ERIC Feb. 22 Letter, at 16.

[634] SIFMA/ISDA Feb. 17 Letter, at 31–32; APGA Feb. 22 Letter, at 4; ATA Feb. 22 Letter, at 5; AMG–SIFMA Feb. 22 Letter, at 3; *cf.* DOL's current fiduciary regulation, which deems a person that renders investment advice to an ERISA plan a ''fiduciary'' where ''the advice will serve as a primary basis for investment decisions with respect to plan assets.'' 29 CFR 2510.3–21(c); *supra* fn. 34.

[635] SIFMA/ISDA Feb. 17 Letter, at 32 fn. 76 (asserting that Commission precedent recognized ''the nature of the overall relationship between the customer and advisor—and the customer's dependence on the advisor—that gives rise to a fiduciary relationship'') citing *In re Jack Savage,* [1975–1977 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,139 (CFTC Mar. 1, 1976).

[636] NACUBO Feb. 22 Letter, at 2–4; U. Tex. System Feb. 22 Letter, at 3; *cf.* VRS Feb. 22 Letter, at 4 (the Commission should exempt transactions between swap dealers and Special Entities that qualify as ''qualified institutional buyers'' as defined in Rule 144A under the Securities Act); CEF Feb. 22 Letter, at 5; SIFMA/ISDA Feb. 17 Letter, at 3 fn. 17. (17 CFR 230.144A). Rule 144A exempts from certain federal securities law protections certain entities that own and invest on a discretionary basis at least $100 million in securities of issuers that are not affiliated with the entity.

[637] *See, e.g.,* CEF Feb. 22 Letter, at 16; VRS Feb. 22 Letter, at 4.

[638] ERIC Feb. 22 Letter, at 2.

[639] SIFMA/ISDA Feb. 17 Letter, at 31; Ropes & Gray Feb. 22 Letter, at 2; NACUBO Feb. 22 Letter, at 4; CEF Feb. 22 Letter, at 16; APPA/LPPC Feb. 22 Letter, at 3; APGA Feb. 22 Letter, at 5; SWIB Feb. 22 Letter, at 5; CalPERS Feb. 18 Letter, at 4; CalSTRS Feb. 28 Letter, at 3; SFG Feb. 22 Letter, at 1; BlackRock Feb. 22 Letter, at 5; AMG–SIFMA Feb. 22 Letter, at 2 and 5; ERIC Feb. 22 Letter, at 3 and 15; ABC/CIEBA Feb. 22 Letter, at 7; *contra* CFA/AFR Nov. 3 Letter, at 3.

[640] NACUBO Feb. 22 Letter, at 4.

[641] A qualified professional asset manager is defined in DOL prohibited transaction exemption 84–14 as a bank, insurance company, or registered investment adviser that meets certain capital, net worth, or assets under management tests. DOL QPAM PTE 84–14, 75 FR 38837.

[642] An in-house asset manager is defined in DOL prohibited transaction exemption 96–23, 61 FR 15975, Apr. 10, 1996 (''DOL In-House Asset Manager PTE 96–23''), as a wholly-owned subsidiary of an ERISA plan sponsor that is a registered investment adviser that meets certain assets under management tests.

[643] SIFMA/ISDA Feb. 17 Letter, at 31; BlackRock Feb. 22 Letter, at 5; ABC/CIEBA Feb. 22 Letter, at 7.

[644] CalSTRS Feb. 28 Letter, at 4.

[645] SEC's proposed rules, 76 FR at 42423–25, 42454, and 42456–57.

[646] Proposing release, 75 FR at 80650–51 and 80659–60.

[647] SEC's proposed rules, 76 FR at 42425–27 and 42457. SEC proposed § 240.15Fh–5(a) is the parallel rule to the Commission's proposed § 23.450–Requirements for swap dealers and major swap participants acting as counterparties to Special Entities. Both proposed rules further describe the duty for a swap dealer, major swap participant, or

dealer has a reasonable basis to believe that the Special Entity is advised by a qualified independent representative as defined in § 240.15Fh–5(a); and (3) the SBS Dealer discloses that it is not undertaking to act in the best interests of the Special Entity. Under the proposal, an SBS Dealer that exchanges the required representations with the Special Entity would not have a duty to act in the best interests of the Special Entity when making a recommendation.

The Commission received comment letters in support of[648] and against[649] the SEC approach. The supporters generally asserted that the SEC's proposed rules represent workable solutions to some of the industry's concerns over the adverse consequences of the Commission's proposed rules.[650] Commenters opposed to the SEC's approach generally asserted that it was inconsistent with congressional intent and would permit an SBS Entity to provide advice that may not be in the best interests of the Special Entity without accountability.[651] Another commenter asserted that the SEC's approach would result in Special Entities signing away their right to the ''best interests'' protection as a condition of doing business.[652]

b. Meaning of ''Best Interests''

Several commenters raised issues concerning the duty to act in the best interests of the Special Entity imposed under Section 4s(h)(4) and § 23.440. Issues raised by commenters generally include: (1) Whether a ''best interests'' duty imposes a fiduciary duty; (2) whether imposing a ''best interests'' duty will improperly encourage Special Entities to rely on the swap dealer; (3) the meaning of the term ''best interests''; (4) whether a ''best interests'' duty also imposes specific disclosure obligations; and (5) whether swap dealers will continue to transact with Special Entities if they are subject to a ''best interests'' duty.

The Commission sought comment on a number of questions regarding proposed § 23.440, including whether swap dealers should be subject to an explicit fiduciary duty when acting as an advisor to a Special Entity.[653] Some commenters cited the legislative history to support the view that Congress rejected an express fiduciary duty for swap dealers entering into a swap with a Special Entity.[654] A number of commenters assert that a ''best interests'' duty creates a fiduciary relationship,[655] or could give rise to fiduciary duties under other bodies of law including the common law, state pension laws, the CEA, the Advisers Act, and ERISA.[656] Commenters also asserted that the inherent conflicts of interest in a counterparty relationship are incompatible with a fiduciary duty.[657] Similarly, another commenter asked the Commission to clarify that complying with §§ 23.440 and 23.450 do not cause a swap dealer to be a fiduciary under any other body of law, including the securities laws or common law.[658]

The Commission also sought comment in the proposing release on whether to define ''best interests,'' and if so, what should the definition be.[659] Some commenters stated that the best interests duty should be removed from the final rules.[660] One commenter suggested that the Commission revise the ''best interests'' standard to require only a duty of fair dealing and not import a fiduciary duty.[661] Another commenter asserted that a ''best interests'' standard of care is appropriate where a swap dealer provides advice tailored to the Special Entity's position; however, the standard would be inappropriate if the definition of ''advice'' was not sufficiently narrowed.[662]

Other commenters supported the proposed ''best interests'' standard and suggested that the Commission should clarify that a ''best interests'' duty is a higher standard than a suitability obligation.[663] The commenter also requested that the Commission clarify that certain practices should be identified as inherent violations of the best interests standard, including (1) designing swaps with features that expose the Special Entity to risks that are greater than those it intends to hedge, and (2) recommending customized swaps when the Special Entity could attain the same results at a lower risk-adjusted cost using standardized swaps.[664]

Other commenters discussed the scope of the duty. A commenter asserted, in the context of trading with a municipality, a swap dealer that demanded additional collateral could arguably violate its best interests duty because obtaining collateral is in the interest of the swap dealer and not the municipality.[665] The commenter also stated that the Commission should clarify the scope of the ''best interests'' standard and ''distinguish advice that is fiduciary in nature from advice rendered in the context of soliciting, structuring or executing a particular transaction.''[666] Conversely, another commenter asserted that customization by its very nature implies that the swap has been designed with the particular needs of the counterparty in mind, and, therefore, there is no benefit to allowing swap dealers to avoid regulatory duties when recommending customized swaps.[667]

Some commenters raised concerns that the ''best interests'' duty will inappropriately encourage a Special Entity to rely on a swap dealer. Commenters claim that reliance could create confusion regarding the parties' respective responsibilities and could inappropriately increase dependence on

SBS Entity to have a reasonable basis to believe that a Special Entity has a qualified independent representative that meets certain statutory criteria described in Section 4s(h)(5) of the CEA or Section 15F(h)(5) of the Exchange Act.

[648] *See, e.g.,* FIA/ISDA/SIFMA Aug. 26 Letter, at 4–5; BlackRock Aug. 29 Letter, at 2 and 7; ABC Aug. 29 Letter, at 2 and 6–8.

[649] Better Markets Aug. 29 Letter, at 2 and 14–15; CFA/AFR Aug. 29 Letter, at 1–2, 9, 13 and 26–29.

[650] *See, e.g.,* BlackRock Aug. 29 Letter, at 2.

[651] Better Markets Aug. 29 Letter, at 15; *see also* CFA/AFR Aug. 29 Letter, at 26–29.

[652] CFA/AFR Aug. 29 Letter, at 26; CFA/AFR Nov. 3 Letter, at 2.

[653] Proposing release, 75 FR at 80651.

[654] SIFMA/ISDA Feb. 17 Letter, at 4 (citing a Senate version of H.R. 4173); *but cf.* CFA/AFR Feb. 22 Letter, at 15 (asserting that the original Senate version imposed a fiduciary duty on all interactions between swap dealers and Special Entities that was ultimately an unworkable approach. However, the legislative history provides an insight into congressional intent that the ''best interests'' standard of care should be broadly applied).

[655] Ohio STRS Feb. 18 Letter, at 2; CPPIB Feb. 22 Letter, at 3; AMG–SIFMA Feb. 22 Letter, at 4 and 6; SIFMA/ISDA Feb. 17 Letter, at 6; NACUBO Feb. 22 Letter, at 2; Calhoun Feb. 22 Letter, at 2–3.

[656] SIFMA/ISDA Feb. 17 Letter, at 6; CalSTRS Feb. 28 Letter, at 3; AMG–SIFMA Feb. 22 Letter, at 4; Comm. Cap. Mkts. May 3 Letter, at 3.

[657] SIFMA/ISDA Feb. 17 Letter, at 6; CalSTRS Feb. 28 Letter, at 4.

[658] ERIC Feb. 22 Letter, at 4; *cf.* BlackRock Feb. 22 Letter, at 5 (recommending the Commission should specify that proposed § 23.440 is not intended to cause a swap dealer to be considered an ERISA fiduciary).

[659] Proposing release, 75 FR at 80651.

[660] BlackRock Feb. 22 Letter, at 5; Calhoun Feb. 22 Letter, at 2–3; *cf.* CalSTRS Feb. 28 Letter, at 3 (asserting that the term ''best interests'' is vague).

[661] AMG–SIFMA Feb. 22 Letter, at 6.

[662] SWIB Feb. 22 Letter, at 3.

[663] CFA/AFR Feb. 22 Letter, at 15.

[664] *Id.*

[665] SIFMA/ISDA Feb. 17 Letter, at 6 fn. 19.

[666] SIFMA/ISDA Feb. 17 Letter, at 32 fn. 74 (asserting that such a distinction exists in other legal contexts, for example, a broker that provides advice on particular occasions does not trigger an ongoing duty to advise in the future and monitor all data potentially relevant to a customer's investment) (citing *de Kwiatkowski* v. *Bears Stearns & Co., Inc.,* 306 F.3d 1293, 1302 (2d Cir. 2003); *see id.* (asserting that the Advisers Act generally does not apply to a person whose only advice consists of advising an issuer how to structure its financing) (citing SEC Staff Legal Bulletin No. 11 (Sept. 2000) and SEC no-action letter to David A. Kekich, The Arkad Company, 1992 WL 75601 (available Mar. 19, 1992)).

[667] CFA/AFR Feb. 22 Letter, at 13 (discussing customized swaps with respect to a suitability duty).

the swap dealer and discourage counterparties from conducting their own investigations and taking responsibility for their own decisions and conduct.[668] Conversely, other commenters stated that applying the ''best interests'' duty to recommendations would strike a reasonable balance by limiting the duty to instances in which Special Entities relied on the swap dealer and the standard should be scalable depending on the degree of reliance.[669]

The Commission listed three questions in the proposing release requesting comment on whether a ''best interests'' duty should require additional specific disclosures regarding (1) conflicts of interest, (2) the profit the swap dealer expects to make on swaps it enters into with the Special Entity, and (3) any positions the swap dealer holds from which it may profit should the swap in question move against the Special Entity.[670] Most commenters discussed material incentives and conflicts of interest generally in the context of proposed § 23.431(a)(3);[671] however, some commenters discussed the Commission's request for comment in the context of a ''best interests'' duty.

One commenter asserted that a swap dealer should provide conflict of interest disclosures that go beyond the issue of compensation and third-party payments when dealing with a Special Entity and consider the full range of conflicts that may exist that are relevant to a particular recommendation.[672] The commenter also stated that it is not necessary to require a swap dealer in all instances to disclose its pre-existing positions; however, disclosure should be required if those positions create a material conflict of interest.[673]

Some commenters opposed requiring a swap dealer to disclose their profit or anticipated profit in connection with a particular swap.[674] Commenters also opposed requirements for swap dealers to disclose pre-existing positions to any counterparty because swap dealers may choose not to enter into swaps with Special Entities if they are required to disclose proprietary positions.[675]

The Commission also requested comment on whether proposed § 23.440 would preclude swap dealers from continuing their current practice of both recommending and entering into swaps with Special Entities.[676] One commenter asserted that Special Entities would retain their ability to engage in transactions with swap dealers as counterparties.[677] Conversely, several commenters asserted that a duty to act in the ''best interests'' is incompatible with a counterparty relationship.[678] These commenters asserted that there are several problems for a swap dealer that both acts as a counterparty and is required to act in the best interests of its counterparty in the same transaction, including that: (1) The duty of care is fundamentally at odds with an arm's length counterparty relationship, (2) it would result in an unresolvable conflict, and (3) the parties' interests are by definition adverse.[679]

Several commenters asserted that a ''best interests'' duty will discourage or prevent swap dealers from transacting with Special Entities.[680] Commenters also asserted that a duty to act in the ''best interests'' of a Special Entity will increase burdens, compliance costs and liability exposure to swap dealers, and the additional costs and risks will be passed on to Special Entities through increased pricing.[681] Thus, several commenters asserted that the proposed rules could increase costs for Special Entities, preclude them from hedging their risks, and do not provide corresponding benefits to Special Entities.[682]

c. Comments on § 23.440(b)(2)—Duty to Make Reasonable Efforts

The Commission sought comment in the proposing release on whether to prescribe additional information that would be relevant to a swap dealer's ''reasonable efforts'' and ''best interests'' duties under the proposed rule.[683] One commenter suggested that the Commission should clarify whether there is certain information without which the swap dealer could not make a recommendation. The commenter also suggested that where a swap dealer makes a recommendation based on limited information, any disclosures about the limitations should be made to the board of the Special Entity and not simply to the investment officer.[684] The commenter agreed that there should be a mechanism to allow a Special Entity to discuss various options with a swap dealer without divulging confidential information.[685] The commenter warned, however, that an overly broad interpretation of proposed § 23.440(c) could undercut the protections of the best interests duty.[686]

Another commenter opposed requirements for swap dealers to seek extensive information about a Special Entity, including information for the swap dealer to reasonably conclude that the Special Entity has the financial capability to withstand potential market-related changes in the value of

[668] *See, e.g.,* SIFMA/ISDA Feb. 17 Letter, at 2.

[669] CFA/AFR Feb. 22 Letter, at 5 and 15; *cf.* AFSCME Feb. 22 Letter, at 3 (asserting that non-swap dealers will often assume that a swap dealer that represents itself as a ''trusted advisor'' will be accountable for the advice it provides).

[670] Proposing release, 75 FR at 80651.

[671] *See* Section III.D.3.d. of this adopting release for a discussion of § 23.431(a)(3).

[672] CFA/AFR Feb. 22 Letter, at 16 (asserting a swap dealer must disclose if a swap is designed so that the dealer will profit if the transaction fails for the Special Entity); *see id.* (when recommending customized swaps, a swap dealer should be required to break out the pricing of the components of the swap, including the profit).

[673] CFA/AFR Feb. 22 Letter, at 7 (asserting that an example of such a material conflict would be where the swap dealer was taking a major short position in a type of swap that it was also recommending a Special Entity take a long position, therefore the swap dealer should be required to disclose that fact and its reasons for believing the counter position is nonetheless in the best interests of the Special Entity).

[674] SIFMA/ISDA Feb. 17 Letter, at 22 (asserting that such disclosure is not required by the statute and is inconsistent with congressional intent as Congress rejected such a requirement when enacting the Dodd-Frank Act); CEF Feb. 22 Letter, at 21.

[675] *See* SWIB Feb. 22 Letter, at 4; SIFMA/ISDA Feb. 17 Letter, at 14–15 (opposing the disclosure of pre-existing positions because it could allow a counterparty to discern confidential information of the swap dealer's other clients, the disclosure is potentially misleading, the requirement would discourage swap dealers from providing liquidity, and compliance would be difficult when considering whether disclosure is required for non-standardized swaps whose relation to a pre-existing position of a recommended swap is a matter of degree).

[676] Proposing release, 75 FR at 80651.

[677] CFA/AFR Feb. 22 Letter, at 17; CFA/AFR Nov. 3 Letter, at 3.

[678] SWIB Feb. 22 Letter, at 4; GFOA Feb. 22 Letter, at 2; Calhoun Feb. 22 Letter, at 2; ABC/CIEBA Feb. 22 Letter, at 7; ABA/ABC Feb. 22 Letter, at 2.

[679] SWIB Feb. 22 Letter, at 4; GFOA Feb. 22 Letter, at 2; ABC/CIEBA Feb. 22 Letter, at 7; *contra* CFA/AFR Nov. 3 Letter, at 3.

[680] *See* SIFMA/ISDA Feb. 17 Letter, at 5–6; Ohio STRS Feb. 18 Letter, at 2; CalSTRS Feb. 28 Letter, at 4; AMG–SIFMA Feb. 22 Letter, at 4; SWIB Feb. 22 Letter, at 4; CalPERS Feb. 18 Letter, at 3–4; VRS Feb. 22 Letter, at 3; OTPP Feb. 22 Letter, at 3; GFOA Feb. 22 Letter, at 2; BlackRock Feb. 22 Letter, at 5; ERIC Feb. 22 Letter, at 2; ABC/CIEBA Feb. 22 Letter, at 2; Texas VLB Feb. 22 Letter, at 1; NACUBO Feb. 22 Letter, at 2–3; HOOPP Feb. 22 Letter, at 2.

[681] *See, e.g.,* CEF Feb. 22 Letter, at 16; CalPERS Feb. 18 Letter, at 4; Ropes & Gray Feb. 22 Letter, at 2; COPE Feb. 22 Letter, at 2; VRS Feb. 22 Letter, at 3; BDA Feb. 22 Letter, at 2; AMG–SIFMA Feb. 22 Letter, at 4.

[682] *See* CEF Feb. 22 Letter, at 16; APGA Feb. 22 Letter, at 1; ETA May 4 Letter, at 8; CalPERS Feb. 18 Letter, at 4; SWIB Feb. 22 Letter, at 3; VRS Feb. 22 Letter, at 4; CalSTRS Feb. 28 Letter, at 2 and 4; OTPP Feb. 22 Letter, at 3; ERIC Feb. 22 Letter, at 2.

[683] Proposing release, 75 FR at 80651.

[684] CFA/AFR Feb. 22 Letter, at 17.

[685] *Id.,* at 16.

[686] *Id.* (asserting that some Special Entities may have incentives to evade the restrictions of their charters to hide the extent to which they are underfunded and, therefore, the Commission should ensure that the regulation does not provide a means for Special Entities to use swaps to assume unreasonably high investment risks to seek higher returns).

the swap.[687] The commenter asserted that if the Special Entity had to provide financial information as a prerequisite to enter into a swap, such a requirement would disadvantage the Special Entity and give swap dealers an informational advantage in negotiations.[688]

Other commenters asserted that the pre-execution duties to make reasonable efforts would require a swap dealer to undertake extensive diligence and obtain detailed representations.[689] One commenter added that such requirements would significantly increase costs, delay execution, and leave Special Entities to pay more for swaps and expose them to extended periods of market risk.[690] The commenter also requested that the Commission permit a swap dealer to rely on representations of the Special Entity to meet both its duty to act in the best interests and its obligation to make reasonable efforts to obtain necessary information.[691] Other commenters asked the Commission to provide greater clarity as to what constitutes ''a reasonable basis to believe that the representations are reliable.'' [692] The commenters suggest that representations from the Special Entity's authorized employee or independent representative should be conclusive unless the swap dealer has actual knowledge that such representations are untrue.[693] Other commenters stated that the proposing release did not provide estimates of the costs of the proposed rule to Special Entities, and that the additional costs and burdens do not have corresponding benefits.[694]

3. Final § 23.440

Considering the comments, statutory construction and legislative history, the Commission has determined to adopt § 23.440 with certain modifications. Final § 23.440(a) defines the term ''acts as an advisor to a Special Entity'' to mean ''when the swap dealer recommends a swap or trading strategy involving a swap that is tailored to the particular needs or characteristics of the Special Entity.'' Final § 23.440(b) provides two safe harbors from the definition of ''acts as an advisor to a Special Entity'' for particular types of conduct: (1) Communications between a swap dealer and an ERISA plan that has an ERISA fiduciary;[695] and (2) communications to any Special Entity (including a Special Entity that is an ERISA plan) or its representative that do not express an opinion as to whether the Special Entity should enter into a recommended swap or trading strategy involving a swap that is tailored to the particular needs or characteristics of the Special Entity.[696] Qualifying for either safe harbor requires an exchange of specified representations in writing by the swap dealer and Special Entity.

The final rule adopts the statutory ''best interests'' duty for swap dealers acting as advisors to Special Entities and ''reasonable efforts'' duty for swap dealers to make a determination that any swap or swap trading strategy is in the best interests of the Special Entity. The final rule allows a swap dealer to rely on the written representations of the Special Entity to satisfy its ''reasonable efforts'' duty. Such representations can be made on a relationship basis in counterparty relationship documentation rather than on a transaction basis, where appropriate. This adopting release and Appendix A to subpart H provide guidance for compliance with the second safe harbor in § 23.440(b)(2).

a. Acts as an Advisor to a Special Entity

The Commission has determined that a swap dealer will act as an advisor to a Special Entity when it recommends a swap or swap trading strategy that is tailored to the particular needs or characteristics of the Special Entity. This approach differs from proposed § 23.440 in two significant ways. First, the type of recommendation that will prompt the ''best interests'' duty in the final rule is limited to recommendations of bespoke swaps,[697] *i.e.,* swaps that are tailored to the particular needs or characteristics of the Special Entity.[698]

Second, in response to commenters' concerns, the Commission clarified in the discussion of the institutional suitability rule, § 23.434, the types of communications that will be considered recommendations.[699] These two changes clarify the circumstances that would cause a swap dealer to act as an advisor to a Special Entity, consistent with the statutory framework and considering the comments.[700]

[687] ABC/CIEBA Feb. 22 Letter, at 7–8.

[688] *Id.*

[689] SIFMA/ISDA Feb. 17 Letter, at 6–7; Ohio STRS Feb. 18 Letter, at 2; BlackRock Feb. 22 Letter, at 5–6; ETA May 4 Letter, at 8.

[690] SIFMA/ISDA Feb. 17 Letter, at 6–7 (asserting such requirements would reduce or eliminate swap transactions for Special Entities if the information gathering is required on a trade-by-trade basis).

[691] *Id.,* at 35.

[692] APPA/LPPC Feb. 22 Letter, at 3; APGA Feb. 22 Letter, at 5.

[693] *Id.*

[694] BlackRock Feb. 22 Letter, at 5–6; ETA May 4 Letter, at 8.

[695] An ERISA ''fiduciary'' is defined in Section 3(21) of ERISA (29 U.S.C. 1002(21)) and DOL Regulations at 29 CFR 2510.3–21.

[696] Swap dealers that choose to operate within the safe harbor would be permitted to recommend tailored swaps to a Special Entity, provided that the swap dealer does not express an opinion as to whether the Special Entity should enter into the particular swap or swap trading strategy. Therefore, the safe harbor carves out from the term ''acts as an advisor to a Special Entity'' recommendations that are trade ideas or alternatives, but does not carve out subjective opinions as to whether the Special Entity should enter into a particular bespoke swap or swap trading strategy.

[697] Unlike § 23.440, the suitability rule § 23.434 covers recommendations regarding any type of swap or trading strategy involving a swap and is not limited to recommendations of bespoke swaps.

[698] Whether a swap is tailored to the particular needs or characteristics of the Special Entity will depend on the particular facts and circumstances. Swaps with terms that are tailored or customized to a specific Special Entity's needs or objectives, or swaps with terms that are designed for a targeted group of Special Entities that share common characteristics, *e.g.,* school districts, are likely to be viewed as tailored to the particular needs or characteristics of the Special Entity. Generally, however, the Commission would not view a swap that is ''made available for trading'' on a DCM or SEF, as provided in Section 2(h)(8) of the CEA, as tailored to the particular needs or characteristics of the Special Entity. *See* Section III.D.3.b. at fn. 394 for a discussion of final § 23.431(b)'s requirement to provide scenario analysis when requested by the counterparty for any swap not ''made available for trading'' on a DCM or SEF; *see also* Proposed Rules, Trade Execution Requirements, 76 FR at 58191; Proposed Rules, Process to Make a Swap Available to Trade, 76 FR 77728.

[699] The facts and circumstances determination of whether a communication is a ''recommendation'' requires an analysis of the content, context, and presentation of the particular communication or set of communications. The determination of whether a ''recommendation'' has been made is an objective rather than a subjective inquiry. An important factor in this regard is whether, given its content, context, and manner of presentation, a particular communication from a swap dealer to a counterparty reasonably would be viewed as a ''call to action,'' or suggestion that the counterparty enter into a swap. An analysis of the content, context, and manner of presentation of a communication requires examination of the underlying substantive information transmitted to the counterparty and consideration of any other facts and circumstances, such as any accompanying explanatory message from the swap dealer. Additionally, the more individually tailored the communication to a specific counterparty or a targeted group of counterparties about a swap, group of swaps or trading strategy involving the use of a swap, the greater the likelihood that the communication may be viewed as a ''recommendation.'' *See* Section III.G. of this adopting release for a discussion of the suitability obligation under § 23.434.

[700] *See, e.g.,* CFA/AFR Feb. 22 Letter, at 20 (''an appropriate definition of advice might be: 'recommendations related to a swap or a swap trading strategy that are made to meet the objectives or needs of a specific counterparty after taking into account the counterparty's specific circumstances' ''); CFA/AFR Nov. 3 Letter, at 2; SIFMA/ISDA Feb. 17 Letter, at 32 (advice is ''individualized based on the particular needs of the Special Entity''); *cf.* SWIB Feb. 22 Letter, at 2–3; *see also* APGA Feb. 22 Letter, at 4 (''a 'recommendation' which would trigger the advisor obligations should mean a firm indication by the swap dealer of a particular preferred transaction, swap, or market strategy''); *id.* (A presentation offering information concerning new products or services or new market strategies, without advancing a particular course of action, should not

Continued

In addition, the Commission has determined to provide two safe harbors to the rule—one that will apply only to ERISA plans and another that would apply to all Special Entities (including a Special Entity that is an ERISA plan). These safe harbors reflect several considerations, including comments describing the benefits of a free flow of information between a swap dealer and Special Entity, clear congressional intent to raise the standard of care for swap dealers that transact with Special Entities, and the implications of the ''best interests'' duty for swap dealers and Special Entities.

First, under § 23.440(b)(1), a swap dealer will not be acting as an advisor to a Special Entity that is an ERISA plan if: (1) The ERISA plan represents in writing that it has an ERISA fiduciary; (2) the ERISA fiduciary represents in writing that it will not rely on recommendations provided by the swap dealer; and (3) the ERISA plan represents in writing that (A) it will comply in good faith with written policies and procedures reasonably designed to ensure that any recommendation the Special Entity receives from the swap dealer materially affecting a swap transaction is evaluated by a fiduciary before the transaction occurs, or (B) any recommendation the Special Entity receives from the swap dealer materially affecting a swap transaction will be evaluated by a fiduciary before that transaction occurs. In reaching this determination, the Commission has considered the comments, the comprehensive federal regulatory scheme that applies to ERISA fiduciaries, and the importance of harmonizing the Dodd-Frank Act requirements with ERISA to avoid unintended consequences.[701] Therefore, § 23.440(b)(1) both harmonizes the federal regulatory regimes and ensures appropriate protections for ERISA plans.

Second, under § 23.440(b)(2), a swap dealer will not be ''acting as an advisor'' to any Special Entity (including a Special Entity that is an ERISA plan)[702] if: (1) The swap dealer does not express an opinion as to whether the Special Entity should enter into a recommended swap or swap trading strategy that is tailored to the particular needs or characteristics of the Special Entity; (2) the Special Entity represents in writing that it will not rely on the swap dealer's recommendations and will rely on advice from a qualified independent representative within the meaning of § 23.450; and (3) the swap dealer discloses that it is not undertaking to act in the best interests of the Special Entity. The Commission believes that this will provide greater clarity to the respective roles of the parties, and because a swap dealer must refrain from making statements or otherwise expressing an opinion to meet the safe harbor's requirements, the provision also provides meaningful protections to Special Entities.

Appendix A to subpart H provides additional guidance to market participants that choose to operate within the safe harbor. If a swap dealer complies with the terms of the safe harbor, it can be assured that the following types of communications, for example, would not be subject to the best interests duty: (1) Providing information that is general transaction, financial, educational, or market information; (2) offering a swap or trading strategy involving a swap, including swaps that are tailored to the needs or characteristics of a Special Entity; (3) providing a term sheet, including terms for swaps that are tailored to the needs or characteristics of a Special Entity; (4) responding to a request for a quote from a Special Entity; (5) providing trading ideas for swaps or swap trading strategies, including swaps that are tailored to the needs or characteristics of a Special Entity; and (6) providing marketing materials upon request or on an unsolicited basis about swaps or swap trading strategies, including swaps that are tailored to the needs or characteristics of a Special Entity. The list is illustrative and not exhaustive. It is intended to provide guidance to market participants. The safe harbor in § 23.440(b)(2) allows a wide range of communications and interactions between swap dealers and Special Entities without invoking the ''best interests'' duty, provided that the swap dealer does not express its own subjective opinion to the Special Entity or its representative as to whether the Special Entity should enter into the swap or trading strategy that is customized or tailored to the Special Entity's needs or circumstances and the appropriate representations and disclosures are exchanged. The Commission notes, however, that depending on the facts and circumstances, some of the examples on the list in Appendix A could be a ''recommendation'' that would trigger a suitability obligation under § 23.434. However, the Commission has determined that such activities would not, by themselves, prompt the ''best interests'' duty in § 23.440 provided that the parties comply with the other requirements of § 23.440(b)(2).

The safe harbor draws a clear distinction between the activities that will and will not cause a swap dealer to be acting as an advisor to a Special Entity. Thus, a swap dealer that wishes to avoid engaging in activities that trigger a ''best interests'' duty must appropriately manage its communications. To clarify the type of communications that they will make under the safe harbor, the Commission expects that swap dealers may specifically represent that they will not express an opinion as to whether the Special Entity should enter into a recommended swap or trading strategy, and that for such advice the Special Entity should consult its own advisor. Nothing in the final rule would preclude such a representation from being included in counterparty relationship documentation. However, such a representation would not act as a safe harbor under the rule where, contrary to the representation, the swap dealer does express an opinion to the Special Entity as to whether it should enter into a recommended swap or trading strategy.

The safe harbor permits a swap dealer to engage in a wide variety of discussions and communications with a Special Entity about individually tailored swaps and trading strategies, including the advantages or disadvantages of different swaps or trading strategies, without invoking the ''best interests'' duty. All of the swap dealer's communications, however, must be made in a fair and balanced manner based on principles of fair dealing and good faith in compliance with § 23.433. Furthermore, where the communications are ''recommendations,'' the swap dealer

be considered advice); SIFMA/ISDA Feb. 17 Letter, at 33 (''in preparing a term sheet, recommending a swap for consideration by a counterparty, and in other similar conduct, [a swap dealer] may well not be providing advice as to the advisability of entering into the relevant swap transaction'').

[701] The Commission has considered commenters' suggestions that different categories of Special Entities should not be treated differently. *See, e.g.,* CalSTRS Feb. 28 Letter, at 2 fn. 1. The Commission disagrees. Congress has established a comprehensive federal regulatory framework for ERISA plans, but has not done so for other Special Entities, which are subject to a wide range of state and local laws. Therefore, the Commission believes it is appropriate and consistent with congressional intent to harmonize regulation under the Dodd-Frank Act and CEA with ERISA requirements. Such harmonization avoids unintended consequences while maintaining protections for ERISA plans. With respect to other Special Entities, the Commission has considered commenters concerns and has provided compliance mechanisms under the final rules to address potential costs without undermining the benefits Congress intended.

[702] When dealing with an ERISA plan, a swap dealer may comply with either or both safe harbors under § 23.440(b)(1) and (b)(2).

must comply with the suitability obligations under § 23.434.

Some commenters requested that the Commission clarify whether activities other than those described in § 23.440 would cause a swap dealer to act as an advisor to a Special Entity. The Commission has determined that a swap dealer will only ''act as an advisor to a Special Entity'' as provided in final § 23.440(a). Similarly, in response to commenters, the Commission confirms that compliance with the requirements of Section 4s(h) and the Commission's business conduct standards rules in subpart H of part 23, will not, by itself, cause a swap dealer to ''act as an advisor to a Special Entity'' within the meaning of § 23.440.

b. Commenters' Alternative Approaches

The Commission considered comments asserting that Sections 4s(h)(4) and 4s(h)(5) of the CEA are mutually exclusive provisions and 4s(h)(4) should not apply where a swap dealer acts as a counterparty to a Special Entity. Similarly, the Commission considered comments requesting that the Commission provide a safe harbor to § 23.440 that would allow a swap dealer to avoid ''acting as an advisor to a Special Entity'' where the Special Entity is advised by a qualified independent representative. The Commission disagrees with commenters' statutory interpretation and declines to provide a safe harbor for all communications between a swap dealer and Special Entity provided that the Special Entity is advised by a qualified independent representative. A plain reading of Section 4s(h) does not provide that a swap dealer acting as a counterparty to a Special Entity may avoid Section 4s(h)(4)'s provisions.[703] The Commission also believes that it would be inconsistent with the statutory language to allow a swap dealer to avoid Section 4s(h)(4)'s requirements when it provides subjective advice to a Special Entity, simply because the Special Entity has a representative on which it is relying. Such an interpretation of the statute would essentially render Section 4s(h)(4) a nullity and grant swap dealers unfettered discretion to provide subjective advice. Such a result would be inconsistent with congressional intent to raise standards for the protection of Special Entities.

Many commenters suggested that a swap dealer should only be deemed to ''act as an advisor'' based on mutual agreement between the swap dealer and Special Entity. The Commission declines to adopt such an approach because it would be inconsistent with the statute. Section 4s(h)(4) is self-effectuating and by its terms does not delegate the determination to the parties. The statute establishes an advisor test based on conduct–''acting'' as an advisor–not agreement. If the parties were permitted to agree that a swap dealer was not acting as an advisor subject to a ''best interests'' duty, irrespective of the swap dealer's conduct, the rule would essentially immunize swap dealers from complying with the obligations imposed by the statute when acting as an advisor. A statutory protection would not be meaningful if the default position were that protection only applies where the entity regulated by the provision, the swap dealer, agrees to be regulated.

Commenters also suggest that the Commission should look to whether the Special Entity relied on the swap dealer's advice or recommendations or whether such communications were the primary basis for the Special Entity's trading decision to determine whether the swap dealer acted as an advisor. The Commission declines to adopt such a standard. Final § 23.440 creates an objective test that analyzes the swap dealer's communications. Such a standard is appropriate considering that the business conduct standards rules regulate the swap dealer's conduct. The commenters' suggestion would shift the inquiry from an analysis of the swap dealer's conduct to an analysis of whether the Special Entity actually relied on the swap dealer.[704] Such a shift would not achieve the purposes of the statue and would create uncertainty.

Commenters also suggested that the Commission adopt rules that permit sophisticated Special Entities to opt out of the protections provided in Section 4s(h)(4) and § 23.440. Neither the statute nor legislative history distinguishes between sophisticated and unsophisticated Special Entities. Congress intended to provide heightened protections to Special Entities, and the Commission is not convinced that there is an objective proxy for sophistication with respect to participants in the swaps markets.[705] Therefore, the Commission has determined not to permit Special Entities to opt out of the protections of the statute and the rules. Instead, the Commission has adopted clear, objective criteria for a swap dealer to determine whether it is acting as an advisor to a Special Entity, subject to a ''best interests'' duty, or operating within the safe harbors provided in the rule.

Those commenters that advocated an opt out regime, a qualified independent representative safe harbor, or to limit application of the rule were primarily concerned that a broad application of the definition of ''acts as an advisor to a Special Entity'' and that potential new costs or liability could chill communications between swap dealers and Special Entities, raise hedging costs for Special Entities, or reduce the number of swap dealers that would be willing counterparties to Special Entities. The Commission believes that the final rule appropriately addresses these concerns. Under the final rule a swap dealer can appropriately manage its communications to its counterparties and can take reasonable steps to avoid ''act[ing] as an advisor to a Special Entity.'' Thus, the Commission believes that § 23.440 is designed appropriately to mitigate costs associated with the statutory requirements and the rule. The rule also achieves the intended regulatory protections by either (1) limiting the types of communications from the swap dealer that could have the greatest potential to mislead a Special Entity, or (2) where the swap dealer ''acts as an advisor,'' subjecting such communications to the ''best interests'' standard of care.

[703] Legislative history supports that 4s(h)(4) and 4s(h)(5) are not mutually exclusive. ''[N]othing in [CEA Section 4s(h)] prohibits a swap dealer from entering into transactions with Special Entities. Indeed, we believe it will be quite common that swap dealers will both provide advice and offer to enter into or enter into a swap with a special entity. However, unlike the status quo, in this case, the swap dealer would be subject to both the acting as advisor and business conduct requirements under subsections (h)(4) and (h)(5).'' 156 Cong. Rec. S5923 (daily ed. Jul. 15, 2010) (statement of Sen. Lincoln).

[704] One commenter asserted that Commission precedent recognizes that dependence or reliance is necessary to give rise to an advisory relationship. SIFMA/ISDA Feb. 17 Letter, at 32 fn. 76 (citing *In re Jack Savage,* [1975–1977 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,139 (CFTC Mar. 1, 1976)). The Commission disagrees that *Savage* can be applied so broadly. In *Savage,* the Commission denied a newsletter publisher's commodity trading advisor registration application. Although the Commission acknowledges in *Savage* that the duties attendant to an advisory relationship exist where a customer may rely on a commodity trading advisor's advice, reliance is not a required element for the creation of an advisory status nor the duties that flow from it. The fact that a customer does not rely would have no bearing on a regulatory action. An advisory relationship and related duties do not arise by the subjective understanding of the customer but by operation of law. A person becomes a commodity trading advisor when advising others for compensation or profit as to the value or advisability of trading in a commodity for future delivery or swap, among others. Once the advice is rendered for compensation or profit, regardless of the customer's reliance, the advisor owes the duties attendant to such advice.

[705] *See* Section III.A.1. of this adopting release for a discussion of ''Opt in or Opt out for Certain Classes of Counterparties.''

c. Best Interests

The final rule (renumbered as § 23.440(c)(1)) adopts the statutory ''best interests'' duty for swap dealers acting as advisors to Special Entities and ''reasonable efforts'' duty for swap dealers making a determination that the swap or swap trading strategy is in the best interests of the Special Entity. The Commission has determined not to define the term ''best interests,'' but rather to provide further guidance as to the meaning of the term and the scope of the duty.

The Commission has considered commenters' views and the legislative history [706] in regard to whether Section 4s(h)(4) imposes a fiduciary duty. The Commission has determined that the ''best interests'' duty under Section 4s(h)(4) is not a fiduciary duty. Additionally, the Commission does not view the business conduct standards statutory provisions or rules in subpart H of part 23 to impose a fiduciary duty on a swap dealer with respect to any other party.

Whether a recommended swap is in the ''best interests'' of the Special Entity will turn on the facts and circumstances of the particular recommendation and particular Special Entity. However, the Commission will consider a swap dealer that ''acts as an advisor to a Special Entity'' to have complied with its duty under final § 23.440(c)(1) where the swap dealer (1) complies with final § 23.440(c)(2) to make a reasonable effort to obtain necessary information, (2) acts in good faith and makes full and fair disclosure of all material facts and conflicts of interest with respect to the recommended swap,[707] and (3) employs reasonable care that any recommendation made to a Special Entity is designed to further the Special Entity's stated objectives.[708]

For a recommendation of a swap to be in the best interests of the Special Entity, the swap does not need to be the ''best'' of all possible alternatives that might hypothetically exist, but should be assessed in comparison to other swaps, such as swaps offered by the swap dealer or ''made available for trading'' on a SEF or DCM.[709] To be in the best interests of a Special Entity, the recommended bespoke swap would have to further the Special Entity's hedging, investing or other stated objectives. Additionally, whether a recommended swap is in the best interests of the Special Entity will be analyzed based on information known to the swap dealer (after it has employed its reasonable efforts required under Section 4s(h)(4)(C) and final § 23.440(c)(2)) at the time the recommendation is made. The ''best interests'' duty does not prohibit a swap dealer from negotiating swap terms in its own interests,[710] nor does it prohibit a swap dealer from making a reasonable profit from a recommended transaction.[711] Depending on the facts and circumstances, the ''best interests'' duty also does not require an ongoing obligation to act in the best interests of the Special Entity.[712] For example, a swap dealer would be able to exercise its rights under the terms and conditions of the swap when determining whether to make additional collateral calls in response to the Special Entity's deteriorating credit rating, whether or not such collateral calls would be, from the Special Entity's perspective, in the Special Entity's ''best interests.''

d. Commenters' Alternative ''Best Interests'' Approaches

The Commission declines some commenters' suggestions that the Commission delete the best interests duty or interpret best interests to be a fair dealing standard. Such an approach is inconsistent with the statute which uses the terms, ''fair dealing'' and ''best interests,'' in different provisions, indicating that they impose different duties.[713] Another commenter requested that the Commission identify certain practices as inherent violations of the ''best interests'' duty including where a swap dealer designs a swap with features that expose the Special Entity to risks that are greater than those they intend to hedge. In the Commission's view, a swap dealer that ''acts as an advisor to a Special Entity'' could not recommend a swap or trading strategy that is inconsistent with the Special Entity's stated objectives. Where a swap dealer that is acting as an advisor concludes that the stated objectives are inconsistent with the Special Entity's best interests, the swap dealer would be expected to so inform the Special Entity and its independent representative.

The Commission has considered commenters' assertions that a Special Entity may be less likely to undertake its own due diligence when dealing with a swap dealer that is subject to the ''best interests'' duty. The Commission, however, believes that final § 23.440 appropriately clarifies the duties and roles of the parties consistent with congressional intent. The Commission also notes that prior to entering into any swap with a swap dealer, a Special Entity will have a qualified independent representative that will evaluate the swap dealer's advice in light of the Special Entity's ''best interests.''

e. Final § 23.440(c)(2)—Duty to Make Reasonable Efforts

Consistent with Section 4s(h)(4)(C), proposed § 23.440(b)(2) (renumbered as § 23.440(c)(2)) required a swap dealer that ''acts as an advisor to a Special Entity'' to make reasonable efforts to obtain information necessary to make a reasonable determination that any recommended swap or trading strategy

[706] In the Senate bill, the business conduct standards provision stated ''a swap dealer that provides advice regarding, or offers to enter into, or enters into a swap with [a Special Entity] shall have a fiduciary duty to the [Special Entity].'' Restoring American Financial Stability Act of 2010, H.R. 4173, Section 731 (May 20, 2010) (Public Print version as passed in the Senate of the United States May 27 (legislative day, May 26, 2010) (proposed amendments to Section 4s(h)(2)(A) and (B) of the CEA), *available at http://www.gpo.gov*). The House and Senate Conference Committee did not adopt the fiduciary duty language and instead adopted the following: ''Any swap dealer that acts as an advisor to a Special Entity shall have a duty to act in the best interests of the Special Entity.'' *See* Section 4s(h)(4)(B) of the CEA.

[707] Where a swap dealer ''acts as an advisor to a Special Entity,'' the nature and content of the conflicts of interest disclosures will depend on the facts and circumstances of the particular swap dealer–Special Entity relationship and the recommended swap or trading strategy. *See* Section III.D. of this adopting release for a discussion of § 23.431–Disclosures of material information, including whether a swap dealer is required to disclose that it is trying to move a particular position off its books at Section III.D.3.d.

[708] A swap dealer would be expected to evaluate the ''best interests'' in accordance with reasonably designed policies and procedures and document how it arrived at a ''reasonable determination'' that a recommended swap is in the best interests of the Special Entity.

[709] *See* Section IV.B.3.a. at fn. 698 for a discussion of Section 2(h)(8) and swaps ''made available for trading'' on a DCM or SEF; *see also* Section III.D.3.b. for a related discussion of swaps ''made available for trading'' for scenario analysis disclosures under final § 23.431(b) at fn. 394 and accompanying text at fn. 405.

[710] For example, the swap dealer may negotiate appropriate provisions relating to collateral calls and termination rights to manage its risks related to the swap.

[711] Some commenters suggested that a swap dealer that ''acts as an advisor to a Special Entity'' should be required to break out the pricing components of the swap, including the profit. *See, e.g.,* CFA/AFR Feb. 22 Letter, at 16. The Commission declines to require any particular disclosures under this principles based standard. Whether such disclosure would be required to comply with the duty to act in the best interests of the Special Entity will depend on the facts and circumstances of the particular recommended swap or trading strategy.

[712] However, whenever the swap dealer engages in activity that would cause it to be acting as an advisor to the Special Entity, the best interests duty would be prompted. For example, if a swap dealer acted as an advisor in connection with a material amendment to, or termination of, a swap, the ''best interests'' duty would apply.

[713] *Compare* Section 4s(h)(3)(C) (''duty for a swap dealer * * * to communicate in a fair and balanced manner based on principles of fair dealing and good faith'') *with* Section 4s(h)(4)(B) (''a duty to act in the best interests'').

involving a swap is in the best interests of the Special Entity.[714] The proposed rule listed eight specific types of information that the swap dealer must make reasonable efforts to obtain and consider when making a determination that a recommendation is in the best interests of the Special Entity.[715] The Commission has determined to delete two of the listed types of information, proposed § 23.440(b)(2)(i)[716] and (vi).[717] Additionally, the Commission is refining the criteria in proposed § 23.440(b)(2)(iv)[718] and (vii)[719] (renumbered as § 23.440(c)(2)(iii) and (v)). These changes are for clarification only and do not substantively change the rule.

The Commission also clarifies how a swap dealer can satisfy its best interests duty where a Special Entity does not provide complete information with respect to the criteria in final § 23.440(c)(2). Commenters have asserted that Special Entities may be reluctant to provide complete information to swap dealers about their investment portfolio or other information that might be relevant to the appropriateness of a particular recommendation. Nothing in the rule is intended to disadvantage a Special Entity in its negotiations with a swap dealer or require it to disclose proprietary information.

However, to comply with its ''best interests'' duty where the Special Entity does not provide complete information, the swap dealer must make clear to the Special Entity that the recommendation is based on the limited information known to the swap dealer and that the recommendation might be different if the swap dealer had more complete information. The Commission has also considered comments suggesting that disclosures about a recommendation's limitations should be made to the board of the Special Entity and not to the investment officer.[720] The Commission agrees that the best practice for a swap dealer that ''acts as an advisor to a Special Entity'' within the meaning of § 23.440(a) would be to ensure that disclosures about the limitations of its recommendation are communicated to the governing board or to a person or persons occupying a similar status or performing similar functions.

Furthermore, where a swap dealer's reasonable efforts to obtain necessary information results in limited or incomplete information, the swap dealer must assess whether it is able to make a reasonable determination that a particular recommendation is in the ''best interests'' of the Special Entity. For example, a fundamental requirement to making a determination that a recommendation is in the best interests is to understand the objectives of the Special Entity with respect to the swap. If, after the swap dealer makes reasonable efforts to obtain information about the Special Entity's objectives, the Special Entity does not provide sufficient information to the swap dealer, then the swap dealer would be unable to make a determination that a recommendation is in the best interests of the Special Entity. Therefore, a swap dealer that ''acts as an advisor to a Special Entity'' would have to refrain from making a recommendation to the Special Entity in such circumstances.

A commenter asserted that any mechanism to allow a Special Entity to avoid divulging confidential information should not be interpreted so broadly as to undercut the protections of a best interests duty or permit Special Entities to engage in swaps with unreasonably high risk.[721] The Commission has considered the comment and has determined that the rule is designed to provide appropriate protections to Special Entities.

f. Final § 23.440(d)—Reasonable Reliance on Representations

Proposed § 23.440(c) (renumbered as § 23.440(d)) permitted a swap dealer to rely on written representations of the Special Entity to satisfy its obligation to ''make reasonable efforts'' to obtain necessary information. However, the proposed rule listed additional criteria that a swap dealer would have to consider to determine that the representations were reliable.[722] The Commission has determined to delete from the final rule text the additional criteria that a swap dealer would be expected to consider. Commenters found the proposed rule text confusing and unworkable.[723] In light of the comments, the Commission has determined to provide additional guidance as to when a swap dealer would not be able to rely on written representations.

A swap dealer would be able to rely on representations unless it had information that would cause a reasonable person to question the accuracy of the representation.[724] The Commission declines to adopt other commenters' suggestion that a swap dealer or major swap participant be permitted to rely on representations unless it had actual knowledge that the representations were untrue. The Commission has determined that an actual knowledge standard may inappropriately encourage the swap dealer to ignore red flags. The Commission also confirms that such representations, where appropriate, can be contained in counterparty relationship documentation consistent

[714] Proposing release, 75 FR at 80650 and 80659–60.

[715] *Id.,* at 80659–60.

[716] Under proposed § 23.440(b)(2)(i), a swap dealer would have to make reasonable efforts to obtain such information regarding ''the authority of the Special Entity to enter into a swap.'' *Id.,* at 80660. The Commission has determined that the regulatory objective intended by this provision is already achieved in final § 23.402(b)—Know your counterparty.

[717] Under proposed § 23.440(b)(2)(vi), a swap dealer would have to make reasonable efforts to obtain such information regarding ''whether the Special Entity has an independent representative that meets the criteria enumerated in [proposed] § 23.450(b).'' *Id.,* at 80660. The Commission has determined that this would be duplicative of the requirements in § 23.450.

[718] *Id.,* at 80660. The provision as adopted clarifies that a Special Entity's objectives in using swaps may be broader than investment or financing needs.

[719] *Id.,* at 80660. The provision as adopted clarifies that the intent of the provision concerns changes in market conditions.

[720] *See* CFA/AFR Feb. 22 Letter, at 17.

[721] *Id.,* at 16.

[722] *See* proposed § 23.440(c)(1)–(3), proposing release, 75 FR at 80660 (''(1) The swap dealer has a reasonable basis to believe that the representations are reliable taking into consideration the facts and circumstances of a particular swap dealer-Special Entity relationship, assessed in the context of a particular transaction; and (2) The representations include information sufficiently detailed for the swap dealer to reasonably conclude that the Special Entity is: (i) Capable of evaluating independently the material risks inherent in the recommendation; (ii) Exercising independent judgment in evaluating the recommendation; and (iii) Capable of absorbing potential losses related to the recommended swap; and (3) The swap dealer has a reasonable basis to believe that the Special Entity has a representative that meets the criteria enumerated in § 23.450(b).'').

[723] *See, e.g.,* BlackRock Feb. 22 Letter, at 6.

[724] The Commission's determination is consistent with several commenters' suggestions. *See, e.g.,* SIFMA/ISDA Feb. 17 Letter, at 36 (''[swap dealers] should be permitted to rely on a written representation * * * that the counterparty and/or its representative satisfies the standards * * * absent actual notice of countervailing facts (or facts that reasonably should have put [a swap dealer] on notice), which would trigger a consequent duty to inquire further.''); ABC/CIEBA Feb. 22 Letter, at 10–11 fn. 3 (asserting the Commission should adopt a standard used under Rule 144A of the federal securities laws, which would not impose a duty to inquire further ''unless circumstances existed giving reason to question the veracity of a certification''); AMG–SIFMA Feb. 22 Letter, at 10–11 (''A swap dealer or [major swap participant] should be able to rely on an investment adviser's representation unless the swap dealer or [major swap participant] has information to the contrary.''); Comm. Cap. Mkts. May 3 Letter, at 2 (''The dealer should be required to probe beyond that representation only if it has reason to believe that the Special Entity's representations with respect to its independent representative are inaccurate.''); BlackRock Feb. 22 Letter, at 3 (''The CFTC should specifically permit the [swap dealer] to rely, absent notice of facts that would require further inquiry.'').

with § 23.402(d) to avoid transaction-by-transaction compliance.[725]

C. Section 23.450—Requirements for Swap Dealers and Major Swap Participants Acting as Counterparties to Special Entities

1. Proposed § 23.450

Proposed § 23.450 followed the statutory language in Section 4s(h)(5) of the CEA, which requires swap dealers and major swap participants [726] that offer to enter or enter into swaps with Special Entities [727] to comply with any duty established by the Commission that they have a reasonable basis to believe that the Special Entity has an independent representative that meets certain enumerated criteria. The enumerated criteria include that a Special Entity representative: (1) Has sufficient knowledge to evaluate the transaction and risks; (2) is not subject to a statutory disqualification; [728] (3) is independent of the swap dealer or major swap participant; [729] (4) undertakes a duty to act in the best interests of the Special Entity it represents; [730] (5) makes appropriate and timely disclosures to the Special Entity; [731] (6) evaluates, consistent with any guidelines provided by the Special Entity, fair pricing and the appropriateness of the swap; [732] (7) in the case of employee benefit plans subject to ERISA, is a fiduciary as defined in Section 3 of ERISA (29 U.S.C. 1002); [733] and (8) in the case of a municipal entity as defined in proposed § 23.451, is subject to restrictions on certain political contributions imposed by the Commission, the SEC or an SRO subject to the jurisdiction of the Commission or the SEC.[734]

The proposed rule set out several factors to be considered by swap dealers and major swap participants in determining whether the Special Entity's representative satisfies the enumerated criteria, including (1) the nature of the Special Entity-representative relationship; (2) the representative's ability to make hedging or trading decisions; (3) the use of consultants or, with respect to employee benefit plans subject to ERISA, use of a Qualified Professional Asset Manager [735] or In-House Asset Manager; [736] (4) the representative's general level of experience in the financial markets and particular experience with the type of product under consideration; (5) the representative's ability to understand the economic features of the swap; (6) the representative's ability to evaluate how market developments would affect the swap; and (7) the complexity of the swap.[737]

The proposed rule provided that a representative would be deemed to be independent if: (1) It was not (with a one-year look back) an associated person of the swap dealer or major swap participant within the meaning of Section 1a(4) of the CEA; (2) there was no ''principal relationship'' between the representative and the swap dealer or major swap participant within the meaning of § 3.1(a) [738] of the

[725] As the Commission stated in the proposing release, such representations can be included in counterparty relationship documentation or other written agreement between the parties and that the representations can be deemed applicable or renewed, as appropriate, to subsequent swaps between the parties if the representations continue to be accurate and relevant with respect to the subsequent swaps. Proposing release, 75 FR at 80641–42.

[726] Although the title of Section 4s(h)(5) refers only to swap dealers, the specific requirements in Section 4s(h)(5)(A) are imposed on both swap dealers and major swap participants that offer to or enter into a swap with a Special Entity. Accordingly, the Commission proposed to apply the counterparty requirements to major swap participants as well as to swap dealers. Proposing release, 75 FR at 80651 fn. 104.

[727] The Commission interpreted the statute as imposing this duty on swap dealers and major swap participants in connection with swaps entered into with all categories of Special Entities. The statutory language is ambiguous as to whether the duty is intended to apply with respect to all types of Special Entity counterparties, or just a sub-group. The ambiguities arise, in part, from the reference to subclauses (I) and (II) of Section 1a(18)(A)(vii) of the CEA, which include certain governmental entities and multinational or supranational government entities. Yet, multinational and supranational government entities do not fall within the definition of Special Entity in Section 4s(h)(2)(C), and State agencies, which are defined as Special Entities, are not included in Section 1a(18)(A)(vii)(I) and (II) but are included in (III). The Commission's interpretation is consistent with legislative history. *See* H.R. Rep. No. 111–517, at 869 (June 29, 2010) (Conf. Rep.) (''When acting as counterparties to a pension fund, endowment fund, or state or local government, dealers are to have a reasonable basis to believe that the fund or governmental entity has an independent representative advising them.''). Proposing release, 75 FR at 80651 fn. 106 and 108.

[728] To guide swap dealers and major swap participants, the proposed rule defined ''statutory disqualification'' as grounds for refusal to register or to revoke, condition or restrict the registration of any registrant or applicant for registration as set forth in Sections 8a(2) and 8a(3) of the CEA. Proposing release, 75 FR at 80651.

[729] The proposed rule clarified that ''independent'' as it relates to a representative of a Special Entity means independent of the swap dealer or major swap participant, not independent of the Special Entity. Proposing release, 75 FR at 80652 fn. 113 and 115.

[730] The Commission did not define ''best interests'' in this context, but noted the scope of the duty would be related to the nature of the relationship between the independent representative and the Special Entity, and established principles in case law would inform the meaning of the term on a case-by-case basis. At a minimum, the swap dealer or major swap participant would have a reasonable basis for believing that the representative could assess: (1) How the proposed swap fits within the Special Entity's investment policy; (2) what role the particular swap plays in the Special Entity's portfolio; and (3) the Special Entity's potential exposure to losses. The swap dealer or major swap participant would also need to have a reasonable basis for believing that the representative has sufficient information to understand and assess the appropriateness of the swap prior to the Special Entity entering into the transaction. Proposing release, 75 FR at 80652.

[731] The proposed rule refined the criterion under Section 4s(h)(5)(A)(i)(V), ''appropriate disclosures'' to mean ''appropriate and timely disclosures.'' Proposing release, 75 FR at 80652.

[732] The proposed rule refined the statutory language to provide that the representative ''evaluate[], consistent with any guidelines provided by the Special Entity, [the] fair pricing and * * * appropriateness of the swap.'' Swap dealers and major swap participants could rely on appropriate legal arrangements between Special Entities and their independent representatives in applying this criterion. For example, where a pension plan has a plan fiduciary that by contract has discretionary authority to carry out the investment guidelines of the plan, the swap dealer or major swap participant would be able to rely, absent red flags, on the Special Entity's representations regarding the legal obligations of the fiduciary. Evidence of the legal relationship between the plan and its fiduciary would enable the swap dealer or major swap participant to conclude that the fiduciary is evaluating fair pricing and the appropriateness of all transactions prior to entering into such transactions on behalf of the plan. To comply with this criterion, the swap dealer or major swap participant also would consider whether the independent representative is documenting its decisions about appropriateness and pricing of all swap transactions and that such documentation is being retained in accordance with any regulatory requirements that might apply to the independent representative. This approach was applied to in-house independent representatives as well. Proposing release, 75 FR at 80652–53.

[733] Notwithstanding comments from ERISA plans and their fiduciaries, the Commission determined that independent representatives of plans subject to ERISA would have to meet all the independent representative criteria in Section 4s(h)(5)(A). The Commission sought further comment on this interpretation of the statute. Proposing release, 75 FR at 80653 fn. 122.

[734] Criterion 8—restrictions on certain political contributions—is not in the statutory text under Section 4s(h)(5)(A)(i)(I)–(VII). The Commission proposed this criterion using its discretionary authority under Section 4s(h)(5)(B). The requirement would not apply to in-house independent representatives of a municipal entity following the definition of ''municipal advisor'' in Section 15B of the Exchange Act (15 U.S.C. 78*o*–4), which excludes employees of a municipal entity. For examples of pay-to-play rules, *see, e.g.,* SEC Rule 206(4)–5 under the Advisers Act (17 CFR 275.206(4)–5) (''SEC Advisers Act Rule 206(4)–5''); MSRB Rule G–37: Political Contributions and Prohibitions on Municipal Securities Business. The Commission proposed to impose comparable requirements on swap dealers and major swap participants that act as counterparties to Special Entities in proposed § 23.451. The Commission stated in the proposing release that it would propose comparable requirements on registered CTAs when they advise municipal entities in a separate release. Proposing release, 75 FR at 80653 fn. 125.

[735] *See* DOL QPAM PTE 84–14, 75 FR 38837.

[736] *See* DOL In-House Asset Manager PTE 96–23, 61 FR 15975; Proposed Amendment to PTE 96–23, 75 FR 33642, June 14, 2010.

[737] Proposing release, 75 FR at 80651; *see also id.,* at 80660–61 (proposed § 23.450(d)(2)).

[738] 17 CFR 3.1(a).

Commission's Regulations; and (3) the representative did not have a material business relationship with the swap dealer or major swap participant.[739] However, if the representative received any compensation from the swap dealer or major swap participant within one year of an offer to enter into a swap, the swap dealer or major swap participant would have to ensure that the Special Entity is informed of the compensation and that the Special Entity agrees in writing, in consultation with the representative, that the compensation does not constitute a material business relationship between the representative and the swap dealer or major swap participant.[740] The proposed rule defined a material business relationship as any relationship with a swap dealer or major swap participant, whether compensatory or otherwise, that reasonably could affect the independent judgment or decision making of the representative.[741]

To address concerns that the statute places undue influence in the hands of the swap dealer or major swap participant by allowing it to control who qualifies as an independent representative of a Special Entity, the proposed rule provided that negative determinations be reviewed by the swap dealer's or major swap participant's chief compliance officer.[742] Under the proposed rule, if a swap dealer or major swap participant determined that an independent representative did not meet the enumerated criteria, the swap dealer or major swap participant would be required to make a written record of the basis for such determination and submit such determination to its chief compliance officer for review.[743] Such review would ensure that the swap dealer or major swap participant had a substantial, unbiased basis for the determination.[744]

Proposed § 23.450(f) also required, as provided in Section 4s(h)(5)(A)(ii), that swap dealers and major swap participants disclose in writing to Special Entities the capacity in which they are acting before initiation of a swap transaction. In addition, if a swap dealer or major swap participant were to engage in business with the Special Entity in more than one capacity, the swap dealer or major swap participant would have to disclose the material differences between the capacities.[745]

Finally proposed § 23.450(g) stated that the rule would not apply with respect to a swap that is initiated on a DCM or SEF where the swap dealer or major swap participant does not know the Special Entity's identity.[746]

2. Comments

The Commission received many comments on the various aspects of proposed § 23.450. The Commission has grouped the comments by the following issues: (1) Types of Special Entities that should be included in final § 23.450; (2) duty to assess the qualifications of a Special Entity's representative; (3) representative qualifications;[747] (4) reasonable reliance on representations; (5) unqualified representatives; and (6) disclosure of capacity.

a. Types of Special Entities Included in Section 4s(h)(5)(A)(i)

Several commenters asserted that Section 4s(h)(5)(A)(i) only applies to the governmental Special Entities that are described in Section 1a(18)(A)(vii)(I) and (II) of the CEA, contrary to the approach taken in proposed § 23.450.[748] Commenters also asserted that it is unclear whether the Commission has the authority to apply the rule to swaps with ERISA plans, governmental plans, and endowments.[749] Some commenters urged the Commission to resolve any ambiguity in the statutory language by applying the final rule only to the State and municipal Special Entities defined in Section 4s(h)(C)(2)(ii).[750] One commenter stated that if the final rule is applied to ERISA plans, then such plans should only be subject to subclause (VII) of Section 4s(h)(5)(A)(i),[751] which requires a Special Entity that is an employee benefit plan subject to ERISA to have an independent representative that ''is a fiduciary as defined in Section 3 of [ERISA].'' [752] Commenters asserted that requirements for ERISA fiduciaries are comparable to those required in subclauses (I)–(VI) of Section 4s(h)(5)(A)(i), rendering the protections of Section 4s(h)(5) and proposed § 23.450 unnecessary, and potentially harmful.[753] Conversely, one commenter opposed any carve-outs for ERISA plans and stated the Special Entity provisions are not served by deferring to ERISA's regulatory regime.[754]

b. Duty To Assess the Qualifications of a Special Entity's Representative

Commenters asserted that proposed § 23.450 will allow a swap dealer or major swap participant to veto a Special Entity's decision to select a particular representative,[755] and will unduly limit a Special Entity's choice regarding its own advisor.[756] Commenters also assert that proposed § 23.450 inappropriately gives additional leverage to a swap dealer or major swap participant dealing with Special Entities, undermines the representative's ability or willingness to negotiate, and may be used to pressure Special Entities to share otherwise confidential information.[757] Furthermore, commenters assert that the duty under the proposed rule is intrusive, creates an inherent conflict of interest, and undermines the Special Entity's own selection process.[758] Other commenters asserted that proposed § 23.450 will not benefit Special Entities and will make dealing with swap dealers more costly and problematic.[759] Conversely, one commenter asserted that proposed § 23.450 created a reasonable and workable approach that is consistent with congressional intent.[760]

Commenters also asserted that proposed § 23.450 may conflict with current law under ERISA or with DOL's proposed fiduciary rule. The commenters asserted that proposed § 23.450 requires a swap dealer or major

[739] Proposing release, 75 FR at 80652.

[740] *Id.*

[741] *Id.*

[742] *Id.,* at 80653.

[743] *Id.*

[744] *Id.*

[745] For example, the Commission stated that when the swap dealer acts both as an advisor and a counterparty to the Special Entity, or when firms act both as underwriters in a bond offering and counterparties in swaps used to hedge such financing, a swap dealer's duties to the Special Entity would vary depending on the capacities in which it is operating. *Id.,* at 80653.

[746] Proposed § 23.450(g) is informed by the statutory language in Section 4s(h)(7) of the CEA.

[747] The comments related to representative qualifications address the following issues: (1) Regulated advisors; (2) independence; (3) best interests, disclosures, fair pricing and appropriateness; and (4) employee benefit plans subject to ERISA.

[748] *See, e.g.,* Ropes & Gray Feb. 22 Letter, at 4–5; CalPERS Feb. 18 Letter, at 5; ABC/CIEBA Feb. 22 Letter, at 2–3 and 8; ERIC Feb. 22 Letter, at 6–7; Davis & Harman Mar. 25 Letter, at 2.

[749] *See, e.g.,* Ropes & Gray Feb. 22 Letter, at 4–5; CalPERS Feb. 18 Letter, at 5; ABC/CIEBA Feb. 22 Letter, at 8.

[750] *See, e.g.,* Ropes & Gray Feb. 22 Letter, at 4–5; CalPERS Feb. 18 Letter, at 5; ERIC Feb. 22 Letter, at 6–7.

[751] ABC/CIEBA Feb. 22 Letter, at 9 fn. 1; ABC Aug. 29 Letter, at 9.

[752] Section 4s(h)(5)(A)(i)(VII).

[753] *See, e.g.,* ERIC Feb. 22 Letter, at 6–9.

[754] AFSCME Feb. 22 Letter, at 5.

[755] ABA/ABC Feb. 22 Letter, at 2; Davis & Harman Mar. 25 Letter, at 2–3; Rep. Smith July 25 Letter, at 2; ABC/CIEBA June 3 Letter, at 5–6;

[756] *See, e.g.,* SIFMA/ISDA Feb. 17 Letter, at 36; ABC/CIEBA Feb. 22 Letter, at 9; CEF Feb. 22 Letter, at 23; Calhoun Feb. 22 Letter, at 5.

[757] ABC/CIEBA Feb. 22 Letter, at 9; ABA/ABC Feb. 22 Letter, at 2; AMG–SIFMA Feb. 22 Letter, at 10.

[758] *See, e.g.,* BlackRock Feb. 22 Letter, at 3; CalPERS Feb. 18 Letter, at 3; Cityview Feb. 22 Submission; Texas VLB Feb. 22 Letter, at 2; GFOA Feb. 22 Letter, at 1.

[759] *See, e.g.,* ASF Feb. 22 Letter, at 5; GFOA Feb. 22 Letter, at 1.

[760] CFA/AFR Feb. 22 Letter, at 17.

swap participant to review the qualifications of the Special Entity's representative which could be considered providing advice as to the selection of the Special Entity's advisor. Commenters asserted this could make the swap dealer or major swap participant a fiduciary to an ERISA plan under ERISA and DOL's existing regulations [761] or under DOL's proposed fiduciary rule.[762]

Commenters also asserted that proposed § 23.450 may conflict with DOL's QPAM prohibited transaction exemption.[763] The QPAM exemption sets out several conditions an ERISA fiduciary must satisfy to be a ''qualified professional asset manager'' within the meaning of the exemption. According to commenters, proposed § 23.450 permits a swap dealer or major swap participant to veto or implicitly cause the Special Entity to replace its advisor which may render the QPAM exemption unavailable to ERISA plans and their ERISA fiduciaries.[764]

c. Representative Qualifications

i. Regulated Advisors

Several commenters recommended that the Commission deem representatives that have a particular regulatory status to meet some or all of independent representative criteria in proposed § 23.450(b). Several commenters suggested that banks, investment advisers, insurance companies, QPAMs, and INHAMs [765] be deemed to meet the statutory criteria.[766] Commenters also stated that requirements under ERISA should automatically qualify an ERISA plan's fiduciary under the proposed criteria.[767] Other commenters asserted that municipal advisors,[768] fiduciaries to governmental plans,[769] and employees of a Special Entity should be deemed to satisfy the enumerated criteria.[770]

Several commenters requested that the Commission or an SRO develop a voluntary certification and proficiency examination program for independent representatives. The commenters proposed that the Commission should permit a swap dealer or major swap participant to conclude that any certified representative would automatically satisfy the criteria in proposed § 23.450(b).[771] Conversely, one commenter asserted that representations and warranties from the representative should not amount to a waiver of compliance for a swap dealer.[772]

ii. Independence

The proposing release clarified that the Special Entity's representative must be ''independent'' of the swap dealer or major swap participant; however, the representative does not have to be independent of the Special Entity.[773] Several commenters agreed with the Commission's proposed interpretation.[774] Commenters also requested that the Commission clarify that an independent representative may be an employee, officer, agent, associate, trustee, director, subsidiary, or affiliate, such as an INHAM.[775]

The Commission received comments concerning the proposed independence test in general and specifically regarding the ''material business relationship'' prong. Some commenters recommended that the Commission delete the ''material business relationship'' requirement.[776] Alternatively, commenters suggested the Commission consider other existing standards which, according to the commenters, would be more workable such as ownership [777] or affiliate tests.[778] Commenters stated that the Commission's proposed standard was unnecessarily duplicative of or not harmonized with other independence standards under the federal securities laws and ERISA.[779] Commenters also asserted that the final regulation should permit a swap dealer or major swap participant to conclude that a plan's representative is ''independent'' if the representative is an ERISA fiduciary,[780] or at a minimum, if the representative is an ERISA fiduciary that is also a regulated entity such as a QPAM.[781]

Commenters also assert that the proposed ''material business relationship'' standard is unclear, vague and overly broad, and swap dealers will refrain from transacting with Special Entities without further clarifications.[782] These commenters stated that the ''material business relationship'' standard may inappropriately preclude many qualified asset managers from acting as independent representatives.[783] According to the commenters, many asset managers have multiple relationships with financial services firms that have swap dealer affiliates, and a requirement to survey all business relationships to determine whether and what compensation was paid would be very burdensome, require the development of costly new recordkeeping systems not currently in place, and provide little or no benefit to Special Entities.[784] The commenters

[761] ABA/ABC Feb. 22 Letter, at 1; Davis & Harman Mar. 25 Letter, at 1; ERIC Feb. 22 Letter, at 9; MFA Feb. 22 Letter, at 6–7 fn. 13; ABC/CIEBA June 3 Letter, at 2.

[762] SIFMA/ISDA Feb. 17 Letter, at 39; ABC/CIEBA Feb. 22 Letter, at 5; ABA/ABC Feb. 22 Letter, at 1; Davis & Harman Mar. 25 Letter, at 1; ERIC Feb. 22 Letter, at 9; ABC/CIEBA June 3 Letter, at 2.

[763] *See* DOL QPAM PTE 84–14, 75 FR 38837.

[764] SIFMA/ISDA Feb. 17 Letter, at 39; ABC/CIEBA June 3 Letter, at 5.

[765] *Cf.* DOL In-House Asset Manager PTE 96–23, 61 FR 15975.

[766] *See* SIFMA/ISDA Feb. 17 Letter, at 36; ERIC Feb. 22 Letter, at 2 and 12; AMG–SIFMA Feb. 22 Letter, at 2; BlackRock Feb. 22 Letter, at 3.

[767] *See, e.g.,* ERIC Feb. 22 Letter, at 6–9.

[768] SIFMA/ISDA Feb. 17 Letter, at 36; Texas VLB Feb. 22 Letter, at 2.

[769] CalSTRS Feb. 28 Letter, at 3.

[770] APGA Feb. 22 Letter, at 6–7.

[771] *See, e.g.,* CalPERS Feb. 18 Letter, at 5–6; CalPERS Aug. 29 Letter, 4–6; SWIB Feb. 22 Letter, at 4; CEF Feb. 22 Letter, at 23; Cityview Feb. 22 Submission; Riverside Feb. 22 Letter, at 1–2; SFG Feb. 22 Letter, at 1; CFA/AFR Aug. 29 Letter, at 23; CFA/AFR Nov. 3 Letter, at 5.

[772] AFSCME Feb. 22 Letter, at 6.

[773] Proposing release, 75 FR at 80652 fn. 113.

[774] *See* CFA/AFR Feb. 22 Letter, at 17; ERIC Feb. 22 Letter, at 3 and 9; APPA/LPPC Feb. 22 Letter, at 2; NACUBO Feb. 22 Letter, at 4; U. Tex. System Feb. 22 Letter, at 3–4; APGA Feb. 22 Letter, at 6.

[775] *See, e.g.,* NACUBO Feb. 22 Letter, at 4; U. Tex. System Feb. 22 Letter, at 3–4; ERIC Feb. 22 Letter, at 9. *Cf.* DOL In-House Asset Manager PTE 96–23, 61 FR 15975.

[776] *See, e.g.,* AMG–SIFMA Feb. 22 Letter, at 11–12; SIFMA/ISDA Feb. 17 Letter, at 38; *contra* CFA/AFR Feb. 22 Letter, at 17 (''the proposed standard generally provides the appropriate level of independence'').

[777] *See, e.g.,* AMG–SIFMA Feb. 22 Letter, at 11–12, fn. 38 (recommending the Commission consider ''standards of ownership'' such as those in DOL's QPAM exemption); *see also* DOL QPAM PTE 84–14, 75 FR 38837.

[778] *See, e.g.,* SIFMA/ISDA Feb. 17 Letter, at 37–38 (''the Commission should adopt one of several other well-established and workable tests of independence (such as excluding all 'affiliates,' as * * * defined under * * * the CEA)''); BlackRock Feb. 22 Letter, at 4.

[779] *See, e.g.,* SIFMA/ISDA Feb. 17 Letter, at 38; ABC/CIEBA Feb. 22 Letter, at 11; ERIC Feb. 22 Letter, at 11–12; AMG–SIFMA Feb. 22 Letter, at 2; BlackRock Feb. 22 Letter, at 4.

[780] ERIC Feb. 22 Letter, at 6 and 8; ABC/CIEBA Feb. 22 Letter, at 11 (''we urge the CFTC to provide that a 'major [sic] business relationship' does not exist if the relationship between the dealer or [major swap participant] and the [ERISA] Plan * * * would not give rise to a prohibited transaction under ERISA''); ABC Aug. 29 Letter, at 14.

[781] *See, e.g.,* BlackRock Feb. 22 Letter, at 4; FIA/ISDA/SIFMA Aug. 29 Letter, at 20; AMG–SIFMA Feb. 22 Letter, at 11–12 fn. 38; *see also* DOL QPAM PTE 84–14, Part (VI)(a), 75 FR at 38843 (a QPAM must be a bank, savings and loan association, insurance company, or registered investment adviser).

[782] *See, e.g.,* SIFMA/ISDA Feb. 17 Letter, at 38 (''the proposing standard is so broad and vague that [swap dealers] wary of the consequence of misinterpreting its requirements will likely simply abstain from affected trades''); APPA/LPPC Feb. 22 Letter, at 5 (the ''standard is both broad and somewhat vague * * * and dealers may be reluctant to take on the potential liability related to this determination''); AMG–SIFMA Feb. 22 Letter, at 11; BlackRock Feb. 22 Letter, at 11.

[783] SIFMA/ISDA Feb. 17 Letter, at 38; ABC/CIEBA Feb. 22 Letter, at 11; AMG–SIFMA Feb. 22 Letter, at 11; BlackRock Feb. 22 Letter, at 4 fn. 9, *but see* CFA/AFR Nov. 3 Letter, at 3–4.

[784] BlackRock Feb. 22 Letter, at 4 (''an asset manager may trade securities through the broker affiliate of the swap dealer; use an affiliated broker dealer as distributor/underwriter for mutual funds

also assert that the ''material business relationship'' standard reduces Special Entities' choices for qualified representatives and increases costs for representatives and Special Entities.[785] A number of commenters also requested that the Commission clarify that the disclosure requirement is limited to compensation received in connection with the relevant swap transaction.[786] Conversely, one commenter asserted the rule should require disclosure of all business relationships.[787]

The proposed definition of ''material business relationship'' also excluded payment of fees by the swap dealer or major swap participant to the Special Entity's representative at the written direction of the Special Entity for services provided in connection with the swap.[788] Some commenters expressed concerns that the exclusion could be used for abuse or would undermine the independence of their advice.[789] These commenters stated the exclusion should be deleted and such practices should be prohibited.[790]

The proposed definition of ''material business relationship'' also stated that the term is subject to a one-year look back, including any compensation received within one year of an offer to enter into the swap.[791] Some commenters recommended that the Commission extend the relevant time period.[792] Conversely, another commenter stated that a one-year look back would be problematic in instances where corporate identities change through corporate transactions or consolidations.[793]

Under proposed § 23.450(c)(3), the Special Entity may agree in writing that any compensation the representative received from the swap dealer or major swap participant does not constitute a ''material business relationship.'' [794] One commenter requested that the Commission clarify that the disclosure of any such compensation is made to the Special Entity's board and the written agreement comes from the board.[795] Other commenters asserted that a Special Entity may be reluctant to make a determination that a relationship was not a ''material business relationship'' because the Special Entity could be held liable if the determination is later deemed inaccurate.[796]

Following the release of the SEC's proposed business conduct standards for SBS Entities, the Commission received comment letters addressing harmonization of the agencies' independence tests.[797] Some commenters requested that both agencies adopt the Commission's proposed approach with ''minor adjustments.'' [798] Other commenters supported the SEC's associated person and gross revenue tests [799] and requested that the agencies coordinate the independence tests.[800]

iii. Best Interests, Disclosures, Fair Pricing and Appropriateness

Section 4s(h)(5) and proposed § 23.450(b) would require a swap dealer or major swap participant to have a reasonable basis to believe that a Special Entity's representative (1) undertakes a duty to act in the Special Entity's ''best interests''; (2) makes appropriate disclosures; and (3) will provide written representations regarding fair pricing and appropriateness of the transaction.[801] To assess the ''best interests'' criterion, the Commission proposed by example that a swap dealer or major swap participant would be able to rely, absent red flags, on duties established by appropriate legal arrangements between Special Entities and their independent representatives.[802] One commenter requested that the Commission clarify that a swap dealer or major swap participant could also rely on an employment relationship to satisfy the ''best interests'' duty, disclosure obligation, and duty to evaluate fair pricing and appropriateness of the swap.[803] Other commenters similarly stated that legal obligations under ERISA or state law would require the fiduciary to an ERISA plan or governmental plan to comply with a best interests duty, disclosure obligations, and a duty to evaluate fair pricing and appropriateness.[804]

iv. Employee Benefit Plans Subject to ERISA

The Commission sought comment on whether the statutory representative criteria under Section 4s(h)(5)(A)(i)(I)–(VI) were duplicative or inconsistent with ERISA's fiduciary requirements.[805] Commenters asserted that ERISA imposes comparable requirements to the statute and proposed § 23.450(b)(1)–(6), and the rule adds administrative costs without corresponding benefits.[806]

managed by the asset manager; or license an index from an affiliate of the dealer''); SIFMA/ISDA Feb. 17 Letter, at 38 (a swap dealer's ''affiliated broker-dealer [that] is the underwriter for mutual funds managed by the investment adviser'' should not constitute a ''material business relationship''); ABC/CIEBA Feb. 22 Letter, at 11 (requiring representatives to determine all compensation received from a swap dealer in connection with all other transactions worldwide would impose staggering administrative burdens and is likely impracticable); AMG–SIFMA Feb. 22 Letter, at 11 (large investment advisers are affiliated with banks and broker-dealers that would also be, or be affiliated with, swap dealers and would be precluded from entering into trades with many swap dealers on behalf of their customers).

[785] SIFMA/ISDA Feb. 17 Letter, at 38; AMG–SIFMA Feb. 22 Letter, at 11; BlackRock Feb. 22 Letter, at 4; APPA/LPPC Feb. 22 Letter, at 5.

[786] ABC/CIEBA Feb. 22 Letter, at 11; SIFMA/ISDA Feb. 17 Letter, at 38 (disclosure should not be required where a swap dealer in its capacity as broker provided soft dollar research unrelated to any swap transaction to a Special Entity's investment adviser); BlackRock Feb. 22 Letter, at 4; APPA/LPPC Feb. 22 Letter, at 5; CEF Feb. 22 Letter, at 23.

[787] Better Markets Feb. 22 Letter, at 8 (asserting swap dealers have provided advantageous allocations of securities in public offerings to influence advisors that should be disclosed).

[788] Proposing release, 75 FR at 80652 and 80660.

[789] CFA/AFR Feb. 22 Letter, at 17; Better Markets Feb. 22 Letter, at 4 and 8; Calhoun Feb. 22 Letter, at 2; *see also* CFA/AFR Nov. 3 Letter, at 4; *but cf.* APPA/LPPC Feb. 22 Letter, at 5 (limiting such arrangements may make it difficult for governmental entities to find qualified swap advisors).

[790] Better Markets Feb. 22 Letter, at 7–8; Better Markets June 3 Letter, at 13; Calhoun Feb. 22 Letter, at 3.

[791] Proposed § 23.450(a)(3), proposing release, 75 FR at 80652 and 80660.

[792] CFA/AFR Aug. 29 Letter, at 33; Better Markets Feb. 22 Letter, at 8.

[793] BlackRock Aug. 29 Letter, at 6 (asserting that DOL eliminated a one-year look back rule in the QPAM Exemption in response to industry concerns regarding the workability in light of consolidation and changes in the financial services industry).

[794] Proposing release, 75 FR at 80660.

[795] CFA/AFR Feb. 22 Letter, at 17; CFA/AFR Nov. 3 Letter, at 4.

[796] APPA/LPPC Feb. 22 Letter, at 5; AMG–SIFMA Feb. 22 Letter, at 4.

[797] The SEC proposed that a Special Entity's representative would be ''independent'' of an SBS Entity if the representative does not have a relationship with the SBS Entity, whether compensatory or otherwise, that reasonably could affect the independent judgment or decision-making of the representative. The SEC's proposal, however, would consider a representative deemed to be independent of the SBS Entity if, within one year, the representative was not an associated person of the SBS Entity and had not received more than ten percent of its gross revenues from the SBS Entity. SEC's proposed rules, 76 FR at 42426.

[798] *See, e.g.,* CFA/AFR Aug. 29 Letter, at 33.

[799] *See, e.g.,* FIA/ISDA/SIFMA Aug. 26 Letter, at 6.

[800] *See, e.g.,* FIA/ISDA/SIFMA Sept. 14 Letter, at passim; *see also* SIFMA/ISDA Feb. 17 Letter, at 37–38.

[801] Section 4s(h)(5)(A)(i)(IV)–(VI) of the CEA and proposed § 23.450(b)(4)–(6); proposing release, 75 FR at 80652–53 and 80660.

[802] Proposing release, 75 FR at 80652–53. Such legal arrangements could include, for example, a contract between a pension plan and a plan fiduciary that required the fiduciary to evaluate, consistent with any guidelines provided by the Special Entity, fair pricing and the appropriateness of the swap.

[803] APGA Feb. 22 Letter, at 6; *cf.* CFA/AFR Aug. 29 Letter, at 34 (asserting that a representative that is subject to separate legal requirements, such as an investment adviser or ERISA fiduciary, could be presumed to satisfy the ''best interests'' criterion).

[804] *See, e.g.,* ERIC Feb. 22 Letter, at 8–9; CalSTRS Feb. 28 Letter, at 3.

[805] Proposing release, 75 FR at 80653.

[806] SIFMA/ISDA Feb. 17 Letter, at 36–37; ERIC Feb. 22 Letter, at 2 and 6–9 (asserting that ERISA imposes ''duties that are similar, but more

Continued

Another commenter stated that it was unclear whether the criteria in Section 4s(h)(5)(A)(i)(I)–(VI) apply to governmental plans that are defined in but not subject to ERISA. The commenter requested that the Commission clarify that a governmental plan's representative does not need to satisfy the first six criteria if it is represented by a fiduciary under state or local law.[807]

d. Reasonable Reliance on Representations

Proposed § 23.450(d) permitted a swap dealer or major swap participant[808] to rely on Special Entity representations to satisfy its duty to assess the qualifications of the Special Entity's independent representative, if the representations were reliable and sufficiently detailed.[809] Several commenters expressed concern with the language in proposed § 23.450(d)(1) that would require the swap dealer or major swap participant to ''consider the facts and circumstances of a particular Special Entity-representative relationship, assessed in the context of a particular transaction.'' [810] Similarly, several commenters expressed concern with the language in proposed § 23.450(d)(2) that would require the representations to be ''sufficiently detailed.'' [811] Conversely, one commenter supported the Commission's approach and requested that the Commission require record retention that would permit the Commission to determine compliance.[812]

A majority of commenters asserted that proposed § 23.450(d) would require extensive and burdensome transaction-by-transaction diligence that would significantly delay execution and increase costs for swap dealers, major swap participants and Special Entities.[813] Commenters also asserted that the conditions for reliance, which include a nonexclusive list of seven factors under proposed § 23.450(d)(2), were unnecessarily complex and could cause swap dealers or major swap participants to overreach in their requests for information.[814] Many commenters requested that the Commission permit swap dealers and major swap participants to rely on representations from the Special Entity or the independent representative that simply repeat the enumerated criteria in proposed § 23.450(b).[815] Commenters also requested that the Commission permit representations to be made on a relationship basis and only updated periodically[816] or upon a material change such as a change in the Special Entity's representative.[817] Another commenter stated that to avoid giving the swap dealer or major swap participant unfair leverage when dealing with Special Entities, the required representations must be unambiguous, and determinations of accuracy must be within the sole judgment of the Special Entity.[818]

A number of commenters also discussed the circumstances in which a swap dealer or major swap participant could rely on a representation without further inquiry. Some commenters suggested the Commission permit a swap dealer or major swap participant to rely if it did not have actual knowledge that the representations were incorrect.[819] Conversely, some commenters suggested the Commission permit reliance unless the swap dealer or major swap participant knows of facts that reasonably should put it on notice that would trigger a duty to inquire further.[820] Two commenters requested that the Commission clarify that the exchange of representations will not give any party any additional rescission, early termination, or monetary compensation rights.[821]

e. Unqualified Representatives

Proposed § 23.450(e) provided that any swap dealer or major swap participant that determines a Special Entity's representative does not meet the relevant criteria must submit a written record of the basis of its determination to the chief compliance officer for review that the determination was unbiased. Two commenters asserted that the proposed rule does not provide meaningful protection to Special Entities from a swap dealer or major swap participant that abuses its discretion.[822] Another commenter recommended the Commission require the swap dealer or major swap participant to submit the written record to the Commission in addition to the chief compliance officer.[823] A commenter also asserted the Commission should require the written determination be made to the trading supervisor rather than the chief compliance officer.[824]

A commenter requested that the Commission confirm that the swap dealer or major swap participant would not have any liability to the Special Entity or its representative as a result of its good faith determination that the representative was not qualified.[825]

f. Disclosure of Capacity

Proposed § 23.450(f) requires a swap dealer or major swap participant to disclose to the Special Entity the capacity in which it is acting in connection with the swap and, if in more than one capacity, to disclose the material differences between such capacities in connection with the swap and any other financial transaction or service involving the Special Entity. Two commenters requested that the Commission clarify that required disclosures of other capacities be limited only to those capacities in connection with the swap.[826]

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exacting,'' with respect to the knowledge requirement, statutory disqualification, independence, best interests, disclosures, and fair pricing and appropriateness); ABC/CIEBA June 3 Letter, at 6.

[807] CalSTRS Feb. 28 Letter, at 6.

[808] Two commenters noted that the rule text of proposed § 23.450(d) provided that a swap dealer may rely on written representations but was silent as to whether major swap participants could rely. *See* SIFMA/ISDA Feb. 17 Letter, at 36 fn. 85; ABC/CIEBA Feb. 22 Letter, at 9 fn. 2. The Commission intended this provision to be available to both swap dealers and major swap participants and expressly references both in final § 23.450(e).

[809] Proposing release, 75 FR at 80660.

[810] SIFMA/ISDA Feb. 17 Letter, at 35–36; ABC/CIEBA Feb. 22 Letter, at 9; BlackRock Feb. 22 Letter, at 3; proposing release, 75 FR at 80660.

[811] *Id.*

[812] CFA/AFR Feb. 22 Letter, at 6; CFA/AFR Nov. 3 Letter, at 5.

[813] *See, e.g.,* SIFMA/ISDA Feb. 17 Letter, at 35–36; ABC/CIEBA Feb. 22 Letter, at 9–10; BlackRock Feb. 22 Letter, at 3; ABA/ABC Feb. 22 Letter, at 2–3; AMG–SIFMA Feb. 22 Letter, at 9; SWIB Feb. 22 Letter, at 4–5; Ropes & Gray Feb. 22 Letter, at 3–4; APPA/LPPC Feb. 22 Letter, at 4.

[814] *See, e.g.,* Ropes & Gray Feb. 22 Letter, at 3–4; APPA/LPPC Feb. 22 Letter, at 4; SIFMA/ISDA Feb. 17 Letter, at 35–36; ABC/CIEBA Feb. 22 Letter, at 9–10.

[815] SIFMA/ISDA Feb. 17 Letter, at 35–36; ABC/CIEBA Feb. 22 Letter, at 10; SWIB Feb. 22 Letter, at 4–5; CEF Feb. 22 Letter, at 16 and 23; VRS Feb. 22 Letter, at 5; APPA/LPPC Feb. 22 Letter, at 4; Comm. Cap. Mkts. May 3 Letter, at 2; Comm. Cap. Mkts. Aug. 29 Letter, at 2–3.

[816] Ropes & Gray Feb. 22 Letter, at 4.

[817] APGA Feb. 22 Letter, at 6–7.

[818] CalPERS Oct. 4 Letter, at 1.

[819] *See, e.g.,* ABC/CIEBA Feb. 22 Letter, at 10–11; Davis & Harman Mar. 25 Letter, at 5–6; APGA Feb. 22 Letter, at 6; SIFMA/ISDA Feb. 17 Letter, at 36; *contra* CFA/AFR Nov. 3 Letter, at 5.

[820] *See, e.g.,* SIFMA/ISDA Feb. 17 Letter, at 36 (''[swap dealers] should be permitted to rely on a written representation * * * that the counterparty and/or its representative satisfies the standards * * * absent actual notice of countervailing facts (or facts that reasonably should have put [a swap dealer] on notice), which would trigger a consequent duty to inquire further.''); *see* also supra fn. 724. *Contra* CFA/AFR Nov. 3 Letter, at 5.

[821] ABC/CIEBA Feb. 22 Letter, at 12–13 (asserting that a swap dealer faced with a highly volatile market and disadvantageous swap position could claim that a Special Entity provided inaccurate representations to avoid its obligations); AMG–SIFMA Feb. 22 Letter, at 10.

[822] ABC/CIEBA Feb. 22 Letter, at 9; CalPERS Feb. 18 Letter, at 3.

[823] CFA/AFR Feb. 22 Letter, at 18.

[824] SIFMA/ISDA Feb. 17 Letter, at 38–39.

[825] *Id.*

[826] SIFMA/ISDA Feb. 17 Letter, at 39; ABC/CIEBA Feb. 22 Letter, at 11–12.

Commenters also requested the Commission clarify the meaning of ''before the initiation of a swap'' and to confirm that such disclosures could be made in a master agreement.[827] One commenter asserted that ERISA plans typically have many different types of relationships with swap dealers, and listing all such relationships prior to each transaction would impose significant burdens and not provide meaningful information to an ERISA plan.[828]

g. Transaction Costs and Risks

Commenters asserted that compliance with proposed § 23.450 would be burdensome, costly, or impractical.[829] Commenters also stated that the proposed rule may expose swap dealers and major swap participants to new litigation risks from Special Entities and representatives.[830] Commenters asserted that swap dealers and major swap participants will either pass additional risk and compliance costs onto Special Entities or refuse to transact with Special Entities altogether, and such results are ultimately harmful to Special Entities and outweigh any benefits.[831]

3. Final § 23.450

Based on consideration of the comments, the Commission has determined to adopt proposed § 23.450 with several changes. The principal changes include, first, under § 23.450(b)(2), a representative of an ERISA plan will have to meet only one criterion to qualify under the section: That it is a fiduciary as defined in Section 3 of ERISA (29 U.S.C. 1002).[832] Second, under § 23.450(d)(1) certain counterparty representations will be deemed to provide a reasonable basis for a swap dealer or major swap participant to believe that a representative of a Special Entity, other than an ERISA plan, meets the enumerated criteria in § 23.450(b).[833] Third, under § 23.450(c) compliance with certain criteria will be deemed to establish that a representative is ''independent'' of the swap dealer or major swap participant within the meaning of § 23.450(b)(1)(iii).[834] The following discussion addresses comments on proposed § 23.450 and the changes in final § 23.450.

a. Types of Special Entities Included in Section 4s(h)(5)(A)(i)

The Commission has determined based on the statutory framework and legislative intent that final § 23.450, like the proposed rule, shall apply to swaps offered or entered into with all types of Special Entities. The Commission declines to adopt commenters' position that the rule be limited to the entities described under Section 1a(18)(A)(vii)(I) and (II).[835] The Commission also disagrees with commenters' assertion that the Commission does not have the authority to apply the rule to swaps with all types of Special Entities.

Requiring swap dealers or major swap participants to comply with § 23.450 when dealing with all types of Special Entities resolves the ambiguities in the statutory text.[836] The determination is also consistent with the legislative history[837] and the clear statutory intent to raise the standard of care for swap dealers and major swap participants dealing with Special Entities, generally. Finally, Section 4s(h)(5)(B) provides the Commission with discretionary rulemaking authority to establish such other standards and requirements as the Commission may determine are appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the CEA. The Commission believes that ensuring all Special Entities have a sufficiently knowledgeable and independent representative that is capable of providing disinterested, expert advice is an essential component of the statutory framework that Congress established for Special Entities.[838]

b. ERISA Plan Representatives That Are ERISA Fiduciaries

The Commission has considered the statutory language in Section 4s(h)(5)

[827] *See, e.g.,* SIFMA/ISDA Feb. 17 Letter, at 39; ABC/CIEBA Feb. 22 Letter, at 11–12; APGA Feb. 22 Letter, at 7.

[828] ABC/CIEBA Feb. 22 Letter, at 12.

[829] *See, e.g.,* ABC/CIEA Feb. 22 Letter, at 3; ERIC Feb. 22 Letter, at 9; CalSTRS Feb. 28 Letter, at 2 and 6; MFA Feb. 22 Letter, at 2; CalPERS Feb. 18 Letter, at 3–4; CEF Feb. 22 Letter, at 16; HOOPP Feb. 22 Letter, at 2.

[830] *See, e.g.,* ABC/CIEBA Feb. 22 Letter, at 9–10; SIFMA/ISDA Feb. 17 Letter, at 39; VRS Feb. 22 Letter, at 3; HOOPP Feb. 22 Letter, at 2; CEF Feb. 22 Letter, at 16.

[831] *See, e.g.,* ABC/CIEBA Feb. 22 Letter, at 9–10; ERIC Feb. 22 Letter, at 9–10; CalSTRS Feb. 28 Letter, at 2 and 6; MFA Feb. 22 Letter, at 2; CalPERS Feb. 18 Letter, at 3–4; CEF Feb. 22 Letter, at 16; HOOPP Feb. 22 Letter, at 2.

[832] Section 23.450(b)(2) provides: ''Any swap dealer or major swap participant that offers to enter or enters into a swap with a Special Entity as defined in § 23.401(c)(3) shall have a reasonable basis to believe that the Special Entity has a representative that is a fiduciary as defined in Section 3 of [ERISA] (29 U.S.C. 1002).'' A swap dealer or major swap participant will have a reasonable basis to believe that an ERISA plan has a qualified independent representative under § 23.450(b)(2) if it receives a representation in writing identifying the representative and stating that the representative is a fiduciary as defined in Section 3 of ERISA (29 U.S.C. 1002) as provided in § 23.450(d)(2).

[833] Section 23.450(d)(1) provides: *Safe Harbor.* (1) A swap dealer or major swap participant shall be deemed to have a reasonable basis to believe that the Special Entity, other than a Special Entity defined in § 23.401(c)(3), has a representative that satisfies the applicable requirements of paragraph (b)(1) of this section provided that: (i) The Special Entity represents in writing to the swap dealer or major swap participant that it has complied in good faith with written policies and procedures reasonably designed to ensure that it has selected a representative that satisfies the applicable requirements of paragraph (b) of this section, and that such policies and procedures provide for ongoing monitoring of the performance of such representative consistent with the requirements of paragraph (b) of this section; and (ii) The representative represents in writing to the Special Entity and swap dealer or major swap participant that the representative: (A) Has policies and procedures reasonably designed to ensure that it satisfies the applicable requirements of paragraph (b) of this section; (B) Meets the independence test in paragraph (c) of this section; and (C) Is legally obligated to comply with the applicable requirements of paragraph (b) of this section by agreement, condition of employment, law, rule, regulation, or other enforceable duty.

[834] Section 23.450(c) provides: *Independent.* For purposes of paragraph (b)(1)(iii) of this section, a represenative of a Special Entity will be deemed to be independent of the swap dealer or major swap participant if: (1) The representative is not and, within one year of representing the Special Entity in connection with the swap, was not an associated person of the swap dealer or major swap participant within the meaning of Section 1a(4) of the Act; (2) There is no principal relationship between the representative of the Special Entity and the swap dealer or major swap participant; (3) The representative: (i) Provides timely and effective disclosures to the Special Entity of all material conflicts of interest that could reasonably affect the judgment or decision making of the representative with respect to its obligations to the Special Entity; and(ii) Complies with policies and procedures reasonably designed to manage and mitigate such material conflicts of interest; (4) The representative is not directly or indirectly, through one or more persons, controlled by, in control of, or under common control with the swap dealer or major swap participant; and (5) The swap dealer or major swap participant did not refer, recommend, or introduce the representative to the Special Entity within one year of the representative's representation of the Special Entity in connection with the swap.

[835] The Commission is persuaded, however, that with respect to ERISA plans, the swap dealer or major swap participant need only assess whether the plan representative is a fiduciary as defined in Section 3 of ERISA (29 U.S.C. 1002) as provided in Section 4s(h)(5)(A)(VII). *See* Section IV.C.3.d. for a discussion of qualification criteria for independent representatives.

[836] *See* fn. 727 discussing the ambiguities in Section 4s(h)(5) of the CEA as to whether the duty is intended to apply with respect to all types of Special Entity counterparties or just a sub-group.

[837] *See* H.R. Rep. No. 111–517 at 869 (June 29, 2010) (Conf. Rep.) (''When acting as counterparties to a pension fund, endowment fund, or state or local government, dealers are to have a reasonable basis to believe that the fund or governmental entity has an independent representative advising them.'').

[838] For ERISA plans, the Commission has determined that the statute deems a fiduciary as defined in Section 3 of ERISA (29 U.S.C. 1002) to be a qualified independent representative within the meaning of Section 4s(h)(5)(A).

and issues raised by commenters[839] and is persuaded that, for transactions with an ERISA plan under final § 23.450, swap dealers and major swap participants need only have a reasonable basis to believe that an ERISA plan representative is an ERISA fiduciary. This interpretation of Section 4s(h)(5) of the CEA is informed by the comprehensive federal regulatory scheme that applies to plans subject to regulation under ERISA, the importance of harmonizing the Dodd-Frank Act requirements with ERISA to avoid unintended consequences, and the Commission's view that ERISA plans will continue to benefit from the many other protections under subpart H of part 23 of the Commission's rules. The Commission declines to opine on commenters claims that requirement's under ERISA for plan fiduciaries are comparable,[840] or not,[841] to those criteria in subclauses (I)–(VI) of Section 4s(h)(5)(A)(i). That is more appropriately addressed by DOL, the primary regulator of ERISA plans.

Thus, the Commission is adopting proposed § 23.450(b)(7) (renumbered as § 23.450(b)(2)) as a separate provision that applies only with respect to ERISA plans as defined in § 23.401(c)(3). A swap dealer or major swap participant that offers or enters into a swap with an ERISA plan need only have a reasonable basis to believe that the ERISA plan's representative is an ERISA fiduciary.

c. Duty To Assess the Qualifications of a Special Entity's Representative

The Commission has determined to clarify the final rule text to address commenters' concerns that a swap dealer or major swap participant could use the statutory framework prescribed for assessing the qualifications of a Special Entity representative to overreach in requesting information from the Special Entity or to otherwise gain a negotiating advantage. Thus, the Commission has added § 23.450(d), which states that a swap dealer or major swap participant shall have a reasonable basis to believe a Special Entity's chosen representative complies with all criteria under § 23.450 where the swap dealer or major swap participant receives certain representations from the Special Entity and its representative.[842] The representations under § 23.450(d) may be made, as appropriate, on a relationship basis in counterparty relationship documentation consistent with §§ 23.402(d) and 23.450(e). Finally, § 23.450(f) requires a swap dealer or major swap participant's chief compliance officer to review any determination that the swap dealer or major swap participant does not have a reasonable basis to believe that a Special Entity's representative meets the criteria in § 23.450. The chief compliance officer's review must ensure that there is a substantial, unbiased basis for the determination.

d. Representative Qualifications

i. Regulated Entities and Suggested Certification Regime

The Commission declines commenters' suggestion that a swap dealer or major swap participant be permitted to conclude that a Special Entity's representative is *per se* qualified because it has a particular status such as CTA, bank, investment adviser, insurance company, municipal advisor, state law pension fiduciary, or is an employee of the Special Entity.[843] The statutory language does not reference any ''status'' other than a fiduciary as defined in ERISA. As a result the Commission is not inclined to conclude that regulatory status alone is a sufficient proxy for the enumerated criteria in Section 4s(h)(5)(A).

The Commission is continuing to consider commenters' suggestion that the Commission or an SRO develop a voluntary certification and proficiency examination program for independent representatives that would permit a swap dealer or major swap participant to rely on such certification as satisfying the enumerated criteria.[844] In this regard, the Commission notes, that it has begun informal consultations with the staffs of the SEC, NFA, and MSRB to harmonize regulatory requirements for municipal advisors and CTAs that advise municipalities on swaps. The Commission intends to continue to explore whether such efforts could be incorporated into a broader application for the independent representatives of all Special Entities.

In the meantime, however, the Commission believes that final § 23.450 provides a manageable approach for qualifying Special Entity representatives that addresses the commenters' concerns about the role of swap dealers and major swap participants under the statutory framework and proposed § 23.450. The Commission has clarified the means of compliance for a swap dealer or major swap participant, including compliance through representations made on a relationship basis, as appropriate. Furthermore, the Commission is adopting an alternative means of compliance under § 23.450(d)[845] with clear, objective criteria that will permit a swap dealer or major swap participant to form a reasonable basis to believe that a Special Entity's representative meets the relevant criteria, without undue influence on the selection process.

ii. Sufficiently Knowledgeable

The Commission requested comment on whether there are other qualifications that should be considered regarding whether an independent representative has sufficient knowledge to evaluate the transaction and risks.[846] The Commission did not receive comments addressing any additional qualifications other than a representative that holds a particular regulatory, state law, or employment status.[847] Therefore, the Commission is adopting § 23.450(b)(1) as proposed (renumbered as § 23.450(b)(1)(i)).

The Commission has determined to delete from the final rule text the list of factors that a swap dealer or major swap participant would be expected to consider in determining whether an independent representative meets the enumerated criteria in the proposed rule.[848] Commenters found the

[839] *See, e.g.,* SIFMA/ISDA Feb. 17 Letter, at 36–37; ERIC Feb. 22 Letter, at 2 and 6; ABC/CIEBA June 3 Letter, at 6.

[840] *See, e.g.,* ERIC Feb. 22 Letter, at 6–9.

[841] AFSCME Feb. 22 Letter, at 5.

[842] Section 23.450(d) *supra* fn. 833. *See also* Section IV.C.3.e. of this adopting release for a discussion of § 23.450(d).

[843] The Commission's determination that ERISA plan representatives that are ERISA fiduciaries will meet the requirements of the rule is premised on the statutory language referencing the comprehensive Federal regulatory scheme under ERISA. *See also* Section IV.C.3.b. of this adopting release for a discussion of representatives of ERISA plans.

[844] The Commission is considering both legal and practical issues raised by commenters' certification proposal. *See, e.g.,* Section 4*o*(2) of the CEA makes it unlawful for any CTA or commodity pool operator registered under the CEA to ''represent or imply in any manner whatsoever that such person has been sponsored, recommended, or approved by the United States or any agency or officer thereof.'' From a practical standpoint, the proposal would depend on resources committed by an SRO or private certification board.

[845] *See* Section IV.C.3.e. of this adopting release for a discussion of § 23.450(d) (under § 23.450(d), as adopted, a swap dealer or major swap participant shall have a reasonable basis to believe a Special Entity's chosen representative complies with all criteria under § 23.450 where the swap dealer or major swap participant receives certain representations from the Special Entity and its representative).

[846] Proposing release, 75 FR at 80653.

[847] The Commission separately addressed comments regarding a Special Entity's representative that holds a particular regulatory, state law or employment status. *See* Section IV.C.3.d.i. of this adopting release.

[848] The proposed rule set out several factors to be considered by swap dealers and major swap participants in determining whether the Special Entity's representative satisfies certain of the enumerated criteria, including (1) the nature of the Special Entity-representative relationship; (2) the representative's ability to make hedging or trading

proposed rule text confusing and unworkable.[849] In light of the comments, the Commission has determined that such considerations are more appropriate as guidance regarding whether a representative is sufficiently knowledgeable, and would be relevant where the Special Entity did not provide the representations specified in § 23.450(d) for establishing the qualifications of a representative.

Where a swap dealer or major swap participant is required to undertake due diligence to assess whether it has a reasonable basis to believe that a representative has sufficient knowledge to evaluate the transaction and risks, it should consider: (1) The representative's capability to make hedging or trading decisions, and the resources available to the representative to make informed decisions; (2) the use by the representative of one or more consultants; (3) the general level of experience of the representative in financial markets and specific experience with the type of instruments, including the specific asset class, under consideration; (4) the representative's ability to understand the economic features of the swap involved; (5) the representative's ability to evaluate how market developments would affect the swap; and (6) the complexity of the swap or swaps involved. Additional considerations may also include the representative's ability to analyze the credit risk, market risk, and other relevant risks posed by a particular swap and its ability to determine the appropriate methodologies used to evaluate relevant risks and the information which must be collected to do so. The listed considerations are illustrative guidance.[850]

iii. Statutory Disqualification

The Commission did not receive any comments regarding this criterion under proposed § 23.450(b)(2); therefore, the Commission adopts § 23.450(b)(2) (renumbered as § 23.450(b)(1)(ii)) and the definition of ''statutory disqualification'' in § 23.450(a)(3) as proposed with respect to Special Entities other than ERISA plans. The Commission also clarifies that a representative must satisfy the criterion regardless of whether it is registered or is required to register with the Commission, such as an employee of the Special Entity.

iv. Independence

The Commission proposed a three prong test to determine whether the Special Entity representative was ''independent'' of the swap dealer or major swap participant. A representative would be deemed to be independent if: (1) It was not, within one year, an associated person of the swap dealer or major swap participant (proposed § 23.450(c)(1)); (2) there was no ''principal relationship'' between the representative and the swap dealer or major swap participant (proposed § 23.450(a)(2) and (c)(2)); and (3) the representative did not have a ''material business relationship'' with the swap dealer or major swap participant (proposed § 23.450(a)(1) and (c)(3)).[851]

a. Associated Person

The Commission is adopting the ''associated person'' prong in proposed § 23.450(c)(1) and clarifies that ''within one year'' means ''within one year of representing the Special Entity in connection with the swap.'' The Commission clarifies that where the Special Entity's representative is an entity, the representative could still satisfy the ''associated person prong'' in final § 23.450(c)(1) if the representative had an employee that was an associated person of the swap dealer or major swap participant within the preceding twelve months (''restricted associated person'').[852] To satisfy the ''associated person'' prong in this situation, a Special Entity's representative must comply with policies and procedures reasonably designed to manage and mitigate the conflict. Such policies and procedures, for example, should impose compensation restrictions to avoid having the restricted associated person benefit from the Special Entity's transactions with the swap dealer or major swap participant and provide for informational barriers, as appropriate, between any restricted associated person and those employees that directly provide advice, make trading decisions or otherwise manage and supervise the Special Entity's account with respect to swaps with the swap dealer or major swap participant.

b. Principal Relationship

The Commission is also adopting the ''principal relationship'' prong of the proposed independence test with one clarification. Section 23.450(a)(2) (renumbered as § 23.450(a)(1)) is amended to clarify that the term ''principal,'' with respect to any swap dealer, major swap participant, or Special Entity's representative, means any person listed in § 3.1(a)(1)–(3) as opposed to a person defined in § 3.1(a).

c. Material Business Relationship

Proposed § 23.450(a)(1) defined ''material business relationship'' as any relationship, whether compensatory or otherwise, that could reasonably affect the independent judgment or decision making of the representative. The Commission has determined to delete the ''material business relationship'' prong of the independence test in proposed § 23.450(a)(1) and (c)(3) and to substitute the following three criteria that were encompassed within the definition.

First, under § 23.450(c)(3), to be deemed ''independent,'' a representative must (1) provide timely and effective disclosures of all material conflicts of interest that could reasonably affect the judgment or decision making of the representative with respect to its obligations to the Special Entity, and (2) comply with policies and procedures reasonably designed to manage and mitigate all such material conflicts of interest. In the Commission's view, to be ''timely and effective'' the disclosures would be have to be sufficient to permit the Special Entity to assess the conflict of interest and take steps to mitigate any materially adverse effect on the Special Entity that could be created by the conflict. In determining whether a conflict of interest exists, a representative would be expected to review its relationships with the swap dealer or major swap participant and their affiliates, including lines of

decisions; (3) the use of consultants or, with respect to employee benefit plans subject to ERISA, use of a QPAM or INHAM; (4) the representative's general level of experience in the financial markets and particular experience with the type of product under consideration; (5) the representative's ability to understand the economic features of the swap; (6) the representative's ability to evaluate how market developments would affect the swap; and (7) the complexity of the swap. These criteria will serve as guidance to swap dealers and major swap participants required to undertake due diligence to assess the sophistication of a Special Entity's representative.

[849] *See, e.g.,* ABC/CIEBA Feb. 22 Letter, at 3.

[850] The Commission does not intend to imply that each consideration is necessarily a prerequisite for a swap dealer or major swap participant to form a reasonable basis to believe the representative is sufficiently knowledgeable. For example, an employee of a Special Entity, in some cases, may not use one or more third party consultants. However, this would not mean, in and of itself, that the representative is not sufficiently knowledgeable.

[851] Proposing release, 75 FR at 80651–52 and 80660.

[852] The definition of ''associated person of a swap dealer or major swap participant'' under Section 1a(4) of the CEA (7 U.S.C. 1a(4)) is limited by its terms to natural persons. Section 1a(4) states in relevant part that the term ''means a person who is associated with a swap dealer or major swap participant as a partner, officer, employee, or agent (or any person occupying a similar status or performing similar function) in any capacity that involves—(i) the solicitation or acceptance of swaps; or (ii) the supervision of any person or persons so engaged.''

business in which the representative will solicit business on an ongoing basis.[853] Additionally, where applicable, the representative should review relationships of its principals and employees who could reasonably affect the judgment or decision making of the representative with respect to its obligations to the Special Entity. The representative must also manage and mitigate its material conflicts of interest to avoid having a materially adverse effect on the Special Entity. A representative should establish and comply in good faith with written policies and procedures that identify, manage and mitigate material conflicts of interest including, where appropriate, those arising from (1) compensation or incentives for employees that carry out the representative's obligations to the Special Entity, and (2) lines of business, functions and types of activities conducted by the representative for the swap dealer or major swap participant.[854]

Second, the Commission has added § 23.450(c)(4) to the independence test to clarify that a representative may not, directly or indirectly, control, be controlled by, or be under common control with the swap dealer or major swap participant. This provision is consistent with the ''principal relationship'' prong and clarifies that a representative would not be deemed ''independent'' where there is indirect control through one or more persons or common control with the swap dealer or major swap participant.

Finally, the Commission is adopting § 23.450(c)(5), which clarifies that a representative will not be deemed independent if the swap dealer or major swap participant refers, recommends, or introduces the representative to the Special Entity within one year of the representative's representation of the Special Entity in connection with the swap. The Commission believes a Special Entity should retain a representative without input from the swap dealer or major swap participant. If a swap dealer or major swap participant is asked by a Special Entity for a name or list of names of potential representatives, the swap dealer or major swap participant would be expected either to decline to answer or direct the Special Entity to, for example, an independently maintained repository of business listings such as a list of registrants with a relevant SRO, a trade association unaffiliated with the swap dealer or major swap participant, or a widely-available independent publication that provides industry contact information.

The Commission has considered the comments and believes that deleting the ''material business relationship'' prong and substituting the enumerated criteria in § 23.450(c) resolves commenters' primary issues about clarity and workability. In addition, the reformulation of the treatment of ERISA plans under § 23.450(b)(2) eliminates any potential conflict with the independence test under ERISA.[855] The final rule also resolves commenters' concern that the standard would inappropriately preclude qualified asset managers with complex business relationships with swap dealers or major swap participants from acting as Special Entity representatives. Furthermore, any added costs associated with the duty to disclose and mitigate material conflicts of interest will only be incremental because many third party independent representatives will already be subject to similar or identical disclosure obligations by virtue of being a CTA, investment adviser, municipal advisor, or other fiduciary to the Special Entity. The Commission has also determined that a conflicts disclosure regime paired with an obligation to manage and mitigate conflicts appropriately balances the statutory independence criterion with any associated costs.

v. Duty To Act in the Best Interests

The Commission agrees with commenters that a swap dealer or major swap participant could rely[856] on evidence of legal arrangements between the Special Entity and its representative that the representative is obligated to act in the best interests of the Special Entity, including by contract, an employment agreement, or requirements under state or federal law.[857] Having considered the comments, the Commission is adopting § 23.450(b)(4) as proposed (renumbered as § 23.450(b)(1)(iv)).

As more fully discussed in connection with § 23.440, the Commission has determined that a best interests duty under §§ 23.440 and 23.450 will be the duty to act in good faith, make full and fair disclosure of all material facts and conflicts of interest, and to employ reasonable care to advance the Special Entity's stated objectives.[858]

vi. Appropriate and Timely Disclosures

The Commission also agrees with commenters and confirms that a swap dealer or major swap participant could rely on appropriate legal arrangements between a Special Entity and its representative to form a reasonable basis to believe the representative makes appropriate and timely disclosures. Therefore, the Commission is adopting § 23.450(b)(5) as proposed (renumbered as § 23.450(b)(1)(v)).[859]

The Commission expects that ''appropriate disclosures'' will be assessed in the context of the Special Entity-representative relationship. For example, a third party advisor would be expected to disclose all compensation it receives, directly or indirectly, with

[853] For example, a representative may have separate lines of business in which it provides services to swap dealers, major swap participants, or their affiliates. The representative should consider whether such ongoing relationships where it has an interest in maintaining existing business or soliciting future business could reasonably affect its judgment or decision making with respect to its obligations to the Special Entity.

[854] Similarly, the Special Entity and representative should consider the basis upon which the representative will be compensated by the Special Entity to ensure that the representative's compensation is not contingent upon executing, for example, a particular swap, or a swap with a particular dealer or major swap participant. The Commission understands based on industry practice that representative fees are sometimes paid at the time of execution of the swap by the swap dealer or major swap participant at the direction of the Special Entity for services provided by the representative in connection with the swap. In the proposed rule, the Commission recognized that such transfer of payment on behalf of the Special Entity would not necessarily be a material conflict of interest between the representative and the swap dealer or major swap participant. *See* proposed definition of material business relationship in proposed § 23.450(a)(1). Proposing release, 75 FR at 80660. However, Special Entities and representatives must ensure that the compensation arrangement does not undermine the independence and ''best interests'' duty of the representative as a result of the contingent nature of the fee arrangement. As a nonexclusive example, where a representative's compensation is contingent on execution by the Special Entity of a specific transaction with a specific swap dealer, the representative will have a material conflict of interest and will not be incentivized to act in the best interests of the Special Entity. Special Entities should ensure that the fee arrangements with their representatives do not compromise the independence of the representative, create conflicts of interest or otherwise undermine the quality of the advice provided by the representative.

[855] *See* Section IV.C.3.b. of this adopting release.

[856] In making the representations specified in § 23.450(d) for establishing the qualifications of a representative Special Entities are encouraged to ensure that their policies and procedures are sufficiently robust to evaluate the effectiveness and enforceability of the obligations of the representative to act in the best interests of the Special Entity, to make appropriate and timely disclosures, and to evaluate the appropriateness and pricing of any swaps entered into by the Special Entity.

[857] This is also consistent with proposed § 23.450(d)(2)(i), which stated that relevant considerations for a swap dealer or major swap participant include: ''The nature of the relationship between the Special Entity and the representative and the duties of the representative, including the obligation to act in the best interests of the Special Entity.'' As with proposed § 23.450(d)(2)(ii)(vii), the Commission has decided to delete proposed § 23.450(d)(2)(i) and adopt it as guidance.

[858] Section IV.B.3.c. of this adopting release.

[859] *See supra,* fn. 856.

respect to the swap, and it would be expected to disclose all material conflicts of interest. Disclosures should also include all fees and compensation structures in a manner that is clearly understandable to the Special Entity.[860] A representative that is a Special Entity's employee would be expected to disclose material information not otherwise known to a Special Entity through the employment relationship such as any material compensation the representative receives from a third party or where the representative trades for its own account in the same or a related market. The Commission also expects that a representative would timely disclose to the Special Entity (or to appropriate supervisors in the case of an employee), where appropriate, unexpected gains or losses, unforeseen changes in the market place, compliance irregularities or violations, and other material information.[861]

vii. Fair Pricing and Appropriateness

Section 4s(h)(5)(A)(i)(VI) states that the representative will provide ''written representations to the Special Entity regarding fair pricing and the appropriateness of the transaction.'' Proposed § 23.450(b)(6) refined the statutory language to state that the representative ''evaluates, consistent with any guidelines provided by the Special Entity, fair pricing and the appropriateness of the swap.''[862] Having considered the comments, the Commission is adopting § 23.450(b)(6) as proposed (renumbered as § 23.450(b)(1)(vi)).

The Commission also clarifies that this provision does not require that the representative provide transaction-by-transaction documentation to the Special Entity with respect to fair pricing and appropriateness of the swap. The Commission expects that in circumstances where the representative is given discretionary trading authority, for example, the representative could undertake in an investment management agreement or other agreement to ensure that the representative will evaluate pricing and appropriateness of each swap consistent with any guidelines provided by the Special Entity prior to entering into the swap. The Commission notes, however, that the independent representative would be expected to prepare and maintain adequate documentation of its evaluation of pricing and appropriateness to enable both the representative and Special Entity to audit for compliance with the duty.

viii. Restrictions on Political Contributions by the Independent Representative of a Governmental Special Entity

The Commission is adopting § 23.450(b)(8) (renumbered as § 23.450(b)(1)(vii)) with modifications to the term ''municipal entity.''[863] Consistent with the modifications to § 23.451, the phrase ''municipal entity as defined in § 23.451'' has been replaced with the phrase ''Special Entity as defined in § 23.401(c)(2) or (4).'' This modification clarifies that the rule only applies to representatives of State and municipal Special Entities and governmental plans. The Commission also clarifies that the exclusion for employees of such Special Entities is limited to paragraph § 23.450(b)(1)(vii).

The Commission also notes that while the provision requires an assessment of whether the representative is subject to restrictions on certain political contributions imposed by the Commission, SEC, or an SRO, neither the Commission nor a registered futures association has, as of the adoption of these rules, promulgated such requirements for CTAs that advise State and municipal Special Entities or governmental plans.[864] Therefore, the Commission has set a separate implementation schedule for § 23.450(b)(1)(vii).[865]

e. Reasonable Reliance on Representations

Final § 23.450 allows swap dealers and major swap participants to comply with the rule by relying on representations of counterparties with respect to the qualifications of their independent representatives. Commenters were particularly concerned with the language in proposed § 23.450(d) (renumbered as § 23.450(e)) that the representations be reliable ''taking into consideration the facts and circumstances of a particular Special Entity-representative relationship, assessed in the context of a particular transaction'' and that the representations be ''sufficiently detailed.''[866] New final § 23.450(d) (safe harbor) and final § 23.450(e) (reasonable reliance on representations of the Special Entities) together address many of the commenters' concerns by clarifying the content of representations that will be deemed to provide a swap dealer or major swap participant a reasonable basis to believe a Special Entity's representative meets the qualification criteria.[867] The

[860] For example, where a representative's fee is expressed as basis points on the notional amount of the transaction, the representative should also disclose a calculation of the fee in dollars.

[861] The Commission encourages Special Entities to consider the factors discussed in this adopting release in developing appropriate policies and procedures for selecting a qualified representative and monitoring their ongoing performance.

[862] Proposing release, 75 FR at 80652–53 and 80660. A commenter requested that the Commission confirm that implementation of a hedge policy and periodic review of compliance with the policy would be sufficient to meet the fair pricing and appropriateness criterion. APGA Feb. 22 Letter, at 6. The Commission declines to endorse any particular method of compliance with the statutory criteria in light of the principles based nature of the rule but believes such considerations would be relevant to an assessment of compliance with the criterion.

[863] Although the Commission did not receive any comments regarding the requirements of proposed § 23.450(b)(8), two commenters requested the Commission clarify the differences between the term ''municipal entity'' in proposed § 23.450(b)(8) and § 23.451 and the definition of Special Entity. *See,* APGA Feb. 22 Letter, at 2; AMG–SIFMA Feb. 22 Letter, at 13. The Commission has addressed the substance of those comments in the definitions section (*see* Section IV.A.3.b. of this adopting release) and the section on § 23.451 (*see* Section IV.D.3. of this adopting release).

[864] Investment advisers registered with the SEC are currently subject to SEC Advisers Act Rule 206(4)–5, Political Contributions by Certain Investment Advisers, effective date Sept. 13, 2010, 17 CFR 275.206(4)–5; *see also* SEC's proposed rules, 76 FR 41018. Pending final adoption of the SEC's registration rule for municipal advisors, the MSRB has withdrawn the Proposed Interpretive Notice Concerning the Application of Rule G–17, on Conduct of Municipal Securities and Municipal Advisory Activities, to Municipal Advisors, SR–MSRB–2011–15 (August 24, 2011). In a press release, the MSRB stated, ''Upon the SEC's adoption of a permanent definition of the term 'municipal advisor' under the Exchange Act, the MSRB plans to resubmit these rule proposals,'' MSRB Notice 2011–51 (Sept. 9, 2011).

[865] *See* Section V at fn. 926 of this adopting release for a discussion of the implementation schedule for § 23.450(b)(1)(vii).

[866] *See, e.g.,* SIFMA/ISDA Feb. 17 Letter, at 36; proposing release, 75 FR at 80660.

[867] Final § 23.450(d) and (e) provide:

(d) *Safe Harbor.* (1) A swap dealer or major swap participant shall be deemed to have a reasonable basis to believe that the Special Entity, other than a Special Entity defined in § 23.401(c)(3), has a representative that satisfies the applicable requirements of paragraph (b)(1) of this section, provided that: (i) The Special Entity represents in writing to the swap dealer or major swap participant that it has complied in good faith with written policies and procedures reasonably designed to ensure that it has selected a representative that satisfies the applicable requirements of paragraph (b) of this section, and that such policies and procedures provide for ongoing monitoring of the performance of such representative consistent with the requirements of paragraph (b) of this section; and (ii) The representative represents in writing to the Special Entity and swap dealer or major swap participant that the representative: (A) Has policies and procedures reasonably designed to ensure that it satisfies the applicable requirements of paragraph (b) of this section; (B) Meets the independence test in paragraph (c) of this section; and (C) Is legally obligated to comply with the applicable requirements of paragraph (b) of this section by agreement, condition of employment, law, rule, regulation, or other enforceable duty. (2) A swap dealer or major swap participant shall be deemed to have a reasonable basis to believe that a Special Entity defined in § 23.401(c)(3) has a representative

Continued

Commission also confirms that such representations, where appropriate, can be contained in counterparty relationship documentation to avoid transaction-by-transaction compliance.[868]

Some commenters suggested that the Commission permit a simple representation that a Special Entity's representative satisfies the criteria in the statute and rule. The Commission does not believe that such an approach is consistent with the statutory framework or the intent of Congress to provide meaningful protections for Special Entities. Nevertheless, the Commission believes it is appropriate to limit the ability of swap dealers and major swap participants to subvert the purpose of the independent representative provisions in Section 4s(h)(5). The Commission further believes that the final rule addresses commenters concerns while encouraging processes to ensure that the quality of representation is consistent with the statutory criteria. The Commission's formulation of the representations will encourage Special Entities and independent representatives to undertake appropriate due diligence to ensure that they incorporate the statutory criteria in the selection and ongoing performance of the independent representative.[869] For example, a representative with specific expertise in interest rate swaps might not be qualified to advise on an oil swap. Under the rule, the Special Entity and independent representative would have to undertake to ensure that their policies and procedures were sufficiently robust to take account of changing circumstances. In addition, Special Entities and their representatives should ensure that their policies and procedures require that the representations provided to the swap dealer or major swap participant are authorized at the appropriate decision making level of the Special Entity or representative.[870]

A swap dealer or major swap participant would be able to rely on representations unless it had information that would cause a reasonable person to question the accuracy of the representation.[871] The Commission declines to adopt other commenters' suggestion that swap dealers and major swap participants be permitted to rely on representations unless it had actual knowledge that the representations were untrue. The Commission has determined that an actual knowledge standard may inappropriately encourage the swap dealer or major swap participant to ignore red flags.[872]

Commenters requested that the Commission clarify that the exchange of representations will not give parties any additional rescission, early termination, or monetary compensation rights.[873] The Commission declines to opine as to potential liability in disputes between private parties, which will depend on the facts and circumstances of the particular case and applicable law.[874]

f. Chief Compliance Officer Review

The Commission has determined to adopt proposed § 23.450(e) (renumbered as § 23.450(f)) with one modification. The phrase ''determines that the representative * * * does not meet the criteria'' has been changed to read ''determines that [the swap dealer or major swap participant] does not have a reasonable basis to believe that the representative * * * meets the criteria.'' This clarifies the Commission's view that § 23.450 does not give swap dealers and major swap participants the authority to determine whether a representative meets the criteria under § 23.450(b). Rather, consistent with the duty, a swap dealer or major swap participant is required to have a reasonable basis to believe the representative satisfies the criteria. The Commission has determined that the clarifications and modifications to § 23.450 provide meaningful protections against commenters' concerns that a swap dealer or major swap participant may overreach or otherwise gain a negotiating advantage when requesting information from the Special Entity. The Commission declines to adopt a commenter's suggestion that the written determination be made by the trading supervisor instead of the chief compliance officer. As stated in the rule, the Commission expects the chief compliance officer to review such determination to ensure that the swap dealer or major swap participant has a substantial, unbiased basis for the determination.[875] The Commission believes that a chief compliance officer is in a better position to review such a determination for compliance with the rules. A trading supervisor is more likely to be directly involved with the Special Entity and to have direct material incentives or bonus structures that could be affected by such a determination.

One commenter also requested that the rule require the written record also be submitted to the Commission for review. The Commission notes that such records of compliance must be kept and made available to the Commission for

that satisfies the applicable requirements in paragraph (b)(2) of this section provided that the Special Entity provides in writing to the swap dealer or major swap participant the representative's name and contact information, and represents in writing that the representative is a fiduciary as defined in Section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002).

(e) *Reasonable reliance on representations of the Special Entity.* A swap dealer or major swap participant may rely on written representations of a Special Entity and, as applicable under this section, the Special Entity's representative to satisfy any requirement of this section as provided in § 23.402(d).

[868] As the Commission stated in the proposing release, such representations can be included in counterparty relationship documentation or other written agreement between the parties and that the representations can be deemed applicable or renewed, as appropriate, to subsequent swaps between the parties if the representations continue to be accurate and relevant with respect to the subsequent swaps. Proposing release, 75 FR at 80641.

[869] *See, e.g.,* SEC and DOL guidance—*Selecting and Monitoring Pension Consultants: Tips for Plan Fiduciaries, available at http://www.dol.gov/ebsa/newsroom/fs053105.html; also available at http://www.sec.gov/investor/pubs/sponsortips.htm.*

[870] Such representations would also apply to representatives that are employees of the Special Entity. For example, the Special Entity could represent that it has (1) complied in good faith with policies and procedures reasonably designed to ensure that its representative employee meets the criteria, and (2) has reasonably designed policies and procedures that the employee must follow to ensure that it satisfies the criteria. The employee could represent that it has complied in good faith with the Special Entity's policies and procedures and that it is legally obligated under its employment agreement or by law to comply with the applicable criteria of § 23.450(b).

[871] The Commission's determination is consistent with several commenters' suggestions. *See, e.g.,* SIFMA/ISDA Feb. 17 Letter, at 36 (''[swap dealers] should be permitted to rely on a written representation * * * that the counterparty and/or its representative satisfies the standards * * * absent actual notice of countervailing facts (or facts that reasonably should have put [a swap dealer] on notice), which would trigger a consequent duty to inquire further.''); *see also supra* fn. 724 and 820.

[872] *See* Section III.A.3.d. of this adopting release for a discussion of § 23.402(d)—Reasonable reliance on representations.

[873] *See, e.g.,* ABC/CIEBA Feb. 22 Letter, at 12–13 (asserting that a swap dealer faced with a highly volatile market and disadvantageous swap position could claim that a Special Entity provided inaccurate representations to avoid its obligations); AMG—SIFMA Feb. 22 Letter, at 10.

[874] For the same reasons, the Commission declines to opine as to whether a swap dealer or major swap participant would have liability to the Special Entity or its representative as a result of its good faith determination that the representative was not qualified. *See, e.g.,* SIFMA/ISDA Feb. 17 Letter, at 38–39. The Commission notes, however, that the duty under Section 4s(h)(5)(A) and final § 23.450 only requires a swap dealer to have a reasonable basis to believe that a representative is qualified. Thus, any determination under proposed § 23.450(e), as clarified in the final rule (renumbered as § 23.450(f)), would not be a determination by the swap dealer or major swap participant that the representative is unqualified.

[875] The Commission believes that reviewing the determination is part of the CCO's duty to ''take reasonable steps to ensure compliance.'' *See* proposed § 3.3(d)(3), CCO proposed rules, 75 FR at 70887.

inspection.[876] In addition, chief compliance officers are required under Section 4s(k) of the CEA and proposed § 3.3 to report to the Commission annually about the firm's compliance record.[877] Thus, the Commission will be apprised of material compliance failures on an annual basis.

g. Disclosure of Capacity

The Commission is adopting § 23.450(f) (renumbered as § 23.450(g)) as proposed. A swap dealer or major swap participant that acts in a capacity other than as a swap counterparty to a Special Entity must disclose the material differences between such capacities. For example, a swap dealer that is also a registered FCM would have to disclose that when it acts as an FCM it is the Special Entity's agent with respect to executing orders; however, when it acts as a swap dealer it is the Special Entity's counterparty and its interests are adverse to the Special Entity's. Such disclosure would be required, at a minimum, at a reasonably sufficient time prior to entering into a swap.[878] The Commission declines commenters' suggestion that the required disclosure should be limited to different capacities in connection with the swap. Such a limitation would not address counterparty confusion that could arise when a swap dealer changes status from transaction to transaction. The Commission clarifies that such disclosures could be made on a relationship basis in counterparty relationship documentation, where appropriate. Permitting such disclosure on a relationship basis implements the statutory duty while appropriately mitigating associated costs.

D. Section 23.451—Political Contributions by Certain Swap Dealers

1. Proposed § 23.451

Pursuant to the Commission's discretionary rulemaking authority under Section 4s(h) of the CEA, proposed § 23.451 prohibited swap dealers and major swap participants from entering into swaps with ''municipal entities'' if they make certain political contributions to officials of such entities.[879] The Commission stated that the proposed rule was meant to deter undue influence and other fraudulent practices that harm the public and to promote consistency in the business conduct standards that apply to financial market professionals dealing with municipal entities. Proposed § 23.451 complemented existing pay-to-play prohibitions imposed by the SEC and the MSRB.

In a manner similar to the prohibitions contained in SEC Advisers Act Rule 206(4)–5 [880] and MSRB Rules G–37 and G–38,[881] proposed § 23.451, generally, made it unlawful for a swap dealer or major swap participant to offer to enter or to enter into a swap with a municipal entity for a two-year period after the swap dealer or major swap participant or any of its covered associates makes a contribution to an official of the municipal entity. The proposed rule also prohibited a swap dealer or major swap participant from paying a third-party to solicit municipal entities to enter into a swap, unless the third-party is a ''regulated person'' that is itself subject to a so-called pay-to-play restriction under applicable law.

The Commission proposed to define ''regulated person,'' for purposes of § 23.451, to mean, generally, a person that is subject to rules of the SEC, the MSRB, an SRO or the Commission prohibiting it from engaging in specified activities if certain political contributions have been made, or its officers or employees.[882] Similar to SEC Advisers Act Rule 206(4)–5, the proposing release defined ''covered associate'' of a swap dealer or major swap participant as: ''(i) any general partner, managing member or executive officer, or other individual with a similar status or function; (ii) any employee who solicits a municipal entity for the swap dealer or major swap participant and any person who supervises, directly or indirectly, such employee; and (iii) any political action committee controlled by the swap dealer or major swap participant or any of its covered associates.'' [883]

The proposed rule barred a swap dealer or major swap participant from soliciting or coordinating contributions to an official of a municipal entity with which the swap dealer or major swap participant is seeking to enter into or has entered into a swap, or payments to a political party of a state or locality with which the swap dealer or major swap participant is seeking to enter into or has entered into a swap.[884] The proposed rule also included a provision that would make it unlawful for a swap dealer or major swap participant to do indirectly or through another person or means anything that would, if done directly, result in a violation of the prohibitions contained in the proposed rule.[885]

The Commission's proposal included three exceptions. First, the proposed rule permitted an individual that is a covered associate to make aggregate contributions up to $350 per election, without being subject to the two-year time out period, to any one official for whom the individual is entitled to vote, and up to $150 per election to an official for whom the individual is not entitled to vote. Second, the proposed rule did not apply to contributions by an individual made more than six months prior to becoming a covered associate of the swap dealer or major swap participant, unless such individual solicits the municipal entity after becoming a covered associate. Third, the prohibitions did not apply to a swap that is initiated on a DCM or SEF, for which the swap dealer or major swap participant does not know the identity of the counterparty.

In addition to the above-mentioned exceptions, proposed § 23.451 included an automatic exemption for those cases where (1) a contribution made by a covered associate did not exceed $150 or $350, as applicable, (2) was discovered by the swap dealer or major swap participant within four months of the date of contribution, and (3) was returned to the contributor within 60 calendar days of the date of discovery.[886] In addition, the Commission proposed that a swap dealer or major swap participant could apply to the Commission for an exemption from the two-year ban and, when considering the exemption application, the Commission would consider certain factors enumerated in the proposing release, including, for example, whether the exemption is necessary or appropriate in the public

[876] Section 23.402(g) requires swap dealers and major swap participants to create a record of their compliance and retain and make available for inspection such records in accordance with § 1.31 (17 CFR 1.31).

[877] *See* Section 4s(k) of the CEA and proposed § 3.3, CCO proposed rules, 75 FR at 70887.

[878] *See, e.g.,* Section III.D. of this adopting release for a discussion of § 23.431 (§ 23.431(a) requires disclosures ''at a reasonably sufficient time prior to entering into a swap'').

[879] Proposing release, 75 FR at 80654.

[880] 17 CFR 275.206(4)–5 (''SEC Advisers Act Rule 206(4)–5'').

[881] *See* MSRB Rule G–37, Political Contributions and Prohibitions on Municipal Securities Business; MSRB Rule G–38, Solicitation of Municipal Securities Business.

[882] Proposing release, 75 FR at 80654 fn. 133.

[883] *Id.,* at 80654.

[884] *Id.*

[885] *Id.*

[886] The scope of this proposed exception was limited to the types of contributions that are less likely to raise pay-to-play concerns, and the exception is intended to provide swap dealers with the ability to undo certain mistakes. Because it would operate automatically, the proposed exception was subject to conditions that are objective and limited to capture only those contributions that are unlikely to raise pay-to-play concerns. *See also* SEC Final Rules, Political Contributions by Investment Advisors, 75 FR 41035–36, Jul. 14, 2010.

interest and consistent with the protection of investors and the purposes of the CEA.[887]

The Commission sought general and specific comment on a number of questions regarding proposed § 23.451, including whether the term ''municipal entity'' was appropriately defined or whether certain alternatives should be considered. The Commission also sought comment on whether the proposed rule should apply only to swap dealers.[888]

2. Comments

The Commission received several comments representing a diversity of views on proposed § 23.451. Where one commenter believed proposed § 23.451 represented an indispensable element of the business conduct standards and should be strengthened to prohibit a swap dealer from making a political contribution after the completion of a transaction, another believed the proposed rule should be deleted as unduly burdensome for those swap dealers that are part of financial institutions that are not, or will not be, subject to the rules of the MSRB.[889] Alternatively, it was suggested by the latter commenter that any final rule parallel in certain respects the MSRB regulations on political contributions made in connection with municipal securities business and, in so doing, limit the final rule's scope to swap dealers and major swap participants already covered by the relevant MSRB regulations.[890] In another alternative, this commenter requested that the Commission consider replacing as the triggering occasion for the application of the rule an ''offer to enter into or enter into a swap or a trading strategy involving a swap'' with the phrase ''engage in municipal swaps business.'' [891] The commenter suggested that ''municipal swap business'' be defined to mean ''the execution of a swap with a municipal entity.'' [892]

Regarding proposed § 23.451(a)(3)'s definition of municipal entity,[893] one commenter requested the Commission clarify differences with the definition of a State and municipal Special Entity under Section 4s(h)(1)(C)(2)(ii) [894] and proposed § 23.401, which limits the definition of Special Entity to ''a State, State agency, city, county, municipality, or other political subdivision of a State.'' [895] Another commenter recommended excluding certain state-established plans that are run by third-party investment advisers, such as 529 college savings plans, from the definition of ''municipal entity'' or, at a minimum, creating a safe harbor from the pay-to-play provision where a Special Entity is represented by a qualified financial advisor and that advisor affirmatively selects the swap dealer.[896]

Regarding the proposed rule's definition of ''solicit,'' one commenter stated that the term could implicate communication by employees of a financial institution that do not have a role in the swaps business and who are already regulated by the MSRB.[897] This commenter advocated that the Commission narrow the definition of ''solicit'' to include only ''direct communication by any person with a municipal entity for the purpose of obtaining or retaining municipal swaps business.'' In so doing, the commenter stated that the proposed rule does not include an analogous provision of MSRB Rule G–37 (and MSRB Proposed Rule G–42, Political Contributions and Prohibitions on Municipal Advisory Activities) limiting the scope of the rule to municipal financial professionals ''primarily engaged in municipal financial representative activities * * *.'' [898] The same commenter urged the Commission to include a provision, parallel to the relevant MSRB rules, which specifies an operative date for the rule, such that it only applies to contributions made on or after its effective date.[899]

Another commenter stated that it is unclear how regulated entities will monitor for compliance with the proposed rule and suggested a re-writing of the rule in a more targeted fashion prohibiting ''political contributions with the intent to solicit swaps business.'' [900] This commenter also stated that the term ''offer'' should be defined in a manner that is consistent with its traditional legal definition.[901]

3. Final § 23.451

The Commission has determined to adopt proposed § 23.451 with changes to reflect certain of the comments and to harmonize its rule with the SEC's proposed pay-to-play prohibition.[902] The SEC's proposed prohibition on certain political contributions by security-based swap dealers, proposed Rule 15Fh–6, would bar an SBS Dealer from entering into a security-based swap agreement with a ''municipal entity'' after they make contributions, with the aim of eliminating pay-to-play.[903] Moreover, the Commission's approach to final § 23.451 is also consistent with MSRB Rules G–37 and G–38. Through such harmonization, the Commission achieves its goal of preventing quid pro quo arrangements while avoiding unnecessary burdens associated with disparities between the SEC's proposed rule and the Commission's final rule and guidance. In this way, the incremental cost of complying with the Commission's prohibition is expected to be minimal as many of the entities that will be subject to its restrictions should already have in place policies and procedures on political contributions by way of their compliance with existing requirements under SEC Advisers Act Rule 206(4)–5 and MSRB Rules G–37 and G–38.

There were two main changes made to proposed § 23.451 in final § 23.451. First, the Commission decided to exclude major swap participants from the pay-to-play prohibition because major swap participants, as defined, do not ''solicit'' swap transaction business within the meaning of the final rule and, as such, the Commission does not expect that major swap participants will assume a dealer-type role in the swap market.

Second, in place of the term ''municipal entity'' in § 23.451(a), the Commission used the term ''governmental Special Entity'' as defined in final § 23.451(a)(3).[904] This change clarifies that the pay-to-play

[887] *Id.,* at 80655.

[888] *Id.*

[889] *Cf.* CFA/AFR Feb. 22 Letter, at 18, *with* SIFMA/ISDA Feb. 17 Letter, at 39–40.

[890] SIFMA/ISDA Feb. 17 Letter, at 40.

[891] *Id.*

[892] *Id.*

[893] *See supra* fn. 60 for a definition of the term ''municipal entity.''

[894] *See* Section IV.A. of this adopting release for a discussion of municipal entities and Special Entities.

[895] APGA Feb. 22 Letter, at 2.

[896] AMG–SIFMA Feb. 22 Letter, at 13.

[897] SIFMA/ISDA Feb. 17 Letter, at 40.

[898] *Id.*

[899] *Id.*

[900] CEF Feb. 22 Letter, at 24.

[901] *Id.*

[902] In making this determination, the Commission concluded that final § 23.451 is fully authorized by the discretionary rulemaking authority vested in the Commission by Section 731 of the Dodd-Frank Act, which amended the CEA by adding Section 4s(h). *See* Section 4s(h)(3)(D) (''Business conduct requirements adopted by the Commission shall establish such other standards and requirements as the Commission may determine are appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of [the CEA].''); *see also* Sections 4s(h)(1)(D), 4s(h)(5)(B) and 4s(h)(6).

[903] SEC's proposed rules, 76 FR at 42432–33.

[904] Section 23.451(a)(3) defines ''governmental Special Entity'' as any Special Entity defined in § 23.401(c)(2) (a State, State agency, city, county, municipality, other political subdivision of a State, or any instrumentality, department, or a corporation of or established by a State or political subdivision of a State) or § 23.401(c)(4) (any governmental plan, as defined in Section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002)).

prohibition applies not just to municipalities, but to any contributions made for the purpose of obtaining state and/or local government business. It also addresses comments recommending that the Commission clarify that the prohibition only applies to certain Special Entities as defined in Section 4s(h) and final § 23.401.

The Commission declined to make changes to proposed § 23.451 based on comments recommending the prohibition on pay-to-play be deleted as unduly burdensome for those swap dealers that are part of financial institutions that are not, or will not be, subject to the rules of the MSRB. Rather, the Commission believes that a pay-to-play prohibition is integral to the business conduct standards framework for the protection of governmental Special Entities. The final rule is intended to protect the public by ensuring that swap dealers solicit and compete for governmental Special Entity business on the merits of their proposals rather than on the basis of their ability and willingness to make political contributions. Similarly, the Commission declines, as one commenter suggested, to limit the prohibition to the ''execution'' of swap business because the final rule is designed to protect the public in all phases of the transaction, including the solicitation or offering stage. At the same time, the Commission is taking steps to mitigate costs by harmonizing the final rule with both the SEC's and MSRB's prohibitions on certain political contributions.

The Commission does not believe that a safe harbor from the final rule is appropriate merely because a governmental Special Entity is being represented by a qualified financial advisor who selects the swap dealer. By its nature, pay-to-play is covert because participants do not broadcast that contributions or payments are being made or accepted for the purpose of influencing the selection of a particular financial services provider. Given the covert and nefarious purpose behind such contributions or payments, the Commission believes any potential loophole, or Commission parsing of the word ''offer,'' would only breed mischief by would-be wrongdoers and unnecessarily expose the public to fraudulent dealings.

As the rule text makes clear, the final rule is designed to prevent ''fraud.'' Given this fact, the Commission believes that it is unnecessary, as some commenters requested, to fashion the prohibition to reach only those ''political contributions made with the intent to solicit swaps business.'' Such an intent-based test in this context would again ignore the covert nature of such contributions or payments. Rather, the Commission believes that § 23.451(b)(1)'s limiting principle (*i.e.,* that it prohibits fraud), and the various exceptions to the prohibitions contained in § 23.451(b)(2), should ameliorate any concerns that the prohibition may be unduly burdensome to monitor for compliance. Presumably, swap dealers already have in place policies and procedures designed to prevent their employees and agents from perpetrating fraud of this sort.

As with the other business conduct standards being promulgated in this adopting release, § 23.451 cannot be read in insolation. Of particular relevance here is the Commission's anti-evasion rule § 23.402(a) which, together with § 23.451(c)'s provision that no swap dealer shall circumvent the prohibitions of the rule, will provide an effective safeguard against those who may be inclined to devise an end-run around final § 23.451. Given these protections, the Commission does not find it necessary, as one commenter recommended, to change the rule text to make sure that improper contributions do not occur both before and after the solicitation and consummation of the transaction. Further, § 23.451(d) provides a mechanism by which a swap dealer can apply for an exemption from the prohibitions of the final rule. Together, these rules ensure that § 23.451 is balanced, flexible and capable of prohibiting multifarious forms of fraud while accommodating legitimate requests for relief based on various facts and circumstances. Similarly, § 23.451(e) specifies where prohibitions are inapplicable, including where the contribution does not exceed the dollar thresholds or timing considerations provided in the rule.

V. Implementation

A. Effective Dates and Compliance Dates

In the proposing release, the Commission requested comment on whether it should delay the effective date of any of the proposed requirements to allow additional time to comply and, if so, commenters were asked to identify the particular requirement and compliance burden that should merit a delay. Under Section 754 of the Dodd-Frank Act, the rules in subpart H of part 23 would be effective not less than 60 days after publication of the final rules implementing Section 731, which adds Section 4s(h) to the CEA.

B. Comments

The Commission received comments concerning implementation of the final external business conduct standards rules. The majority of the comments urged the Commission to implement the external business conduct standards after the implementation of the entity definitions and registration rules applicable to swap dealers and major swap participants and to allow sufficient time to implement appropriate policies and procedures and execute counterparty relationship documentation.[905]

Other commenters suggested that the Commission's rules, including the business conduct standards rules, be implemented in a certain number of phases. The suggestions varied from as few as three to as many as sixteen phases. From among the commenters who believed that the rules should be implemented in phases, one commenter stated that the Commission should divide the rulemakings into three phases, with business conduct standards in the middle phase.[906] Another commenter believed that the business conduct rules should be effective in the third of three phases.[907]

Among the commenters who believed that the rules should be implemented in four phases, one commenter stated that the external business conduct rules should be implemented during the second of four phases, following the implementation of the definitions rules.[908] Another commenter believed

[905] *See* MFA Mar. 24 Letter, at Annex A p. 3; EEI June 3 Letter, at 7; NFA Aug. 31 Letter, at *passim,* NextEra Mar. 11 Letter, at 6; Comm. Cap. Mkts. June 24 Letter, at 2; Financial Assns. May 26 Letter, at 3; Financial Assns. June 10 Letter, at 8–9 (The business conduct standards rulemaking should occur after the definitions rulemakings because, in most places, the Dodd-Frank Act refers to ''swap dealers'' instead of ''registered swap dealers,'' and the statutory definition of swap dealer is vague. Many persons could unwittingly violate the business conduct standards rules because they would not have known that they were subject to the rules. Certain terms such as ''Special Entity,'' ''best interests'' and ''acts as an advisor'' must be clarified by rule prior to the effectiveness of the business conduct standards rules.); *see also* ISDA June 3 Letter, at 2–4; WMBAA June 3 Letter, at 5; AGA June 3 Letter, at 3.

[906] CME June 3 Letter, at 3–4 and 7 (Rulemaking should occur in three phases—''early,'' ''middle'' and ''late.'' The early phase rules should deal solely with systemic risk. Business conduct standards, by contrast, should be in the middle phase.).

[907] BlackRock June 3 Medero, Prager and VedBrat Letter, at 2–3 (The Commission should publish a proposed sequencing plan that details both the sequence and implementation for all rules. Implementation should be divided into three phases and business conduct rules would be effective in the final phase.); *see also* BlackRock June 3 Medero and Prager Letter, at 6.

[908] MFA Mar. 24 Letter, at Annex A p. 3 (Business conduct standards rules should be implemented

Continued

the Commission should issue the business conduct standard rules in the second of four phases, but they recommended that the Commission should grant a ''one year blanket exemption'' for entities that engage in bilateral exempt commodity transactions.[909] Another commenter suggested that the Commission should implement the business conduct standards during the last of four phases.[910] One commenter suggested that the Commission's swap rules should be implemented in the fourth of eight phases,[911] while another commenter opined that the rules should be divided into 16 phases with business conduct standards being implemented in phase number seven.[912]

One commenter specifically mentioned the phases that were suggested by Commissioner O'Malia.[913] The commenter stated that the Commission should adopt a schedule for implementation with each such phase. The commenter stated that if all the rules cited in Commissioner O'Malia's Phase 2 were adopted simultaneously, then it would be a burden on the commenter and, therefore, the rules should be implemented in a staggered schedule.[914]

Some commenters did not suggest a specific number of phases, but had suggestions regarding the implementation of the rules. One commenter stressed the importance of the Commission providing a clear date for implementation and believed that market participants would work towards that date.[915] The commenter also suggested that if documentation of customer relationships is a concern because of the large numbers of customers, some phasing in should be considered by the Commission.[916]

Another commenter believed that the public should be given an opportunity to review the rule changes that resulted from public comments and have an opportunity to comment on the changes prior to the final rules being promulgated.[917]

One commenter suggested that the Commission should sequence and implement the final rules by asset class.[918] Another commenter opined that the Commission should require clearing, reporting and electronic execution for the ''better-prepared'' asset classes first (*e.g.,* certain commodity and interest rate products that are already quite liquid and standardized) and should provide ample time for the maturation of those asset classes and products that are not yet at that stage.[919]

The Commission received numerous comments on other portions of the business conduct standards rules that deal with Special Entities. [920] With regard to the implementation and phasing of the Commission's rules, one commenter stated that it is ''critical'' that, on or before finalization of the proposed rules, the Commission and DOL make a joint formal announcement that no action required by the business conduct standards will make a swap dealer or major swap participant an ERISA fiduciary.[921]

Two commenters believed that the rules should be phased in with the mandatory rulemaking being implemented first, followed by the implementation of rules issued using the Commission's discretionary authority.[922]

during the second of four phases, following the implementation of definitions rules. The second phase should include implementation of clearing rules, swap-data reporting rules and internal/external business conduct standards for swap dealers and major swap participants. The third phase should prioritize SEF trading and segregation of uncleared swaps. The final phase should include real-time/public reporting and all other rulemaking, including antifraud and market manipulation rules.).

[909] NextEra Mar. 11 Letter, at 6 and 8 (The Commission should issue definitional rules first, then proceed to the core substantive rules, and then turn to non-core and ancillary rules. The second phase of rule implementation, which would follow the first phase of definitional rules, would implement business conduct standards, registration, governance, and capital and margin rules. The third phase would implement clearing requirements, the fourth phase would cover reporting and record-keeping standards, and the fifth phase would implement ancillary rules and necessary discretionary rules.).

[910] EEI June 3 Letter, at 7 (The Commission: (i) Should build its final rules in a common-sense manner (to start with basic definitions of ''swap,'' ''swap dealer,'' and ''major swap participant''); (ii) next build strong institutions such as SEFs, DCOs, and SDRs; (iii) then implement the mandatory clearing, exchange-trading, reporting, recordkeeping and other rules controlling those new markets; and (iv) then, finally, implement the obligations [*e.g.,* business conduct standards] of swap dealers and major swap participants in a phased manner that is synchronized to the development of the new markets and the institutions that support them.).

[911] Comm. Cap. Mkts. June 24 Letter, at 2 (The first phase would include definitions and standards, and the second phase would include rules to reduce systemic risk, such as central clearing. Business conduct standards would occur in the fourth phase.).

[912] Financial Serv. Roundtable April 6 Letter, at 4–5.

[913] MGEX June 3 Letter, at 1–2; *see also* Extension of Comment Periods, 76 FR at 25276 Appendix 2.

[914] MGEX June 3 Letter, at 1–2.

[915] Better Markets June 3 Letter, at 20.

[916] *Id.*

[917] Noble July 7 Letter, at 2. The Commission declines to reopen the comment period on this rulemaking. If the Commission were to delay the final rulemaking to allow additional comments to address changes that were a result of comments that are already part of the public record, then it would only be fair to allow further comments to changes made as a result of those subsequent comments. The result would be the indefinite delay of the final rules for so long as someone is willing to comment on changes that were made.

[918] ETA May 4 Letter, at 2–5 (The rules should be implemented first for market infrastructure entities, then registration of market professionals, and finally registration of financial entities with new roles in each asset class.).

[919] Financial Assns. May 4 Letter, at 2–3 (Phased implementation by type of market participant will also allow the Commission and market participants to use lessons learned from larger market participants when developing rules applicable to end users. In addition, the Commission should, within each asset class and type of market participant, prioritize implementation of requirements that reduce systemic risk ahead of other requirements. Implementation of requirements designed to achieve other goals, such as trade execution, should be phased in only once clearing has been successfully implemented. This commenter also submitted charts that would sequence rules over nine separate stages. The Associations propose that the CFTC ''initiate'' business conduct standards in the sixth stage and ''finalize'' business conduct standards in the ninth and final stage.).

[920] Commenters submitted alternatives to the proposed rule regarding independent representatives for Special Entities (proposed § 23.450). *See, e.g.,* CalPERS Feb. 18 Letter, at 5–6; CEF Feb. 22 Letter, at 23; Cityview Feb. 22 Submission; Riverside Feb. 22 Letter, at 1–2; SFG Feb. 22 Letter, at 1; CFA/AFR Aug. 29 Letter, at 23. CalPERS suggested a testing regime for independent representatives but noted that it would take time to create the testing framework. CalPERS recommended that, should their proposal advance, it may be necessary to delay the effective date of the independent representative provision of the regulations to permit implementation of their alternative approach. The Commission has modified proposed § 23.450 to respond to commenters concerns, but has determined not to adopt a testing regime at this time. CalPERS Feb. 18 Letter, at 4–6. *See* Section IV.C.3. of this adopting release for a discussion of final § 23.450.

[921] ABC/CIEBA Feb. 22 Letter, at 2–3 (The proposed rules should not be finalized when there is any uncertainty regarding whether the DOL regulations will be compatible with the CFTC's rules. If the DOL is not prepared to make the announcement when the CFTC is ready to finalize its proposed rules, the only workable solution is to delay the finalization of the business conduct standards with respect to ERISA plans until the DOL is prepared to act. Any other course of action would elevate timing issues over the retirement security of millions of Americans.). The Commission has harmonized the rulemaking with DOL requirements. *See* Section II of this adopting release for a discussion of ''Regulatory Intersections.''

[922] BlackRock Feb. 22 Letter, at 2 (The Commission should adopt only mandatory rules, and after the Commission has gained more familiarity with the swaps marketplace, it may consider changing those standards.); Encana Feb. 22 Letter, at 2 (Some of the business conduct standards rules were not mandated by Congress and, in light of the compressed timeline for the implementation of the Dodd-Frank Act and current budgetary constraints, the Commission should reconsider its decision to impose non-mandatory requirements on swap dealers and major swap participants at this time. Encana suggests that, for swap dealers and major swap participants whose counterparties are normally end-users, the Commission should limit the rules to the requirements mandated by the Dodd-Frank Act. If, after a few years of experience, the Commission believes that additional business conduct standards are necessary, then the Commission could explore imposing additional

One commenter stated that the Commission should continue to apply the exclusion for swaps available under pre-Dodd-Frank Act Section 2(h) of the CEA to allow firms such as its members to facilitate an orderly transition to the new rules. The commenter suggested that the Commission's rules be applicable first to bank holding companies, then later to other swaps participants.[923]

One commenter stated that, although Section 721 of the Dodd-Frank Act limits the Commission's exemptive authority with regard to certain provisions of the CEA, the Commission still retains authority to exempt persons from its own implementing rules.[924] This commenter asked that the Commission use its authority to exempt persons from its implementing regulations to address instances where such an exemption would be in the public interest.

Another commenter suggested that the Commission should adopt implementing regulations deferring the effective date of the provisions of Title VII to be in line with the ongoing international effort to implement reforms of the OTC derivatives market by December 31, 2012, following the September 2009 meeting of the G20 in Pittsburgh.[925]

C. Commission Determination

After considering the comments, the Commission has determined that the effective date of the rules in subpart H of part 23 will be 60 days after publication of the final rules in the **Federal Register.** Swap dealers and major swap participants must comply with the rules in subpart H of part 23 on the later of 180 days after the effective date of these rules or the date on which swap dealers or major swap participants are required to apply for registration pursuant to Commission rule 3.10.[926]

The compliance schedule established by the Commission for the subpart H rules will allow swap dealers and major swap participants to, among other things, implement appropriate policies and procedures, train relevant personnel, execute any necessary amendments to counterparty relationship documentation, receive any representations from counterparties and enable Special Entities to ensure that they have qualified independent representatives as provided in § 23.450.[927] While the schedule does not distinguish among swap dealers, asset classes or counterparties as suggested by various commenters, the schedule does provide a time certain for compliance and a substantial lead time of a minimum of eight months to accommodate the tasks that must be completed by affected market participants. The Commission was not persuaded that the distinctions among swap dealers, asset classes, counterparties or mandatory versus discretionary rules provide a compelling basis for the Commission to phase-in the implementation of the bulk of the external business conduct standards rules. Rather, the Commission believes that swap dealers and major swap participants will be able to develop and implement the required compliance mechanisms efficiently by considering their affected business processes across the board. Within the time frame provided, swap dealers and major swap participants will be able to phase-in their compliance according to their own priorities, provided that the requirements are implemented by the applicable compliance date.

VI. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (''RFA'') requires Federal agencies to consider the impact of its rules on ''small entities.''[928] A regulatory flexibility analysis or certification typically is required for ''any rule for which the agency publishes a general notice of proposed rulemaking pursuant to'' the notice-and-comment provisions of the Administrative Procedure Act, 5 U.S.C. 553(b).[929] As the Commission stated in the proposing release, it previously has established that certain entities subject to its jurisdiction are not small entities for purposes of complying with the RFA.[930] However, as the Commission also noted in the proposing release, swap dealers and major swap participants are new categories of registrant for which the Commission had not previously addressed the question of whether such persons are small entities.[931]

In this regard, the Commission explained in the proposing release that it previously had determined that FCMs should not be considered small entities for purposes of the RFA, based, in part, upon FCMs' obligation to meet the minimum financial requirements established by the Commission to enhance the protection of customers' segregated funds and protect the financial condition of FCMs generally.[932] Like FCMs, swap dealers will be subject to minimum capital and margin requirements and are expected to comprise the largest global financial firms, and the Commission is required to exempt from designation as a swap dealer entities that engage in a *de minimis* quantity of swap dealing in connection with transactions with or on behalf of customers.[933] Accordingly, for purposes of the RFA for the proposing release and future rulemakings, the Commission proposed that swap dealers should not be considered small entities for essentially the same reasons that it had previously determined FCMs not to be small entities.[934]

The Commission further explained that it also had previously determined that large traders are not small entities for RFA purposes, with the Commission considering the size of a trader's position to be the only appropriate test for the purpose of large trader reporting. The Commission then noted that a

requirements on swap dealers and major swap participants at that time.). The Commission has determined to adopt both mandatory and discretionary rules. See Section III.A.1. of this adopting release for a discussion of § 23.400–Scope.

[923] CEF June 3 Letter, at 2.

[924] NY City Bar June 13 Letter, at 3.

[925] Bank of Tokyo May 6 Letter, at 4.

[926] Under § 23.450(b)(1)(vii), any swap dealer or major swap participant that offers to enter or enters into a swap with a Special Entity, other than a Special Entity defined in § 23.401(c)(3), shall have a reasonable basis to believe that the Special Entity has a representative that, in the case of a Special Entity as defined in § 23.401(c)(2) or (4), is subject to restrictions on certain political contributions imposed by the Commission, the SEC, or an SRO subject to the jurisdiction of the Commission or the SEC; provided however, that § 23.450(b)(1)(vii) shall not apply if the representative is an employee of the Special Entity. Because neither the Commission nor an SRO registered with the Commission has established restrictions on certain political contributions as provided in § 23.450(b)(1)(vii), swap dealers and major swap participants will not have to have a reasonable basis to believe that a qualified independent representative of a Special Entity is subject to such restrictions on political contributions until the later of 180 days after the effective date of the final subpart H rules or the effective date of any rules promulgated by the Commission or an SRO registered with the Commission imposing such restrictions on political contributions that would apply to such qualified independent representative.

[927] The compliance dates in this adopting release are subject to any superseding order of the Commission providing exemptive relief from certain requirements under the CEA pending completion of certain other rulemakings, including the entity and product definitions rulemakings. *See, e.g.* Effective Date for Swap Regulation, 76 FR 42508, Jul. 19, 2011; Amendment to July 14, 2011 Order for Swap Regulation, 76 FR 80233, Dec. 23, 2011.

[928] 5 U.S.C. 601 *et seq.*

[929] 5 U.S.C. 601(2), 603, 604 and 605.

[930] Proposing release, 75 FR at 80655–56.

[931] *See id.*

[932] Policy Statement and Establishment of Definitions of ''Small Entities'' for Purposes of the Regulatory Flexibility Act, 47 FR 18618, Apr. 30, 1982.

[933] *See* Section 1a(49)(D) of the CEA.

[934] Proposed Rules for Registration of Swap Dealers and Major Swap Participants, 75 FR at 71385.

person will be obligated to register as a major swap participant based upon its maintenance of substantial positions in swaps, creating substantial counterparty exposure that could have serious adverse effects on the financial stability of the United States banking system or financial markets. Accordingly, for purposes of the RFA for the proposing release and future rulemakings, the Commission also proposed that major swap participants should not be considered to be small entities for essentially the same reasons that it previously had determined large traders not to be small entities.[935]

In response to the proposing release, one commenter, representing a number of market participants, submitted a comment related to the RFA, stating that ''[e]ach of the complex and interrelated regulations currently being proposed by the Commission has both an individual, and a cumulative, effect on [certain] small entities,'' and that the Small Business Administration had determined some of its members to be small entities.[936] These members, as the Commission understands, have been determined to be small entities by the SBA because they are ''primarily engaged in the generation, transmission, and/or distribution of electric energy for sale and [their] total electric output for the preceding fiscal year did not exceed 4 million megawatt hours.'' [937] Thus, the commenter concluded that the Commission should conduct a regulatory flexibility analysis for each of its rulemakings under the Dodd-Frank Act, including this rulemaking applicable to Business Conduct Standards for Swap Dealers and Major Swap Participants with Counterparties.[938]

This commenter did not provide any information on how the proposing release may have a significant economic effect on a substantial number of small entities. Nonetheless, the Commission has reevaluated this rulemaking in light of the statements made to it by this commenter. After further consideration of those statements, the Commission has again determined that this final rulemaking, which is applicable to swap dealers and major swap participants, will not have a significant economic effect on a substantial number of small entities.

In terms of affecting a substantial number of small entities, the Commission is statutorily required to exempt from registration as a swap dealer those entities that engage in a *de minimis* quantity of swap dealing. Thus, it is expected that most small entities will not be required to register with the Commission as a swap dealer.[939] Additionally, the Commission does not expect that the small entities identified by the commenter will be subject to registration with the Commission as a major swap participant, as most entities with total electric output not exceeding 4 million megawatt hours are not expected to maintain ''a substantial position in swaps'' or swap positions that will ''create substantial counterparty exposure that could have serious adverse effects on the financial stability of the United States banking system or financial markets.'' [940]

Accordingly, for the reasons stated in the proposing release, the Commission continues to believe that the Business Conduct Standards for Swap Dealers and Major Swap Participants with Counterparties rulemaking will not have a significant economic impact on a substantial number of small entities. Therefore, the Chairman, on behalf of the Commission, hereby certifies, pursuant to 5 U.S.C. 605(b), that these regulations being published today by this **Federal Register** release will not have a significant economic impact on a substantial number of small entities.

B. Paperwork Reduction Act

The Paperwork Reduction Act (''PRA'') [941] imposes certain requirements on Federal agencies in connection with their conducting or sponsoring any collection of information as defined by the PRA. Certain provisions of these regulations will result in new collection of information requirements within the meaning of the PRA. 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.

In the proposing release, the Commission informed the public that, while the proposed rules did contain collections of information, these collections would overlap with collections proposed by the Commission in the Business Conduct Standards—Internal rulemakings [942] and with collections under the proposed rules adapting the recordkeeping, reporting and daily trading records requirements under § 1.31 to account for swap transactions.[943] Thus, the Commission did not submit the proposing release to OMB for approval or for assignment of an OMB control number.

The Commission invited comment on the accuracy of its estimate that no additional recordkeeping or information collection requirements or changes to existing collection requirements, other than those in the overlapping rulemakings, would result from the proposed rules. The Commission received no comments directly addressing this request, but it did receive one comment indirectly responsive to its invitation.[944] In it, the commenter asserted that, for electric utilities that are governmental entities, the proposed rules require swap dealers and major swap participants to provide valuation and scenario analysis, as well as advice and disclaimers that are not currently requested or required by these electrical utilities.[945] According to this commenter, these requirements will create new ''paperwork'' for the swap dealer or major swap participant, thereby creating new costs for the end-user.

The Commission has accounted for the information collection costs attributable to the swap dealer and major swap participant as required by the PRA in the information collections prepared for the rulemakings noted above, and understands that the only costs that may be created for end-users is any costs for which the Commission has accounted that may be passed on to the end-user in the form of transaction fees, if at all, which would not require an increase in the Commission's burden estimates in the information collections. Moreover, as the Commission noted in the proposing release, not only were the proposed disclosure rules aligned with current industry best practices, but several large swap dealers had told the

[935] *Id.,* at 71385–86.

[936] ETA June 3 Letter, at 20–21.

[937] Small Business Administration, *Table of Small Business Size Standards,* (Nov. 5, 2010).

[938] ETA June 3 Letter, at 20–21.

[939] Section 1a(49)(D) of the CEA (7 U.S.C. 1a(49)(D)).

[940] Section 1a(33)(A)(ii) of the CEA (7 U.S.C. 1a(33)(A)(ii)). *See also* Section 1a(33)(B) (7 U.S.C. 1a(33)(B)) (requiring the application of a threshold for ''substantial position,'' below which an entity will not be required to register as an MSP).

[941] 44 U.S.C. 3501 *et seq.*

[942] *See* proposing release, 75 FR at 80656. The Business Conduct Standards—Internal rulemakings referenced in the proposing release and their proposing release citations are: Governing the Duties of Swap Dealers, 75 FR 71397; CCO proposed rules, 75 FR 70881; and Conflict-of-Interest Standards by Swap Dealers, 75 FR 71391. The Commission submitted these proposing releases to the Office of Management and Budget (OMB) for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. The Commission requested that OMB approve, and assign a new control number for, the collections of information covered by the proposing releases.

[943] *See* Adaptation of Regulations to Incorporate Swaps, 76 FR 33066, Jun. 7, 2011. The Commission requested that OMB approve amendments to existing collections of information in connection with this proposal.

[944] ETA May 4 Letter.

[945] *Id.,* at 8.

Commission staff during consultations that they were already providing counterparties with scenario analysis, at no extra charge.[946] Therefore, considering what swap dealers have represented the current landscape to be, any ''paperwork'' associated with scenario analysis should already be passed along to today's end-user. Moreover, to address counterparty concerns about costs and delay, the final rules will require scenario analysis only when requested by the counterparty for any swap not available for trading on a DCM or SEF and only from swap dealers, not major swap participants. In other circumstances, a swap dealer will have to notify its counterparty of the right to receive a scenario analysis. Thus, any pass-through costs for scenario analysis will be borne by those end-users that elect to receive it.

Regardless, for purposes of this PRA analysis, these collections are part of the overall (1) supervision, compliance and recordkeeping requirements imposed by the Commission in the Business Conduct Standards—Internal rulemakings[947] and (2) recordkeeping, reporting and daily trading records requirements under §§ 1.31 and 1.35 of the Commission Regulations (17 CFR 1.31 and 1.35).[948] By their terms, these rules are part of the supervision, compliance and recordkeeping requirements that are provided for under the Business Conduct Standards–Internal rulemaking and the rulemaking adapting §§ 1.31 and 1.35 to swap transactions, and those rulemakings are compliant with PRA.

C. Cost-Benefit Considerations

Section 15(a) of the CEA requires the Commission to consider the costs and benefits of its action before promulgating a regulation under the CEA.[949] In particular, the costs and benefits of the proposed Commission action shall be evaluated in light of the following five considerations: (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. The Commission has considered the costs and benefits of its business conduct standards rulemaking as part of the deliberative rulemaking process and discussed them below and throughout the preamble.

The final rules in this adopting release implement Section 4s(h) of the CEA, which provides the Commission, subject to certain statutory requirements, with both mandatory and discretionary rulemaking authority to impose business conduct standards requirements on swap dealers and major swap participants in their dealings with counterparties, including Special Entities. Many of the final rules in this adopting release are mandated by Section 731 of the Dodd-Frank Act, leaving the Commission with little or no discretion to consider any alternatives where the statute prescribes particular requirements. Therefore, in many cases, the Commission's final regulations adhere closely to the enabling language of the statute. For example, the statute directs the Commission to adopt rules requiring swap dealers and major swap participants to verify that counterparties meet eligibility criteria, disclose material information about contemplated swaps to counterparties, including the material risks and characteristics of the swap, and incentives and conflicts of interest that the swap dealer or major swap participant may have in connection with the swap. The Commission also must adopt rules that require swap dealers and major swap participants to provide counterparties with a daily mark for swaps and establish a duty for swap dealers and major swap participants to communicate in a fair and balanced manner based on principles of fair dealing and good faith. In formulating the final mandatory rules, the Commission adopted approaches that mitigate the potential costs while maintaining fidelity to the congressional intent behind Section 731 the Dodd-Frank Act.

In adopting rules using its discretionary authority, the Commission has acted consistently with the intent of Congress as expressed in Section 4s(h)(3)(D) to establish business conduct standards that the Commission determines are appropriate in the public interest, for the protection of investors or otherwise in furtherance of the purposes of the CEA.[950] The discretionary rules include confidential treatment of counterparty information, institutional suitability, ''know your counterparty,'' scenario analysis and pay-to-play restrictions. The discretionary rules reflect the Commission's expertise in establishing and overseeing an effective regulatory scheme for derivatives market professionals and appropriate harmonization with existing business conduct standards across market sectors. The final rules strike an appropriate balance between protecting the public interest and providing a workable compliance framework for market participants.

Section 731 of the Dodd-Frank Act, which added new Section 4s(h) to the CEA, gave the Commission broad new authority to set business conduct standards rules for swap dealers and major swap participants in response to abuses in the unregulated derivatives markets. Among the abuses were those that targeted Special Entities, such as municipalities and school districts, which led to the heightened protections for Special Entities in Sections 4s(h)(4) and (5). These abuses have been the subject of congressional hearings, regulatory enforcement actions and private litigation. Section 4s(h) is aimed at reversing a caveat emptor trading environment and providing transparency in dealings between swap dealers or major swap participants and their counterparties. Transparency is enhanced through: Mandatory pre-trade disclosures of material information and a daily mark; communications based on principles of fair dealing and good faith; and Special Entity provisions to ensure that swap transactions are in the ''best interests'' of the Special Entity. Congress also included a robust anti-fraud provision that applies to swap dealers and major swap participants in their dealings with counterparties.

As contemplated by Congress through its grant of broad discretionary authority, the Commission supplemented the mandatory provisions in Section 4s(h) to limit the ability of

[946] *See* proposing release, 75 FR at 80645.

[947] The Business Conduct Standards—Internal rulemakings referenced in the proposing release and their proposing release citations are: Governing the Duties of Swap Dealers, 75 FR 71397; CCO proposed rules, 75 FR 70881; and Conflict-of-Interest Standards by Swap Dealers, 75 FR 71391. The Commission submitted these proposing releases to the Office of Management and Budget (OMB) for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. The Commission requested that OMB approve, and assign a new control number for, the collections of information covered by the proposing releases.

[948] *See* Adaptation of Regulations to Incorporate Swaps, 76 FR 33066, Jun. 7, 2011. The Commission requested that OMB approve amendments to existing collections of information in connection with this proposal.

[949] 7 U.S.C. 19(a).

[950] In exercising its broad discretionary authority under Section 4s(h), the Commission was guided by the purposes of the CEA contained in Section 3. Section 3 explicitly includes among the purposes of the CEA ''to protect all market participants from fraudulent or other abusive sales practices * * *'' and ''to promote * * * fair competition * * * among * * * market participants.'' The final business conduct standards accomplish that by holding swap dealers and major swap participants to fair dealing standards and by providing counterparties with tools necessary to negotiate effectively with swap dealers and major swap participants and make informed trading decisions. *See also* Sections 4s(h)(1)(D), 4s(h)(5)(B) and 4s(h)(6) of the CEA.

dealers to employ abusive practices that could disadvantage market participants that are less sophisticated or have less market power. The final rules endeavor to protect market participants and the public without unduly restricting access to the important risk management tools and investment opportunities provided by swap markets. The final rules are informed by extensive consultations with relevant federal and foreign regulators and stakeholders. Where possible, the rules are harmonized with requirements in related market sectors, industry best practice recommendations and SRO rules.

The Commission received comments regarding the potential costs and benefits of the proposed rules, which are discussed in detail above in each section of the preamble relating to the rules. The Commission considered these comments in adopting the final rules. The benefits of the final rules identified by commenters and the Commission include: (1) Enhanced transparency and reduced information asymmetries among market participants resulting from required disclosures and communications standards; (2) principles based duties that are sufficiently flexible to address emerging compliance issues; (3) Special Entity provisions to protect taxpayers, pensioners and charitable institutions from abusive practices; (4) a compliance framework and mechanisms, including safe harbors, that facilitate information flow and market access, mitigate costs and enhance legal certainty, while raising business conduct standards consistent with legislative intent; and (5) regulatory harmonization of existing business conduct standards and best practices in related market sectors and among dealers, including consideration of SRO guidance for comparable principles based rules.

The costs identified by commenters include assertions that: (1) Required disclosures are costly both in resources and possible delays, and could create potential liability unless disclosure can be standardized with appropriate safe harbors; (2) requiring swap dealers and major swap participants to make suitability evaluations of counterparties for specific trades will increase transaction costs and may create execution delays (both when a counterparty with an established relationship with a given swap dealer elects to begin trading a product outside of that relationship and a counterparty with no such relationship looks to begin trading with a given dealer); (3) principles based rules may expose swap dealers and major swap participants to potential compliance risk in both enforcement and private rights of actions; as a result, swap dealers and major swap participants will pass the costs of added risk to their counterparties or there will be fewer possible swap dealer trading relationships, which could reduce liquidity; (4) execution delay and the chilling of trading activity may result as the rules will interfere with the flow of information between swap dealers or major swap participants and counterparties and impose barriers to efficient execution of transactions and possibly create moral hazard; and (5) the cost and risks to Special Entities may increase if dealers avoid such counterparties, and sophisticated Special Entities may not need the protections provided by the rules.

The Commission considered the comments it received and, as discussed in detail in the various sections of the preamble above, and as highlighted below, has taken steps to mitigate the costs and lower the burdens to the extent possible while also achieving the regulatory objectives of the Dodd-Frank Act. For example, the final rules in this adopting release allow compliance on a relationship basis rather than a transaction basis, when appropriate, to meet disclosure and due diligence duties. In addition, whenever possible, the Commission provides guidance in complying with the principles based statutory disclosure duties, which should reduce the burdens of complying with such obligations. The Commission also confirmed that certain business conduct standards rules will not apply to swaps executed on a SEF or DCM where the swap dealer or major swap participant does not know the identity of the counterparty prior to execution, including verification of eligibility, disclosures and Special Entity requirements. Finally, the Commission created safe harbors where appropriate, including an affirmative defense for swap dealers and major swap participants to a non-scienter fraud claim, and, for non-scienter violations of the other rules, the Commission will consider good faith compliance with policies and procedures in exercising its prosecutorial discretion if such policies and procedures are reasonably designed to comply with the requirements of any particular rule.

The Commission has considered the costs and benefits of the final rules in this adopting release pursuant to Section 15(a) of the CEA, including the comments it received relating to potential costs and benefits of each rule, where applicable. A discussion of the final rules in light of the Section 15(a) considerations is included below. In some cases, the Section 15(a) discussions apply to clusters of rules where the rules have a common purpose and shared costs and benefits. For example, the rules requiring disclosure of material information (risks, characteristics, incentives and conflicts of interest) have the common purpose of providing information to counterparties in a manner sufficient to enable counterparties to assess transactions before assuming the associated risks. The costs and benefits of providing such disclosures are similarly shared and, therefore, are addressed together to fully appreciate their cumulative effects. The Commission has indicated with respect to each rule how it has analyzed the five considerations in Section 15(a) of the CEA.

With respect to quantification of the costs and benefits of the final business conduct standards rules, the Commission notes that, because the Dodd-Frank Act establishes a new regulatory regime for the swaps market, there is little or no reliable quantitative data upon which the Commission can evaluate, in verifiable numeric terms, the economic effects of the final business conduct standards rules. No commenters presented the Commission with verifiable data pertinent to any of the proposed rules, stated whether such verifiable data exists, or explained how such cost data or any empirical analysis of that data would inform the choice of implementation pursuant to a specific provision of the Dodd-Frank Act or whether such data and resultant empirical analysis is ascertainable with a degree of certainty that could inform Commission deliberations.[951]

[951] For example, with respect to potential costs associated with restrictions on information flows from dealers to their counterparties and increased reliance by counterparties on dealers, there is no clear means of quantification because of the difficulty in designing metrics for these potential costs. In addition, because there is no historical period in which similar rules were in effect, there remains the formidable (and costly) challenge of comparing the current environment to the post-rule environment. This challenge is compounded by the likelihood that the effect of the rule will differ across dealers and across counterparties. Quantification of the potential delays in swap execution and higher associated fees faces similar challenges, including lack of available data over which to measure the effect (if any) of such delays. The combination of these factors makes it impractical to determine reliable estimates of these types of costs. Moreover, no commenters provided verifiable estimates. As a consequence, the discussion of these potential costs is undertaken in qualitative terms.

The Commission recognizes that the business conduct standards rules impose certain compliance costs, most of which are the result of statutory mandates. Generally, the costs are anticipated to be incremental, because they are associated with existing, highly complementary compliance burdens imposed by the SEC or prudential

Commenters did not provide any verifiable cost estimates.[952]

1. Section 23.402(a)—Policies and Procedures To Ensure Compliance and Prevent Evasion and Section 23.402(g)—Record Retention

a. Benefits

Section 23.402(a) requires that swap dealers and major swap participants (1) have written policies and procedures to ensure compliance with subpart H of part 23 and to prevent evasion of any provision of the CEA or Commission Regulations, and (2) implement and monitor compliance with such policies and procedures as part of their supervision and risk management requirements as specified in subpart J of part 23. Section 23.402(g) requires that swap dealers and major swap participants create a record of their compliance with subpart H and retain records in accordance with subpart F and § 1.31. As a result, the requirements of § 23.402(a) and (g) are part of the overall supervision, compliance and recordkeeping regime established in Section 4s of the CEA and as implemented in the relevant internal business conduct standards rulemakings. As such, the costs and benefits of § 23.402(a) and (g) discussed herein are part of the overall costs and benefits of the related internal business conduct standards requirements as discussed in connection with those rulemakings[953] and are a function of the requirements in the other rules that comprise subpart H. In this way, § 23.402(a) and (g) facilitates compliance with all of the subpart H business conduct standards rules.

Although difficult to quantify, robust policies and procedures and documentation requirements will benefit all market participants.[954] Swap dealers and major swap participants will benefit because, in the absence of fraud, the Commission will consider good faith compliance with policies and procedures reasonably designed to comply with the business conduct standards rules as a mitigating factor when exercising its prosecutorial discretion for violation of the rules.[955] In addition, swap dealers and major swap participants will be able to rely on their policies and procedures to demonstrate compliance with subpart H in connection with their registration applications.[956] The requirement to document compliance with the business conduct standards rules will reduce misunderstandings and complaints between swap dealers or major swap participants and counterparties. Robust compliance procedures will also benefit counterparties by encouraging a culture of compliance that will help to ensure that swap dealers and major swap participants deliver the protections intended by Section 4s(h). Section 23.402(a) also requires swap dealers and major swap participants to have policies and procedures to prevent evasion of the CEA and Commission Regulations. Such policies and procedures will assist regulators in ensuring that the intent of Congress, particularly through the Dodd-Frank Act amendments, is abided and that the Commission's jurisdictional markets are not used to circumvent regulatory requirements, including by engaging in fraud or other abuses.[957] Implementing anti-evasion policies and procedures as part of the supervision, risk management and compliance regimes of swap dealers and major swap participants should benefit swap markets by enhancing transparency and encouraging participation.

b. Costs

While there will be costs associated with establishing, implementing, testing, reviewing and auditing compliance with policies and procedures, the Commission expects these costs to be incremental. Many swap dealers and major swap participants are already subject to comprehensive supervision, compliance and recordkeeping requirements imposed in related regulated market sectors, including futures, banking and securities. Therefore, the additional costs will be limited to adapting existing policies and procedures to accommodate these new requirements. Regardless, the costs will be an incremental part of a swap dealer's or major swap participant's overall risk management program as required under subpart J and may be tailored to the swap related business conducted by a particular swap dealer or major swap participant.

Similarly, there will be costs associated with record retention, including the costs of creating a record of compliance and storing it. To mitigate these costs, the Commission has confirmed that counterparty relationship documentation containing standard form disclosures, other material information and counterparty representations may be part of the written record of compliance with the external business conduct rules that require certain disclosures and due diligence. Further, swap dealers and major swap participants may choose to

regulators. These existing regulations, however, are not uniformly applied across the entire dealer community. As a consequence, certain dealers are expected to face higher compliance costs than others. The lack of dealer-specific information (*e.g.,* on current staffing levels and those levels envisioned as being necessary for compliance with the rule) prevents reliable estimation of these costs, and no such information was provided to the Commission during the comment period.

[952] One late-filing commenter recently provided the Commission with a report to support its position that cost-benefit considerations compel excluding entities ''engaged in production, physical distribution or marketing of natural gas, power, or oil that also engage in active trading of energy derivatives''—termed ''nonfinancial energy companies'' in the report—from regulation as swap dealers, including this final rulemaking. See NERA Dec. 20 letter, at 1. Based on responses to an anonymous survey of an unspecified number of firms identified only in the aggregate as nonfinancial energy companies that ''could be captured'' under the swap dealer definition, the report estimates that nonfinancial energy companies would incur certain initial and recurring regulatory compliance costs relevant to this rulemaking. As indicated in fn. 951, the Commission recognizes the potential for compliance costs associated with this rule to fall disproportionately across all swap dealers. The final rule attempts to minimize these burdens overall while remaining consistent with statutory intent.

[953] Because the firm-wide supervision, compliance, and recordkeeping functions are all accounted for in the Business Conduct Standards—Internal Rulemakings (*see* Governing the Duties of Swap Dealers, 75 FR 71397; CCO proposed rules, 75 FR 70881; and Conflict-of-Interest Standards by Swap Dealers, 75 FR 71391) and § 1.31 (*see* Adaptation of Regulations to Incorporate Swaps, 76 FR 33066, Jun. 7, 2011), and these policies and procedures and record retention provisions are subsets of the overall supervision, compliance and recordkeeping functions of the swap dealer or major swap participant, the Commission also has considered the costs and benefits of these rules in connection with those other rulemakings.

[954] This benefit is enhanced by the Commission requirement that recordkeeping policies and procedures ensure that records are sufficiently detailed to allow compliance officers and regulators to determine compliance.

[955] In particular, in connection with allegations of fraud under § 23.410(a)(2) and (3) (for violations of the fraud provisions under subpart H), final § 23.410(b) provides that a swap dealer or major swap participant may establish an affirmative defense against allegations of violations of final § 23.410(a)(2) and (3) by demonstrating that it did not act intentionally or recklessly and complied in good faith with written policies and procedures reasonably designed to meet the particular requirement that is the basis for the alleged violation.

[956] As part of the materials submitted in an application for registration as a swap dealer or major swap participant, an applicant may submit its written policies and procedures to ''demonstrate, concurrently with or subsequent to the filing of their Form 7–R with the National Futures Association, compliance with regulations adopted by the Commission pursuant to section[] * * * 4s(h) * * * of the [CEA] * * *.'' The Commission adopted final registration rules on the same day as these business conduct standards rules. *See also* proposed § 3.10(a)(1)(v)(A), Proposed Rules for Registration of Swap Dealers and Major Swap Participants, 75 FR 71379.

[957] *See* Section 747 of the Dodd-Frank Act.

use internet based applications to provide disclosures and daily marks.[958]

c. Section 15(a) of the CEA

In light of the foregoing, the Commission has evaluated the costs and benefits of final § 23.402(a) and (g) pursuant to the five considerations identified in Section 15(a) of the CEA as follows:

i. Protection of Market Participants and the Public

The Commission believes that the § 23.402(a) policies and procedures and record retention requirements, which are part of the overall supervision, risk management and compliance systems of swap dealers and major swap participants included in subparts F and J of part 23, reinforce subpart H's protections for swap market participants and the public by promoting compliance with subpart H and discouraging evasion of regulatory requirements. The costs of compliance are incremental and do not diminish the intended benefits of the business conduct standards rules for market participants.

ii. Efficiency, Competitiveness and Financial Integrity

The Commission believes that effective internal risk management and oversight protects the financial integrity of the critical market participants—individual swap dealers and major swap participants. Their financial integrity, in turn, promotes the financial integrity of derivatives markets as a whole by fostering confidence in financial system stability. Additionally, the Commission believes that § 23.402(a) will enhance the efficiency and competitiveness of markets to the extent that swap dealers and major swap participants have sound risk management programs.

Accurate recordkeeping is foundational to sound risk management and the financial integrity of swap dealers and major swap participants. The recordkeeping rules, including § 23.402(g), will enhance confidence in the financial integrity of the market and encourage participation by avoiding misunderstandings and reducing the potential for disputes between counterparties and evasion of regulatory requirements. Documentation will facilitate compliance reviews and Commission enforcement actions for failure to comply with disclosure, due diligence and fair dealing requirements.

iii. Price Discovery

The Commission does not believe that § 23.402(a) and (g) will have a material impact on price discovery.

iv. Sound Risk Management Practices

The policies and procedures and record retention provisions in § 23.402(a) and (g) which apply principally to counterparty relationships of swap dealers and major swap participants are subsets of the overall supervision, compliance, recordkeeping and risk management functions of the swap dealer or major swap participant (as accounted for in the Business Conduct Standards—Internal rulemakings).[959] The Commission believes that proper recordkeeping is essential to risk management because it facilitates an entity's awareness of its swap business. Such awareness supports sound internal risk management policies and procedures by ensuring that decision-makers within swap dealers and major swap participants are fully informed about the entity's activities, including its dealings with counterparties, and can take steps to mitigate and address significant risks faced by the entity. When individual market participants engage in sound risk management practices, the entire market benefits. On the other hand, compliance with these policies and procedures and recordkeeping requirements is likely to require investment in recordkeeping, as well as front office and back office systems. The costs associated with this investment might otherwise be used to enhance other aspects of a firm's risk management program.

v. Other Public Interest Considerations

The Commission has not identified any other public interest considerations in connection with § 23.402(a) or (g).

2. Section 23.402(b)—Know Your Counterparty; Section 23.402(c)—True Name and Owner; and Section 23.434—Recommendations to Counterparties—Institutional Suitability

a. Benefits

The Commission is promulgating certain due diligence rules for swap dealers pursuant to its discretionary authority under Section 4s(h) that further the purposes of the Dodd-Frank Act business conduct standards provisions. These final rules are §§ 23.402(b)—Know your counterparty, 23.402(c)—True name and owner, and 23.434—Institutional suitability (collectively, the ''due diligence rules'').

Sections 23.402(b) and 23.402(c) require a swap dealer to use reasonable due diligence to obtain and retain a record of the essential facts concerning each counterparty whose identity is known to the swap dealer prior to the execution of the transaction and the authority of any person acting for such counterparty. Final § 23.434 requires swap dealers making recommendations to undertake reasonable diligence to understand the potential risks and rewards of the swap or trading strategy and to have a reasonable basis to believe that the swap is suitable for the counterparty.

All of the due diligence rules confer similar benefits in that they protect the public and market participants by requiring swap dealers to have essential information about their counterparties prior to entering into transactions and, to the extent they are making a recommendation, understand the trading objectives and characteristics of the counterparty. While not readily amenable to quantification, the benefits of the rules are significant. The rules are designed to prevent the potentially considerable costs for the counterparty (and incidentally the swap dealer when a counterparty is unable or unwilling to cover losses) of entering into unsuitable transactions. Such costs include losses associated with the position, generally, and the costs (at times considerable) of both exiting the position and establishing a new position, recognizing that the discovery of an ''unsuitable'' trade is more likely to occur during a period of market stress, which may magnify these costs. In this way, the due diligence rules are an integral component of the business conduct standards that are, in large part, designed to ensure that the counterparties and dealers understand the swap or trading strategy and place the dealer and counterparty on equal footing with respect to the risks and rewards of a particular swap or trading strategy.

The Commission believes that the due diligence rules will secondarily benefit dealers and regulators by requiring that a dealer be able to document essential information about its counterparties and any swaps or trading strategies that it recommends. While not a quantifiable benefit, documentation will facilitate effective review of a recommendation's suitability and render such recommendations less susceptible to ''second-guessing,'' as well as review of the authority of its counterparty to enter into transactions. The due diligence

[958] Swap dealers and major swap participants will have to retain a record of all required information irrespective of the method used to convey such information.

[959] *See* Governing the Duties of Swap Dealers, 75 FR 71397; CCO proposed rules, 75 FR 70881; Conflict-of-Interest Standards by Swap Dealers, 75 FR 71391; and § 1.31 (*see* Adaptation of Regulations to Incorporate Swaps, 76 FR 33066).

rules relate to the risk management systems of the swap dealer making explicit the requirement that the swap dealer obtain facts required to implement the swap dealer's credit and operational risk management policies in connection with transactions entered into with the counterparty. The due diligence rules also harmonize the requirements for market professionals in related market sectors, including futures, securities and banking. An ancillary public interest benefit of such rules in those related markets has been their deterrence of counterparty misconduct, including, for example, unauthorized trading and money laundering.

b. Costs

The primary costs of final §§ 23.402(b), (c) and 23.434 are associated with obtaining information necessary to identify the counterparty, conducting any required due diligence before making a recommendation and maintaining records of essential customer information and suitability determinations. The Commission believes these costs are mitigated by at least five factors. First, as stated above, many of the dealers subject to these rules have long been subject to similar obligations under either NFA rules or the mandates of regulatory authorities in other markets, including banking and securities.[960] As such, the incremental costs of complying with the Commission's final rules are likely to be insignificant. Indeed, the Commission confirmed that it would consider SRO interpretations of analogous provisions, as appropriate, when assessing compliance with the due diligence rules by swap dealers.[961] Second, in response to the comments it received, the Commission elected to promulgate several cost-mitigating alternatives to the proposed due diligence rules. For example, the Commission made clear that a dealer could fulfill its counterparty-specific suitability obligations through certain representations from the counterparty. Third, the Commission provided additional guidance, including a detailed explanation of what is likely and, as importantly, unlikely to constitute a ''recommendation'' within the meaning of final § 23.434. The guidance is included in the preamble to the final rules as well as in Appendix A to subpart H of part 23 of the Commission's Regulations. Fourth, the Commission made clear that a determination of whether a dealer acted in compliance with the rules is an objective inquiry based on a consideration of all the relevant facts and circumstances surrounding a particular recommendation. Fifth, the Commission set forth various safe harbors from which a dealer could demonstrate compliance. In these and other ways, the Commission believes that it has taken meaningful steps to minimize the risks and costs of compliance and any ancillary costs associated with, for example, vexatious litigation by a counterparty experiencing buyer's remorse.

Commenters expressed concerns about potential costs of the due diligence rules. They claimed that the proposed due diligence requirements would interfere with efficient execution of transactions if required on a transaction-by-transaction basis. The proposed rules also may have disadvantaged counterparties by requiring them to provide confidential information to swap dealers that could be used against them in negotiations or misappropriated by swap dealers. The Commission has made a number of changes in the final rules to mitigate those costs. For example, the Commission clarified that the due diligence requirements can be satisfied on a relationship basis, where appropriate, in accordance with final § 23.402(d), through representations from the counterparty that can be contained in counterparty relationship documentation. The Commission also amended the requirements in the ''know your counterparty'' rule to align with the arm's length nature of the relationship between swap dealers and counterparties. In addition, the Commission adopted a confidential treatment rule, § 23.410(c), that protects confidential counterparty information from disclosure and use that would be materially adverse to the interests of the counterparty.

c. Section 15(a) of the CEA

In light of the foregoing, the Commission has evaluated the costs and benefits of the final due diligence rules pursuant to the five considerations identified in Section 15(a) of the CEA as follows:

i. Protection of Market Participants and the Public

The final due diligence rules, although discretionary, are important components of the business conduct standards regime that Congress mandated to add to the integrity of the swaps market. By codifying and, in some cases, enhancing current market practices, the final rules provide protections for counterparties. More specifically, the rules protect market participants and the public from the risks attendant to swap dealers subrogating customers' interests to increase the dealer's own profit maximizing interests by selling unsuitable swaps or trading strategies. The requirement that dealers make suitable recommendations, together with the requirement that swap dealers know their counterparty, should help to ameliorate the risks associated with unfair dealing. Taken together, these practices should also help regulators perform their functions in an effective manner. The informational and diligence costs associated with this rulemaking are incremental and do not diminish these benefits.

ii. Efficiency, Competitiveness and Financial Integrity

A frequent criticism of the swaps market leading up to the 2008 financial crisis was that dealers engaged in self-dealing to the detriment of customers and counterparties, such as by offering swaps and trading strategies that the dealers knew were unsuitable for the specific counterparty.[962] Recommending products that have no beneficial purpose other than to enrich the dealer erodes confidence in markets, which, in turn, casts doubt on the efficiency, competitiveness and financial integrity of the markets subject to the jurisdiction of the Commission.

The Commission designed these rules to achieve the intended statutory benefits set forth in the Dodd-Frank Act and concludes that any incremental costs above the statutory-baseline will not be of such magnitude so as to impede swap market efficiency, competitiveness or financial integrity of the markets.

iii. Price Discovery

To the extent the final due diligence rules, which are part of a larger business conduct standards regulatory framework, prevent the aforementioned erosion of confidence in the markets,

[960] *See, e.g.,* Section III.A.3.b. at fn. 179 discussing SRO know your customer rules; *see also* Section III.G.3. at fn. 536 discussing suitability requirements under the banking and federal securities laws.

[961] *See* Section III.A.3.b. of this release at fn. 188 discussing final § 23.402(b) (know your counterparty), Section III.F.3. of this release at fn. 500 discussing final § 23.433 (communications-fair dealing), and Section III.G.3. of this release at fn. 542 discussing final § 23.434 (recommendations to counterparties–institutional suitability).

[962] *See, e.g.,* CFA/AFR Feb. 22 Letter, at 1–4; Better Markets Feb. 22 Letter, 1–2; Sen. Levin Aug. 29 Letter, at 2–5 and 8–10; Senate Report, at 382, 397–98 and 619–24.

they also facilitate price discovery albeit indirectly.

iv. Sound Risk Management Practices

Verification and recording of counterparty identities, and carefully considered and well-documented recommendations, improve the risk management practices of a swap dealer and have concomitant benefits in that actual compliance with the final rules will help to insulate the dealer from later accusations by a disgruntled counterparty seeking to exit an unprofitable swap position by alleging, for example, that the dealer engaged in malfeasance or recklessness in recommending a swap or trading strategy. The above-acknowledged informational and diligence costs do not directly diminish these benefits.

v. Other Public Interest Considerations

The due diligence rules have the ancillary benefit of dissuading market participants from using Commission regulated derivatives markets to engage in illegal conduct in violation of other criminal laws, including money laundering and tax evasion. Swap dealers will be required to obtain certain essential information from counterparties to know their identity, their authority to trade and who controls their trading. This type of information has been helpful in related market sectors, like futures, securities and banking, in detecting and deterring such misconduct.

3. Section 23.402(d)—Reasonable Reliance on Representations

a. Benefits

Section 23.402(d) does not impose any affirmative duties on swap dealers or major swap dealers, but rather provides them with an alternative means of compliance with certain other rules under subpart H of part 23 that require due diligence.[963] In this way, the rule benefits market participants by facilitating compliance with certain of the business conduct standards rules without undermining the protections intended by the rules.

The rule allows swap dealers and major swap participants to rely on written representations from counterparties and their representatives to satisfy certain due diligence obligations unless the swap dealer or major swap participant has information that would cause a reasonable person to question the accuracy of the representation. Furthermore, representations can be made on a relationship basis in counterparty relationship documentation and need not be made on a transaction-by-transaction basis, provided that the counterparty undertakes to timely update such representations in connection with new swaps.

Swap dealers and major swap participants requested clarity about the type of information that would satisfy their due diligence obligations, and counterparties were concerned that they would be required to provide confidential financial and position information that would give swap dealers and major swap participants an unfair advantage in their swap related negotiations. Section 23.402(d), coupled with the safe harbors and guidance provided to address compliance with the due diligence rules in subpart H, will benefit all parties by streamlining the means of compliance to enable efficient execution of transactions without materially diminishing the protections intended by the Dodd-Frank Act business conduct standards.

b. Costs

Section 23.402(d) does not, by itself, impose any direct costs on market participants. The costs of this rule, if any, are indirect since the rule is only applicable where swap dealers, major swap participants and counterparties choose to rely on counterparty representations to satisfy due diligence requirements imposed by other business conduct standards rules. As such, any costs of the rule are accounted for in the analysis of the related rules. One other cost that could arise is if the swap dealer or major swap participant had information that would cause a reasonable person to question the accuracy of a representation. In that situation, the swap dealer or major swap participant could not rely on the representation without undertaking appropriate due diligence and incurring any costs associated with further inquiry. However, swap dealers and major swap participants benefit from such inquiry if it keeps them from entering into a swap under false pretenses. Moreover, if the Commission determined not to adopt the rule, the cost to swap dealers and major swap participants would be significant. Under that alternative, as one commenter asserted in connection with § 23.450—Acting as a counterparty to a Special Entity, swap dealers and major swap participants might stop entering into swaps altogether or, at the very least, pass increased costs onto their counterparties.[964]

c. Section 15(a) of the CEA

In light of the foregoing, the Commission has evaluated the costs and benefits of final § 23.402(d) pursuant to the five considerations identified in Section 15(a) of the CEA as follows:

i. Protection of Market Participants and the Public

The purpose of the business conduct standards rules is to protect market participants and the general public. Final § 23.402(d) furthers that intent by providing clear instruction on how market participants can comply with certain of those rules. The proviso that a swap dealer and major swap participant can only rely on a counterparty's representation in the absence of information that would cause them to question the accuracy of the representation protects swap dealers and major swap participants from the potentially negative consequences of entering into a swap in reliance on false information. This rule also protects counterparties by providing counterparties with control over the amount and type of information provided to a swap dealer or major swap participant.

ii. Efficiency, Competitiveness and Financial Integrity

This rule gives swap dealers and major swap participants a timely and cost-effective way to comply with their duties to counterparties. This increases the efficiency, competitiveness and financial integrity of the swaps market relative to an alternative that retains a due diligence requirement without an explicit means of compliance. Moreover, the Commission believes that the protection of proprietary information, which also is achieved through this rule, is essential for the competitiveness and integrity of derivatives markets.

[963] *See* Sections III.A.3.b., III.C., III.G., IV.B. and IV.C. in this adopting release for a discussion of the following final due diligence rules, respectively: § 23.402(b)—Know your counterparty; § 23.430—Verification of counterparty eligibility; § 23.434—Institutional suitability; § 23.440—Requirements for swap dealers acting as advisors to Special Entities; and § 23.450—Requirements for swap dealers and major swap participants acting as counterparties to Special Entities.

[964] *See* SWIB Feb. 22 Letter, at 5. The costs and benefits associated with the ability of swap dealers and major swap participants to reasonably rely on a counterparty's representations are discussed in greater detail under the cost-benefit considerations for the particular requirements to which it applies: § 23.402(c) (True Name and Owner), § 23.430 (Verification of Counterparty Eligibility), § 23.434 (Recommendations to Counterparties—Institutional Suitability), § 23.440 (Requirements for Swap Dealers Acting as Advisors to Special Entities), and § 23.450 (Requirements for Swap Dealers and Major Swap Participants Acting as Counterparties to Special Entities).

iii. Price Discovery

The Commission does not believe that § 23.402(d) will have a material impact on price discovery.

iv. Sound Risk Management Practices

The Commission does not believe that § 23.402(d) will adversely impact sound risk management practices. While the principles based nature of the rules may introduce some uncertainty into the process of complying with the due diligence business conduct standards rules, the compliance roadmap in this particular rule decreases that risk by providing an efficient means for swap dealers and major swap participants to comply with several of their pre-transactional duties.

v. Other Public Interest Considerations

The Commission has not identified any other public interest considerations in connection with § 23.402(d).

4. Section 23.402(e)—Manner of Disclosure; Section 23.402(f)—Disclosures in a Standard Format; Section 23.431—Disclosure of Material Risks, Characteristics, Material Incentives and Conflicts of Interest Regarding a Swap; Section 23.432—Clearing Disclosures; and Section 23.433—Communications—Fair Dealing

a. Benefits

Final § 23.431, which requires disclosures of material information, and the associated disclosure rules in subpart H of part 23 (the ''disclosure rules'') [965] contain the disclosure regime for swap dealers and major swap participants. These rules are fundamental to the transparency objectives of Section 4s(h) of the Dodd-Frank Act. The disclosure rules primarily benefit counterparties by requiring that swap dealers and major swap participants disclose material information regarding potential swap transactions, including material risks, characteristics, incentives, conflicts of interest, daily marks and rights relating to clearing of the swap. They also benefit counterparties by providing flexible and reliable means of compliance to take account of the nature of the swaps being offered and to avoid undue interference with the execution process.

In addition, the communications-fair dealing rule in final § 23.433 adopts the statutory language in Section 4s(h)(3)(C) and requires swap dealers and major swap participant ''to communicate in a fair and balanced manner based on principles of fair dealing and good faith.'' The fair dealing rule works in concert with the disclosure rules and the anti-fraud rules in § 23.410 (the ''abusive practices rules'') to provide transparency to market participants in dealing with swap dealers and major swap participants.[966]

While not readily amenable to quantification, the benefits of the disclosure and fair dealing rules are significant for counterparties. The disclosure rules will allow counterparties to better assess the risks and rewards of a swap and avoid swaps that are inconsistent with their trading objectives. The fair dealing rule ensures that swap dealers' and major swap participants' communications to counterparties are not exaggerated and discussions or presentations of profits or other benefits are balanced with the associated risks. The disclosure and fair dealing regime imposed by Section 4s(h) reverses the caveat emptor environment that permeated the unregulated derivatives marketplace prior to enactment of the Dodd-Frank Act and afforded little transparency or protection for either sophisticated counterparties or Special Entities. Legislative history indicates that the business conduct standards in Section 4s(h) were the result of widespread concerns about sharp practices and significant information asymmetries between swap dealers and their counterparties that created significant imbalances in their respective bargaining power and the assumption of unanticipated risks by counterparties. The disclosure and fair dealing rules implement the statutory objective of transparency for all swap transactions.

With respect to disclosures of the daily mark for uncleared swaps, the rules will provide counterparties, on a daily basis, the mid-market mark for the swap.[967] This information will provide an objective reference mark for counterparties to assist them in valuing open positions on their books for a variety of purposes, including risk management. The standard in the rule is intended to achieve a degree of consistency in the calculation of the daily mark across swap dealers and major swap participants. Such consistency will provide added transparency in pricing transactions and enhance the ability of counterparties to consider daily marks for their own valuation purposes. Counterparties will also receive from the swap dealer or major swap participant a mid-market mark along with the price of any swap prior to entering into the swap. Again, receiving the mid-market mark prior to execution of a swap will assist counterparties in assessing the price of a swap and negotiating swap terms, generally, with swap dealers and major swap participants.

The Commission believes that the disclosure rules will secondarily benefit swap dealers, major swap participants and regulators by requiring documentation of swap-related disclosures. While not a quantifiable benefit, documentation will facilitate effective supervision and compliance with required disclosures, which should reduce potential complaints, investigations and litigation. The fair dealing rule also benefits swap dealers and major swap participants by harmonizing the statutory requirements with similar protections that currently apply to registrants in the futures and securities markets.[968]

b. Costs

The primary costs of the disclosure rules are associated with implementing policies and procedures to achieve compliance with the principles based disclosure requirements, preparing and disseminating the disclosures, and maintaining records of the disclosures. The Commission expects that expenses will vary depending on the regulatory status of the swap dealer or major swap participant with financial firms regulated by prudential or securities authorities having relatively less additional costs because of existing regulatory requirements. Costs will also vary depending on the nature of the business conducted by the swap dealer considering that the process of making disclosures may be more streamlined for standardized swaps than, for example, complex bespoke swaps.

Regardless, the Commission believes that any costs associated with the disclosure rules will be incremental for

[965] Consistent with Section 4s(h)(3)(B) of the CEA, § 23.431—Disclosures of material information, requires disclosure of material risks, characteristics, material incentives, conflicts of interest and daily mark relating to a swap. Associated rules include: § 23.402(e)—Manner of disclosure; § 23.402(f)—Disclosures in a standard format; and § 23.432—Clearing.

[966] *See* Section III.F. of this adopting release for a discussion of § 23.433—Communications—Fair Dealing.

[967] The mid-market mark will not include amounts for profit, credit reserve, hedging, funding, liquidity or any other costs of adjustments.

[968] *See* NFA Interpretive Notice 9041–Obligations to Customers and other Market Participants (''Communications with the Public—Under NFA Compliance Rules 2–4 and 2–29(a)(1), all communications with the public regarding security futures products must be based on principles of fair dealing and good faith * * *.''); *see also* NASD Rule 2210(d). Final § 23.433 is also harmonized with the SEC's proposed Fair and Balanced Communications rule for SBS Entities. *See* proposed 17 CFR 240.15Fh–3(g), SEC's proposed rules, 76 FR at 42455; and SEC's proposed rules Correction, 76 FR 46668, Aug. 3, 2011.

the following reasons. First, as stated above in Section III.D. of this adopting release, many swap dealers and major swap participants subject to this scheme have long been subject to similar disclosure obligations based on informal OTC derivatives industry practice and under the mandates of regulatory authorities in related market sectors, including banking, securities and insurance. As such, the incremental cost of complying with the Commission's final rules is likely to be small relative to the overall costs of operating as a swap dealer or major swap participant.

Second, in response to comments, the Commission elected to promulgate several cost-mitigating alternatives in the final disclosure rules. For example, the Commission made clear that a swap dealer or major swap participant could fulfill its disclosure obligations by any reliable means agreed to in writing by the counterparty. In addition, disclosures applicable to multiple swaps may be made in counterparty relationship documentation or other written agreements rather than on a transaction-by-transaction basis. The scenario analysis rule was revised from mandatory to elective and limited to swaps that are not made available for trading on a DCM or SEF. Further, anonymous transactions initiated on a SEF or DCM are exempt from the pre-transaction disclosure requirements.

Third, the Commission provided additional guidance in response to comments regarding many aspects of the disclosure scheme, including manner of disclosure, disclosures in a standard format, material risks, scenario analysis, material characteristics, material incentives, conflicts of interest, daily mark and clearing issues. Fourth, the Commission made clear that in exercising its prosecutorial discretion for disclosure violations, it would consider whether the swap dealer or major swap participant had complied in good faith with policies and procedures reasonably designed to comply with the particular disclosure requirement. In these and other ways, the Commission believes that it has taken meaningful steps to minimize the risks and costs of compliance and any ancillary costs associated with, for example, private rights of action by counterparties unhappy with a particular swap transaction.

The Commission is allowing swap dealers and major swap participants to satisfy their disclosure obligations, where appropriate, on a relationship basis, as opposed to a transaction-by-transaction basis as a way of avoiding trading delays and the associated costs. However, in certain instances, consistent with the statutory requirement that swap dealers and major swap participants disclose information about the material risks and characteristics of the swap, the disclosure obligation will require supplements to standardized disclosures that are, to a degree, tailored to the individual transaction under consideration. The costs and benefits of these types of transaction-specific disclosures are considered relative to a case where material risk disclosure, as required under the statute, is accomplished at a level less granular than that which tailors such disclosure to a particular swap type. In addition, since the requirement for scenario analysis, through its value for illustrating material risk, is made at the discretion of the Commission, its associated costs and benefits are discussed relative to the absence of such a requirement.

Commenters also identified costs associated with the fair dealing rule. One commenter asserted that the principles based nature of the proposed fair dealing rule had the potential to impose costs on swap dealers and major swap participants including costs resulting from compliance risk.[969] As discussed in the introduction to this Section VI.C. of this adopting release, such costs are not readily subject to quantification. Another commenter requested that the Commission clarify the standards for communication by reference to existing SRO standards applicable in related market sectors.[970]

In response to commenters, the Commission clarifies in this adopting release that it will consider NFA guidance when interpreting § 23.433.[971] The Commission believes harmonizing with existing SRO rules and precedents in the futures and securities markets diminishes the potential costs associated with legal uncertainty. Furthermore, the Commission clarifies in this adopting release that, in the absence of fraud, the Commission will consider good faith compliance with policies and procedures reasonably designed to comply with the fair dealing rule as a mitigating factor when exercising its prosecutorial discretion in connection with a violation of § 23.433.

c. Section 15(a) of the CEA

In light of the foregoing, the Commission has evaluated the costs and benefits of the final disclosure rules and the fair dealing rule pursuant to the five considerations identified in Section 15(a) of the CEA as follows:

i. Protection of Market Participants and the Public

The principal purpose of the disclosure rules is to protect market participants and the public by making swaps more transparent to enable counterparties to better assess the risks and rewards of entering into a particular transaction. The disclosure rules are a core component of the overall business conduct standards regime imposed in Section 4s(h) of the Dodd-Frank Act.

In determining how to implement the statutory disclosure requirements, the Commission considered certain negative externalities that may be created by requiring swap dealers and major swap participants to provide transaction specific disclosures. One risk is that requiring such disclosures by swap dealers and major swap participants could create disincentives to counterparties for performing their own independent assessments of a transaction under consideration. As a result, there is an increased likelihood that any insufficiencies in the information provided by swap dealers and major swap participants that are not easily discernible at the time the disclosure is made could impact an expanded class of market participants in a similar way. For instance, the model risk borne by swap dealers and major swap participants may be transferred onto a broader set of market participants.

In addition, transaction-specific disclosures, generally, and specifically those based on model outputs (*e.g.,* certain scenario analyses) require ongoing validation to ensure their sufficiency, accuracy and relevance. To the extent that the level of these validation efforts varies across swap dealers and major swap participants, the risk of relative insufficiencies or omissions in disclosure borne by the counterparties reliant on this information will vary correspondingly.

Because the disclosure rules are principles based, the quality of policies and procedures adopted by swap dealers and major swap participants will play a significant role in determining the sufficiency, accuracy and relevance of the disclosures made to counterparties. Moreover, some of the disclosures are models-based, whether through disclosures of a given product's sensitivity to certain market risk factors or the performance of the product during different scenario events or episodes. Policies and procedures, generally, and especially those governing models require ongoing

[969] NY City Bar Feb. 22 Letter, at 3.

[970] FHLBanks Feb. 22 Letter, at 6.

[971] *See* Section III.F.3. of this adopting release for a discussion of final § 23.433 and NFA guidance.

validation to ensure their sufficiency, accuracy and relevance. The consequences of varying levels of supervision, to the extent that these levels vary in their ability to preserve the sufficiency, accuracy and relevance of the disclosures, will be borne by counterparties. Any such differences in supervisory efforts, to the extent they are allowed to persist, lessen the degree to which counterparties can rely on the information being provided to them. To mitigate these concerns, the Dodd-Frank Act imposes robust supervision and compliance requirements on swap dealers and major swap participants, which are implemented in subpart J of part 23. In subpart H, and in guidance in this adopting release, the Commission has endeavored to clarify the relationship between swap dealers and major swap participants, on the one hand, and counterparties on the other to discourage undue reliance and to incentivize counterparties to engage in appropriate due diligence before entering into swaps.

Transaction-specific information is certainly valuable to the counterparty to assess the relative merits of a prospective transaction. Through economies of scale, swap dealers and major swap participants may be better positioned to provide these disclosures (as opposed to the counterparty discovering the information itself). In other words, swap dealers and major swap participants may be the lowest-cost provider of this information. As a result, efficiency gains may be realized by requiring swap dealers and major swap participants to disseminate this information. The fact that commenters point to significant information advantages enjoyed by swap dealers and major swap participants over their counterparties supports this lowest-cost solution.

Additionally, the fair dealing rule protects market participants and the public by requiring that communications between swap dealers or major swap participants and their counterparties are conducted based on principles of fair dealing and good faith. The rule raises the standard for communications in the previously unregulated swaps market and encourages confidence in the swap market by market participants and the public. The fair dealing rule, particularly in conjunction with the disclosure rules, ensures that market participants have information necessary to assess the risks and rewards of a swap when dealing with swap dealers and major swap participants, which have had informational advantages over their counterparties by virtue of their roles in the marketplace.

ii. Efficiency, Competitiveness and Financial Integrity

Commenters raised concerns that requiring material information disclosure prior to execution may delay execution, increase market risk and adversely affect efficiency. Further, the required disclosures may result in proceedings or litigation, which could test the financial integrity of certain swap market participants.

The Commission has designed the disclosure rules to minimize potential inefficiencies and anti-competitive results, and to bolster financial integrity. For example, the rules allow disclosures to be made by any reliable means agreed to by the counterparty. In addition, risk disclosures in a standard format may be included in counterparty relationship documentation or other written agreements between the parties. Scenario analysis is elective rather than mandatory. Moreover, because the disclosure rules are principles based, the Commission will take into account whether reasonably designed policies and procedures are in place prior to exercising its prosecutorial discretion when considering violations of the disclosure rules.

The fair dealing rule principally protects counterparties; however, there are additional benefits for markets. The fair dealing rule, particularly when considered with the abusive practices rules and the disclosure rules, improves transparency and discourages abusive practices, and thereby encourages participation in the market, which contributes to liquidity, efficiency and competitiveness in the marketplace. Furthermore, the fair dealing rule assists market participants to assess potential risk in connection with a swap and make more informed decisions consistent with their trading objectives.

iii. Price Discovery

Transaction specific disclosures may, to a degree, cause delays in execution. These delays may occur either when a counterparty with an established relationship with a given swap dealer or major swap participant elects to begin trading a product outside of that relationship or a counterparty with no such relationship looks to begin trading with a given swap dealer or major swap participant. These delays may have negative consequences on liquidity, potentially subjecting counterparties to heightened transaction costs. Moreover, these delays may be pro-cyclical, meaning that they increase during times of heightened market volatility. In recognition of the potential for these delays, the Commission adopted several procedural provisions to mitigate adverse consequences, including (1) allowing, where appropriate, disclosures to be made at the relationship level as opposed to the transaction level, (2) allowing certain oral disclosures if agreed to by the counterparty and confirmed in writing, (3) making Web site-based disclosures (password-protected if for the daily mark) available, and (4) allowing swap dealers and major swap participants to partner with DCMs, SEFs, and/or third-party vendors to make certain disclosures.

To the extent that delays in execution foster a more complete assessment of the merits of a particular transaction, the likelihood of after-the-fact realizations of ill-conceived positions may be reduced as well as any trading activity these realizations encourage. To the extent that this trading activity impacts market volatility, its reduction has positive implications for price discovery. Moreover, since these realizations are more likely to occur during periods of market stress, the corresponding benefit of their reduction may be elevated during such periods.

As stated in the price discovery consideration of final § 23.410, the fair dealing rule benefits counterparties but also provides added benefits for markets.[972] The fair dealing rule requires swap dealer and major swap participant communications to be fair and balanced and restricts misleading or other potentially abusive communications that could undermine the price discovery function of the swap market.

iv. Sound Risk Management Practices

Presumably, exercising the opt-in feature for scenario analysis will impart some cost to the counterparty. This cost will depend on the specificity of the analysis being requested and will be paid through some combination of delayed execution and/or higher fees. The rule attempts to mitigate these costs by making scenario analysis optional on the part of the counterparty as it is under current industry practice. Moreover, exercising this feature signals that the counterparty values the information provided by the analysis and, therefore, is willing to bear the associated costs. In contrast, a policy of mandatory scenario analysis forces this cost to be borne, to varying degrees, by

[972] *See* Section VI.C.5.c.iii. of this adopting release for a discussion of price discovery considerations of final § 23.410—Prohibition on fraud, manipulation and other abusive practices.

all market participants, even though the corresponding benefit to a subset of those participants may be at or near zero. As a result, the final scenario analysis provision furthers a primary objective of the Dodd-Frank Act by encouraging sound risk management practices among market participants without unduly imposing costs.

Consistent with the statutory framework in Section 4s(h), whether standard form or particularized disclosures are sufficient in any given case will depend on the facts and circumstances of the subject transaction. Principles based disclosure rules take into account the various types of swap transactions that are subject to the rules (from highly standardized agreements to complex bespoke swaps), as well as the varied scope of swap related business undertaken by swap dealers and major swap participants. Compliance with principles based rules, like the disclosure rules, is by nature a matter of interpretation by swap dealers or major swap participants in the design of their policies and procedures, as well as by regulators and counterparties in their after-the-fact review of such disclosures, prompted, for example, by performance results that are claimed to be inconsistent with such disclosures. Subjective criteria introduce uncertainty into the compliance process and, in so doing, contribute to heightened risk costs that, at least in part, may be passed on to counterparties. Depending on how this uncertainty distributes across all swaps products, certain market participants may bear a disproportionate share of the resulting costs. The Commission attempts to dampen these costs, generally, by considering good faith compliance with policies and procedures reasonably designed to comply with the requirements of any particular rule. The rules also supply guidance for complying with these duties as a means for mitigating any uncertainty in regulatory compliance.

To the extent that the disclosure rules contribute to execution delays, for the duration of these delays, market participants will either need to bear certain market risks or be prevented from taking on those risks.[973]

The fair dealing rule does not undermine sound risk management practices for swap dealers or major swap participants and has the potential to enhance risk management practices for counterparties. Counterparties will be able to manage their swap related risks based on more complete and reliable information from swap dealers and major swap participants. Swap dealers and major swap participants will be incentivized to implement policies and procedures reasonably designed to ensure that they make fair and balanced communications that provide their counterparties with a sound basis for evaluating the facts with respect to any swap. Similar to the discussion of the cost-benefit considerations of the anti-fraud rules, such practices will reduce counterparties' risk that they may otherwise enter into a swap that is inconsistent with their trading objectives based on unbalanced or misleading communications.

v. Other Public Interest Considerations

The disclosure rules are designed to address historical information asymmetry between counterparties and swap dealers or major swap participants and should enable counterparties to better protect their own interests before assuming the risk of any particular swap transaction. In addition, requiring both the disclosure of material information and fair dealing will enhance transparency and promote counterparty confidence in the previously unregulated swap market, which better enables counterparties to use swaps to assume and manage risk.

5. Section 23.410—Prohibition on Fraud, Manipulation and Other Abusive Practices

a. Benefits

Final § 23.410 prohibits fraud, manipulation and other abusive practices and is applicable to swap dealers and major swap participants. Section 23.410(a) mirrors the language of Section 4s(h)(4)(a) of the CEA. Section 23.410(b) provides an affirmative defense for swap dealers and major swap participants to alleged non-scienter violations of § 23.410(a)(2) and (3). Final § 23.410(c) prohibits swap dealers and major swap participants from disclosing confidential counterparty information or using such confidential information in a manner that would tend to be adverse to the counterparty.

The rule primarily benefits counterparties, including Special Entities, in that it prohibits fraudulent, deceptive and manipulative practices by swap dealers and major swap participants and misuse of confidential information to the detriment of the counterparty. While not readily amenable to quantification, the benefits of the rule are significant. The rule is designed to mitigate the potentially considerable costs associated with a counterparty entering into a swap having been induced by fraudulent, deceptive or manipulative conduct. The rule also reduces the possibility that counterparties will be disadvantaged by manipulative conduct or misuse of confidential information by, among other things, improper disclosure of the counterparty's trading positions, intentions to trade or financial status.[974] In these ways, the rule is an integral component of the business conduct standards, which are, in large part, designed to ensure that counterparties and swap dealers are on equal footing with respect to understanding the risks and rewards of a particular swap or trading strategy.

The rule also enhances the authority of the Commission to ensure fair and equitable markets. Market participants and the public will benefit substantially from such enhanced prevention and deterrence of fraud and manipulation. Rules protecting the confidential treatment of counterparty information and prohibiting fraud and manipulation encourage market participation, with the ensuing positive implications such participation has on market efficiency and price discovery.

b. Costs

The Commission does not believe that there will be significant costs in connection with final § 23.410. First, § 23.410(a) merely codifies Section 4s(h)(4)(A) of the CEA.[975] To the extent there were any costs to be considered, Congress made that determination in promulgating Section 4s(h)(4)(A). Further, final § 23.410(b) has added an affirmative defense, which mitigates any costs that may have been imposed by the application of non-scienter fraud provisions in final §§ 23.410(a)(2) and (3) to swap dealers and major swap participants. The Commission believes that swap dealers and major swap participants already have in place policies and procedures, and provide training to ensure that their traders and staff do not engage in fraud and manipulation. To the extent there are any costs with respect to final § 23.410(a), such costs will be related to training staff and ensuring that existing compliance procedures are up-to-date. In addition, such policies and procedures are already accounted for by virtue of the Commission's

[973] *See* the discussions of price discovery above for a description of the provisions designed to mitigate these delays.

[974] The protections in final § 23.410 also address historical imbalances in negotiating power between swap dealers and counterparties related to sophistication and financial wherewithal. The treatment of confidential counterparty information by swap dealers depended on the relative ability of the parties to negotiate terms in their interest.

[975] *See* Section 731 of Dodd-Frank Act.

promulgation of final §§ 180.1 and 180.2, which similarly prohibit manipulative or deceptive conduct, as well as the other applicable anti-fraud and manipulation prohibitions in the CEA.

To the extent there are costs with respect to the protection of confidential counterparty information, the primary costs of this rule are associated with implementing policies and procedures designed to protect such information. The design of the final rule, and the Commission guidance in this adopting release, address concerns by commenters that the proposed confidential treatment and trading ahead provisions would have unduly affected the ability of swap dealers and major swap participants to enter into transactions with other counterparties or manage their own risks. The Commission believes that the actual costs to swap dealers and major swap participants will be insubstantial and have been mitigated by the final rules.

First, as stated above, swap dealers and major swap participants subject to final § 23.410(a) are already subject to Section 4s(h)(4)(A) of the CEA, which was added by the Dodd-Frank Act. In addition, as stated above, the Commission believes that swap dealers and major swap participants already have policies and procedures and a compliance regime in place to prevent fraud and manipulation by traders and staff. Further, swap dealers and major swap participants have long been subject to either self-imposed internal business conduct rules or to contractual requirements of confidentiality contained in negotiated swap agreements for individual swaps or in counterparty relationship documentation with counterparties.[976]

The Commission understands that there will be incremental costs associated with adapting existing policies and procedures to the new rules, but believes that these costs would be materially the same regardless of the rules' substance. Final § 23.410(a) imposes no affirmative duties, and it is unlikely that it will impose any additional costs beyond the existing costs associated with ensuring that behavior and statements are not fraudulent, deceptive or manipulative.[977] In this regard, the Commission believes it will not be necessary for firms that currently have adequate compliance programs to hire additional staff or significantly upgrade their systems to comply with the new rules, although firms may incur some compliance costs such as the cost associated with training traders and staff about the new rules.

Finally, in response to comments regarding proposed § 23.410(a), the Commission elected to revise the proposed rule by adding a cost-mitigating section. Final § 23.410(b) provides that a swap dealer or major swap participant may establish an affirmative defense against allegations of violations of final § 23.410(a)(2) and (3) by demonstrating that it did not act intentionally or recklessly and complied in good faith with written policies and procedures reasonably designed to meet the particular requirement that is the basis for the alleged violation. With respect to the confidential treatment of counterparty information, the Commission provided that such confidential information may be disclosed or used for effective execution of the swap with the counterparty, to hedge or mitigate exposure created by the swap, or to comply with requests from regulators or as required by law, or as agreed by the counterparty. In these and other ways, the Commission believes that it has taken appropriate steps to minimize the risks and costs of compliance and any ancillary costs associated with final § 23.410 (*e.g.,* vexatious litigation by a counterparty experiencing buyer's remorse).

c. Section 15(a) of the CEA

In light of the foregoing, the Commission has evaluated the costs and benefits of final § 23.410 pursuant to the five considerations identified in Section 15(a) of the CEA as follows:

i. Protection of Market Participants and the Public

The purpose of final § 23.410 is to protect market participants and the public by prohibiting fraud, manipulation and other abusive practices. Final § 23.410(a) codifies Section 4s(h)(4)(A) of the CEA and appropriately extends the protections intended under the Dodd-Frank Act. Final § 23.410(c) provides protection for counterparties by prohibiting disclosure and misuse of their confidential information. As such, § 23.410(c), although discretionary, is a central element in the business conduct standards regime that Congress mandated the Commission implement by imposing standards on swap dealers and major swap participants in their dealings with counterparties. The rule is also guided by Section 3(b) of the CEA, which explicitly includes among the purposes of the CEA ''* * * to protect all market participants from fraudulent or other abusive sales practices * * *.'' In addition, the rule implements the discretionary authority provided by Congress in Section 4s(h)(1)(A) of the CEA, which authorizes the Commission to prescribe rules that relate to ''fraud, manipulation, and other abusive practices involving swaps (including swaps that are offered but not entered into * * *).'' As provided by Sections 3 and 4s(h)(1)(A) of the CEA, the rule protects market participants, generally, and Special Entities, particularly (which, when victims of fraud, manipulation or abuse, can have significant negative implications for taxpayers, pensioners and charitable institutions).

In addition, the requirements that dealers disclose counterparty information only on a ''need to know'' basis and establish policies and procedures to protect confidential counterparty information, together with the other important requirements set forth in this rulemaking, ameliorate the risks associated with disclosure of confidential information to a swap dealer or major swap participant. The above-acknowledged diligence costs do not diminish these benefits.

ii. Efficiency, Competitiveness and Financial Integrity

While final § 23.410 is aimed at protecting counterparties, there are ancillary benefits for markets. Markets that are free of fraud, manipulation and other abusive practices encourage participation, which adds to liquidity, efficiency and competitiveness. The final rule enhances these benefits by appropriately restricting abusive conduct by swap dealers and major swap participants. In addition, protections against fraud, manipulation and misuse of counterparty information promote the financial integrity of counterparties by reducing the likelihood of (1) their being victims of fraud (and needing to bear the costs associated with such fraud) or manipulation in the value of their positions, and (2) their confidential information being used in ways that are adverse to their investment objectives. These protections look to reduce the level of risk to which counterparties are exposed when conducting business in the swaps markets.

iii. Price Discovery

As stated in the previous section, while final § 23.410 is aimed at protecting counterparties from abusive conduct by swap dealers and major swap participants, there are ancillary

[976] *See* SIFMA/ISDA Feb. 17 Letter, at 11.

[977] *See* Prohibition on Manipulative and Deceptive Devices, 76 FR at 41408–41409, for a discussion of the costs and benefits of final §§ 180.1 and 180.2.

benefits for markets. These benefits are key to providing ''a means for managing and assuming price risks, discovering prices, or disseminating pricing information through trading in liquid, fair and financially secure trading facilities.'' [978] Indeed, it is an explicit purpose of the CEA ''to deter and prevent price manipulation or any other disruptions to market integrity.'' [979] The final rule appropriately restricts abusive conduct by swap dealers and major swap participants without unduly chilling legitimate trading that could undermine the price discovery function of the market.

iv. Sound Risk Management Practices

Final § 23.410 supports sound risk management practices for swap dealers and major swap participants by incentivizing them to expand their policies and procedures to avoid misuse of confidential counterparty information. This will reduce the risks faced by counterparties that their proprietary information will be misappropriated, while concomitantly mitigating litigation risks for swap dealers and major swap participants. The above-acknowledged diligence costs do not diminish these benefits.

v. Other Public Interest Considerations

Final § 23.410 is consistent with prohibitions against fraudulent and manipulative practices in other market sectors, including futures, securities and banking. It is also consistent with market abuse prohibitions that are generally in effect in foreign markets. Harmonization reduces compliance costs and enhances protections for market participants whose trading strategies cross market sectors and international borders.

6. Section 23.430—Verification of Counterparty Eligibility

a. Benefits

Final § 23.430—Verification of counterparty eligibility, is a due diligence business conduct requirement for swap dealers and major swap participants that is mandated by Section 4s(h) of the CEA. The final rule implements congressional intent that only ECPs have access to swaps that are traded bilaterally or on a SEF (where the swap dealer or major swap participant knows the identity of the counterparty). The final rule also ensures that swap dealers and major swap participants determine prior to offering to enter into or entering into a swap whether its counterparty is a Special Entity, which would trigger additional protections under Sections 4s(h) and subpart H of part 23.[980] To avoid interfering with the efficient execution of transactions, the rule provides a safe harbor that allows swap dealers and major swap participants to rely on counterparty representations, which can be contained in counterparty relationship documentation. The rule specifies the content of the written representations on which the swap dealer or major swap participant can reasonably rely.

While not readily amenable to quantification, the benefits of the verification rule are material. The principal benefit is the implementation of congressional intent that certain swaps be available only to ECPs and that retail customers be limited to swaps trading only on a DCM. The rule also fosters compliance with the Special Entity rules by verifying Special Entity status early in the relationship between the swap dealer or major swap participant and the Special Entity counterparty. Swap dealers and major swap participants benefit from the rule to the extent that verification of eligibility will assist them in avoiding non-ECP counterparties that would seek to avoid liability for unprofitable swaps based on ineligibility. The requirement to verify the Special Entity status of a counterparty is implicit in the provisions that afford heightened protections for Special Entities.[981]

b. Costs

As discussed above, Congress required the Commission to implement a counterparty eligibility verification rule. The Commission is not required to consider the costs and benefits of Congress' mandate; rather Section 15(a) of the CEA requires the Commission to consider the costs and benefits of its regulatory actions. In this case, the primary costs of final § 23.430 are associated with obtaining information necessary to verify that a counterparty is an ECP, and where relevant a Special Entity or counterparty able to elect Special Entity protections as provided in § 23.401(c)(6), and maintaining records regarding the verification. The Commission believes that its implementing regulation mitigates these costs by closely adhering to the existing industry best practices, which provide that professional intermediaries, prior to entering into any transaction, evaluate counterparty legal capacity, transactional authority and credit. In addition, the Commission's regulation is similar to swap counterparty restrictions under the Commodity Futures Modernization Act amendments to the CEA.[982] Given existing OTC derivatives market practice and historical restrictions on market access, the Commission expects the cost of complying with final § 23.430 will be insignificant. In addition, the final rule specifically allows swap dealers and major swap participants to rely on written representations by the counterparty to satisfy the verification rule for both ECP and Special Entity status and such representations can be made in counterparty relationship documentation. The rule also specifies the content of representations that would provide a reasonable basis for reliance, and the Commission confirmed that a change in a counterparty's ECP status during the term of a swap will not affect the enforceability of the swap. Based on the foregoing, the Commission believes that it has taken meaningful and appropriate steps to minimize the risks and costs of compliance with Congress' directive to implement a counterparty eligibility verification rule as mandated in Section 4s(h) of the CEA.

c. Section 15(a) of the CEA

In light of the foregoing, the Commission has evaluated the costs and benefits of final § 23.430 pursuant to the five considerations identified in Section 15(a) of the CEA as follows:

i. Protection of Market Participants and the Public

Congress has determined that swap market participation, except on a DCM, should be limited to ECPs, and final § 23.430 furthers that determination by establishing a procedure for restricting access by unqualified persons. In this way, the rule provides protection for market participants and the public by limiting access to qualified persons. The due diligence costs associated with this rulemaking are incremental and do not diminish the benefits.

ii. Efficiency, Competitiveness and Financial Integrity

The final verification rule mitigates negative effects on efficiency, competitiveness and financial integrity by addressing costs associated with execution delays. In addition, the financial integrity of the market may be enhanced by requiring due diligence by swap dealers and major swap participants to restrict participation by non-ECPs that generally have limited

[978] Section 3(a) of the CEA (7 U.S.C. 5(a)).

[979] Section 3(b) of the CEA (7 U.S.C. 5(b)).

[980] *See* Section 4s(h)(4) and (5) of the CEA and §§ 23.440 and 23.450.

[981] *Id.*

[982] *See* Sections 2(g) and 2(h) of the CEA prior to the Dodd-Frank Act amendments.

ability to evaluate and assume the risk of complex bilateral swaps.

iii. Price Discovery

By virtue of the compliance mechanisms built into the rule, the Commission believes that it will not unduly interfere with the price discovery function of the market that could result from execution delays. Section 4s(h) limits market participation to ECPs, which could negatively affect liquidity and price discovery, but the final rule does not exacerbate such potential consequences by limiting market access. Indeed, by ensuring that only ECPs (the CEA proxy for sophistication and financial wherewithal) can participate, other ECPs may be encouraged to participate, thereby enhancing liquidity and price discovery.

iv. Sound Risk Management Practices

The final rule addresses counterparty risk, which is one of the primary risks in the swaps market. As indicated above, the final rule codifies OTC derivatives industry best practice by requiring swap dealers and major swap participants to verify that the potential counterparty is an ECP and, where relevant, a Special Entity. This verification supplements the industry best practice requirement advising that, prior to trading, market professionals should check a counterparty's legal capacity, transactional authority and credit. Therefore, the rule complements existing market practice and sound risk management practices.

v. Other Public Interest Considerations

The Commission has not identified any other public interest considerations.

7. Section 23.440—Requirements for Swap Dealers Acting as Advisors to Special Entities; Section 23.450—Requirements for Swap Dealers and Major Swap Participants Acting as Counterparties to Special Entities; and Section 23.451—Political Contributions by Certain Swap Dealers

a. Benefits

Final §§ 23.401(c), 23.440, 23.450 and 23.451 (the ''Special Entity rules'') provide heightened protections to a particular class of swap market participant when dealing with swap dealers and major swap participants. Special Entities play an important public interest role by virtue of their responsibility for managing taxpayer funds, the assets of public and private employee pension plans and endowments of charitable institutions. The Special Entity rules implement the congressional mandate to establish a higher standard of care for swap dealers that act as advisors to Special Entities and to ensure that Special Entities are represented by knowledgeable, independent advisors when dealing with swap dealers and major swap participants.

The Special Entity rules also prohibit swap dealers from entering into swaps with a governmental Special Entity [983] if the swap dealer makes certain political contributions to officials of that governmental Special Entity to prevent what is known as ''pay-to-play.'' The Commission believes that the pay-to-play rule in § 23.451 is a necessary and appropriate prohibition to prevent swap dealers and others from engaging in fraudulent practices. Given the competitive nature of the swaps market, the incentives to engage in pay-to-play may be significant. The rule also harmonizes with existing pay-to-play restrictions applicable to certain swap dealers who are also subject to pay-to-play rules in the securities sector to promote regulatory consistency across related market sectors.

The Special Entity rules provide substantial benefits to Special Entities and the general public. Swaps may have complex terms or employ leverage that can expose counterparties to significant financial risks, and unanticipated losses from a swap transaction can be financially devastating. Because financial losses in connection with a swap depend on the facts and circumstances regarding the particular swap and the particular Special Entity, the costs of such losses are not reliably quantifiable and, therefore, the benefits of preventing such losses are also not reliably quantifiable.

Although the costs of the Special Entity rules are not readily quantifiable, the benefits to Special Entities are significant. Ensuring that Special Entities are represented by independent advisors that have sufficient knowledge to evaluate the transaction and risks of a swap is a vitally important protection for Special Entities. Independent and knowledgeable advice will benefit Special Entities, and those whose interests they represent, by creating a more level playing field when negotiating with swap dealers and major swap participants. Final § 23.450 mitigates the likelihood that a Special Entity will assume risks and any consequent losses based on (1) inadequate advice due to a lack of understanding of the risks, or (2) biased advice that is not in the best interests of the Special Entity.

Final § 23.440 benefits Special Entities by restricting swap dealers from providing advice that is not in the Special Entity's best interests. A swap dealer that markets a swap to counterparties has an inherent conflict of interest, but is often in the best position to know the risks and characteristics of a complex swap, and the incentives for a swap dealer to provide conflicted advice that is not in the best interests of the Special Entity are substantial. The Commission believes that § 23.440 will provide important protections to make sure that a swap dealer's communications that are the most susceptible to being misleading or abusive are subject to the statutory ''best interests'' standard.

Commenters were in general agreement that pay-to-play is a serious issue that should be addressed by the Commission. As discussed in this adopting release, the Commission expects that final § 23.451 will yield several important, if unquantifiable, benefits. Overall, the rule is intended to address pay-to-play relationships that interfere with the legitimate process by which a governmental Special Entity decides to enter into swaps with a particular swap dealer. Such a process should be determined on the merits rather than on contributions to political officials. The potential for fraud to invade the various, intertwined relationships created by pay-to-play arrangements has been documented in notorious cases of abuse. The Commission believes that the prohibition will reduce the occurrence of fraudulent conduct resulting from pay-to-play and, as a result, will achieve its goals of protecting market participants and the public from the resulting harms.

By addressing pay-to-play practices, § 23.451 helps to ensure that governmental Special Entities consider the merits of any particular transaction with a swap dealer and not the size of a swap dealer's political contributions. These benefits, although difficult to quantify, could result in substantial savings to government institutions, public pension plans and their beneficiaries, resulting in better performance for taxpayers. Efficiencies are enhanced when government counterparties competitively award business based on price, performance and service and not the influence of pay-to-play, which in turn enables firms to compete on merit, rather than their

[983] Final § 23.451(a)(3) defines ''governmental Special Entity'' as State and municipal Special Entities defined in § 23.402(c)(2) and governmental plans as defined in § 23.402(c)(4); *see also* Section IV.D. of this adopting release at fn. 904.

ability or willingness to make contributions.[984]

Finally, the Special Entity rules protect U.S. taxpayers, the retirement savings of U.S. private and public employees and pensioners, and beneficiaries of charitable endowments (''Special Entity beneficiaries''). Losses to a company that assumes significant risk through swaps are typically limited to its investors and creditors. However, Special Entities that assume risk through the use of swaps also expose Special Entity beneficiaries to such risks. When a Special Entity suffers losses in connection with a swap, the Special Entity beneficiaries ultimately bear such losses. Certain swaps can create significant risk exposure that may result in substantial losses. And in the wake of the 2008 financial crisis, significant or even catastrophic losses have been proven not to be merely theoretical. In the case of Special Entities, such losses could result in taxpayer bailouts of public institutions or devastating losses to vulnerable members of the public including pensioners and beneficiaries of charitable endowments. Additionally, taxpayers and public employees and pensioners may benefit from § 23.451 because they might otherwise bear the financial burden of bailing out a public institution or governmental pension plan that has ended up with a shortfall due to poor performance or excessive fees that might result from pay-to-play. Therefore, the Special Entity rules provide significant protections for Special Entity beneficiaries and the public at large by ensuring that Special Entities have independent and knowledgeable representatives, are afforded a higher standard of care from swap dealers that act as advisors and, in the case of governmental Special Entities, are not unduly influenced by political contributors. The Commission has considered a number of regulatory alternatives proposed by commenters and has revised some of the proposed rules in response to commenters' suggestions.[985]

b. Costs

As identified by commenters,[986] the proposed Special Entity rules had the potential to impose costs including: (1) Reduced access to swap markets for Special Entities if swap dealers and major swap participants decline to act as their counterparties, (2) limited flow of information from swap dealers to Special Entities, (3) litigation risk for swap dealers and major swap participants, (4) compliance obligations on swap dealers and major swap participants, (5) and delays in swap execution.[987] As discussed in the introduction to this Section IV.C. of this adopting release, such costs are difficult and costly to quantify and, in some cases, are not subject to reliable quantification. Additionally, some commenters asserted that conflicting federal regulatory regimes could impose costs, such as penalties for violating ERISA's prohibited transaction provisions.[988] Any penalty for violation of another federal law in connection with a swap will depend on the facts and circumstances regarding the particular swap and the particular Special Entity; therefore, the costs of such penalties are not reliably quantifiable.

One commenter provided an example to quantify potential costs to the sponsor of a fully-funded ERISA plan that could not hedge its interest rate risk in the swap markets.[989] The commenter stated that an ERISA plan with $15 billion in assets and liabilities ''whose interest rate sensitivity is somewhat higher than average,'' would be exposed to a 13% increase in liabilities with a 1% decrease in interest rates.[990] According to the commenter, the 1% decrease in interest rates would result in a $1.46 billion shortfall in plan assets to liabilities, amortized over seven years, and the ERISA plan sponsor would owe approximately $248 million in annual contributions to cover the shortfall.[991] The commenter's example, however, illustrates that the costs to a Special Entity that cannot access the swap markets will depend on the particular facts and circumstances of the particular Special Entity. Therefore, quantification of such costs to Special Entities as a class is not feasible.

The heightened standard of care for swap dealers that act as advisors to Special Entities, which § 23.440 implements, may, to a degree, reduce the level of information swap dealers are willing to share with Special Entities regarding swaps products and strategies out of a concern over triggering advisory status and the best interests duty attached to that status. Final § 23.440 attempts to mitigate these costs by providing safe harbors that effectively exclude from the swap dealer's best interests duty (1) communications between swap dealers and ERISA plans and (2) communications to a Special Entity where the swap dealer does not express an opinion as to whether the Special Entity should enter into a recommended swap or swap trading strategy that is tailored to the particular needs or characteristics of the Special Entity.

The safe harbor for a swap dealer dealing with any Special Entity in § 23.440(b)(2) preserves the ability of the swap dealer to communicate a wide range of information about swaps, including communications where a swap dealer provides trading ideas for swaps or swap trading strategies that are tailored to the needs or characteristics of a Special Entity, without being subject to the best interests duty. Moreover, to provide additional clarity on the types of communications that would not cause a swap dealer to ''act as an advisor,'' the Commission offers in Appendix A to subpart H a non-exclusive list of communications not subject to the best interests duty as guidance for swap dealers that elect to operate within the safe harbor. Additionally, the types of communications and information not subject to the best interests duty under the safe harbor in § 23.440(b)(2) are the types information that many commenters found to be most valuable.[992] The types of communications and information included in the scope of the safe harbor also facilitates swap dealers' ability to engage in normal course of business

[984] In addition to § 23.451, which prohibits swap dealers from engaging in pay-to-play practices with governmental Special Entities, § 23.450(b)(1)(vii) similarly requires a swap dealer or major swap participant to have a reasonable basis to believe that a governmental Special Entity's representative (other than an employee) is subject to pay-to-play prohibitions imposed by the Commission, SEC or an SRO subject to the jurisdiction of the Commission or the SEC. The Commission believes that § 23.450(b)(1)(vii) will create substantially similar benefits to those described regarding § 23.451. Therefore, the Commission believes governmental Special Entities and their beneficiaries will benefit from advisers that are selected based on the quality of their advisory services and not the size of their political contributions. *See* Section IV.C.3.d.viii. of this adopting release for a discussion of final § 23.450(b)(1)(vii).

[985] *See, e.g.,* Section IV.B.3.b. and d. of this adopting release for a discussion of commenters' alternative approaches to § 23.440 and Section IV.C.3 of this adopting release for a discussion of alternative approaches to § 23.450.

[986] The Commission requested comment on the costs and benefits of the proposed Special Entity rules and invited commenters to provide data or other information to support their views on the proposal's costs and benefits. The Commission received general comments on costs and benefits but no verifiable data. *See* proposing release, 75 FR at 80657.

[987] *See, e.g.,* Section IV.C.2.g. of this adopting release for a summary of comments regarding transaction costs and risks related to the Special Entity rules.

[988] *See* Section II of this adopting release for a discussion of regulatory intersections with the Commission's business conduct standards rules.

[989] ABC/CIEBA Feb. 22 Letter, at 4.

[990] *Id.*

[991] *Id.*

[992] *See* Section IV.B.2.a. of this adopting release at fn. 624 and accompanying text.

communications, including sales, marketing and trading ideas, with Special Entities without being subject to the best interests duty and potential litigation risks attendant to such a duty.

Final § 23.450 also establishes a safe harbor for a swap dealer or major swap participant to satisfy its duty to have a reasonable basis to believe that a Special Entity has a qualified independent representative. The safe harbor under § 23.450(d)(2) harmonizes the independent representative requirements for ERISA plans. A swap dealer or major swap participant will have a reasonable basis to believe that an ERISA plan has a qualified independent representative whenever the ERISA plan represents in writing that it has an ERISA fiduciary. This safe harbor alleviates concerns raised by some commenters that compliance with the proposed rule could cause a swap dealer or major swap participant to become an ERISA fiduciary that would impose costs, including private litigation liabilities, costs associated with violations of ERISA's prohibited transaction rules or costs to ERISA plans that may be unable to find swap dealers or major swap participants willing to enter into swaps with them.

With respect to all Special Entities other than ERISA plans, the safe harbor under § 23.450(d)(1) permits a swap dealer or major swap participant to rely on written representations from the Special Entity and its representative that each, respectively, has complied in good faith with written policies and procedures reasonably designed to ensure that the representative satisfies the applicable requirements in Section 4s(h)(5) and § 23.450. Additionally, the Commission revised § 23.450 to address commenters' concerns regarding the proposed ''material business relationship'' prong of the independence test.[993]

Many commenters expressed concern that the proposed independence test would create costly and burdensome compliance requirements and that the proposed material relationship prong was duplicative of or not harmonized with other independence standards.[994] The revised independence test mitigates commenters' concerns that the ''material business relationship'' was unadministrable by deleting the requirement to identify and disclose all compensation that a swap dealer or major swap participant paid to the Special Entity's representative within the previous 12 months.[995] The revised standard under which a representative will be deemed independent replaced the ''material business relationship'' prong with three requirements: (1) The representative discloses material conflicts of interest to the Special Entity and complies with policies and procedures designed to manage and mitigate such conflicts; (2) the representative is not controlled by, in control of or under common control with the swap dealer or major swap participant; and (3) the swap dealer or major swap participant did not refer, recommend or introduce the representative to the Special Entity. Any costs that arise due to a representative disclosing, managing and mitigating conflicts of interest will be incremental because third-party advisors, generally, will be regulated entities such as CTAs, investment advisers or municipal advisors, and will be subject to similar requirements. In addition, representatives that are in-house employees will likely be subject to conflict of interest restrictions by virtue of their employment agreement.

The safe harbor under § 23.450(d) reduces litigation risk concerns raised by some commenters asserting that a swap dealer or major swap participant may be held liable to a Special Entity for ''approving'' an unqualified representative or may be liable to a representative that was found to be unqualified.[996] Under the safe harbor, a swap dealer or major swap participant may rely on written representations that the representative is qualified thereby relieving the swap dealer or major swap participant of engaging in extensive due diligence to make its own determination.

Special Entities may incur additional costs to retain the services of a representative and to develop policies and procedures to ensure that the representative is qualified and independent. The Commission believes that any additional costs will be incremental and relatively minimal because, according to commenters, many Special Entities already employ in-house or third-party expert advisors.[997] Furthermore, the independent representative rules implement the statutory requirement that Special Entities have qualified independent representatives. Therefore, Congress made the determination that the additional costs are justified by the benefits that such a protection provides to Special Entities and Special Entity beneficiaries. However, the final rules implement the statutory requirements in such a way as to minimize any additional costs associated with the concerns expressed by commenters.

To mitigate and reduce any due diligence costs imposed under Sections 4s(h)(4) and (5), both §§ 23.440 and 23.450 permit reliance on representations to satisfy such due diligence obligations. Furthermore, such representations may be made on a relationship basis to reduce or eliminate execution delays that could otherwise result from transaction-by-transaction compliance. Commission staff has also extensively consulted with the SEC and DOL staffs to ensure that the final rules are appropriately harmonized and so that compliance with the Special Entity rules will not result in violation of other federal laws.[998]

The Commission has clarified, in response to commenters, that the definition of Special Entity under § 23.402(c) does not include collective investment vehicles in which a Special Entity invests.[999] Some commenters asserted that adopting a look-through test for the Special Entity definition would create unnecessary and duplicative compliance costs and execution delays for collective investment vehicles and their investors.[1000] This adopting release clarifies that the Commission will not look-through a collective investment vehicle to its investors to determine whether an entity is a Special Entity and thereby eliminates these cost concerns.

The pay-to-play prohibition in § 23.451 is designed to prevent fraud. A prohibition on fraud should not, in the Commission's judgment, impose significant costs. Nevertheless, the Commission is cognizant that its pay-to-pay prohibition will involve some compliance costs. At the same time, such costs are expected to be incremental and minimal because the Commission anticipates that many of the persons subject to § 23.451 will already be subject to similar prohibitions imposed by the MSRB or

[993] *See* Section IV.C.3.d.iv. of this adopting release for a discussion of the final independence standard in § 23.450.

[994] *See* Section IV.C.2.c.ii. of this adopting release for a summary of comments regarding the independence tests under proposed § 23.450 at fn. 779.

[995] *See* proposing release, 75 FR at 80660.

[996] *See, e.g.,* ABC/CIEBA Feb. 22 Letter, at 9–10; HOOPP Feb. 22 Letter, at 2; ABC Aug. 29 Letter, at 7.

[997] *See, e.g.,* ERIC Feb. 22 Letter, at 12; VRS Feb. 22 Letter, at 2 and fn. 3; U. Tex. System Feb. 22 Letter, at 4.

[998] *See* Section II of this adopting release for a discussion of regulatory intersections and harmonization with the SEC and DOL.

[999] *See* Section IV.A.3.e. of this adopting release for a discussion of the Commission's determination regarding collective investment vehicles and the definition of Special Entity.

[1000] *See, e.g.,* AMG–SIFMA Feb. 22 Letter, at 12–13.

SEC.[1001] In an effort to mitigate these costs, the Commission has adopted a practical, cost-effective means to comply with the rule without requiring a swap dealer to impose a blanket ban on all political contributions by its covered associates. Further, based on comments received, the Commission modified its proposed rule to achieve the goal of discouraging swap dealer participation in pay-to-play practices while seeking to limit the burdens imposed by the rule. In this regard, the Commission highlights its efforts to harmonize its rule with the prohibition proposed by the SEC,[1002] the exceptions for certain *de minimis* contributions, automatic exemptions and safe harbors.[1003]

c. Section 15(a) of the CEA

In light of the foregoing, the Commission has evaluated the costs and benefits of the final Special Entity rules pursuant to the five considerations identified in Section 15(a) of the CEA as follows:

i. Protection of Market Participants and the Public

At the core of the Special Entity rules is the protection of a specific class of market participants that are central to the public interest. Final § 23.440 ensures that swap dealers that act as advisors to Special Entities are subject to a best interests duty. Conversely, where the swap dealer elects to operate within the safe harbor, the rule facilitates open communications with Special Entities to afford them the benefits of the swap dealer's access to valuable swap related information.

Final § 23.450 seeks to ensure that any Special Entity that enters into swaps with swap dealers or major swap participants has a sufficiently knowledgeable representative to evaluate the risks inherent in the transaction and to provide unbiased, independent advice that is in the best interests of the Special Entity. The pay-to-play prohibition protects market participants and the public from fraud. Government business allocated on the basis of political contributions exposes the public to several hazards, including noncompetitive pricing and unnecessary assumption of risk.

The Commission believes that the Special Entity rules protect the public from, among other things, taxpayer bailouts and unnecessary losses to U.S. retirement savings and charitable endowments. To the extent the rules impose increased costs on swap dealers or major swap participants that may be passed on to Special Entities or may serve as an incentive for swap dealers or major swap participants to decline to transact with Special Entities, the Commission believes it has provided for reasonable and practicable means of compliance that mitigate any such costs.

ii. Efficiency, Competitiveness and Financial Integrity of Futures Markets

The Special Entity rules do impose costs that impact efficiency. However, the rules have been designed to mitigate the impact. For example, the rules allow for reliance on representations on a relationship basis to mitigate due diligence costs or transaction-by-transaction compliance that may delay execution. In addition, Congress made the determination that Special Entities need additional protections by enacting Section 4s(h), and the Commission has furthered congressional intent by mitigating the attendant costs of such protections without materially diminishing their benefits. Furthermore, the public interest is served and markets function more efficiently when swap dealers compete for governmental Special Entity business based on price and the overall utility of the swap to the Special Entity and not on the swap dealers' willingness to make political contributions.

iii. Price Discovery

In the event that advisory status is triggered, compliance with the best interests duty by the affected swap dealer may lead to execution delays. The cumulative effect of these delays may, to a degree, adversely impact liquidity resulting in higher transaction costs for counterparties that trade swaps. In recognition of this potential impact, the best interests duty is limited to certain recommendations of swaps that are tailored to the particular needs or characteristics of the Special Entity, and the swap dealer may rely on representations from the Special Entity to satisfy the ''reasonable efforts'' duty for determining whether a recommended swap or swap trading strategy is in the best interests of that Special Entity.

Final rule § 23.450 provides several means to mitigate the costs of satisfying the ''reasonable basis'' requirement. First, if the representative to an ERISA plan is an ERISA fiduciary, then the reasonable basis is established. Second, certain representations made by the Special Entity will be deemed to provide such a reasonable basis, and these representations, where appropriate, are allowable at the relationship level as opposed to the transaction level. Third, in the absence of such representations, the Commission has provided a list of factors as guidance for establishing this reasonable basis.[1004]

iv. Sound Risk Management Practices

The Special Entity rules foster sound risk management practices by ensuring that Special Entities have representatives and advisors that are capable of evaluating the risks and rewards of swap transactions and that they evaluate each transaction considering the best interests of the Special Entity. The independent representative provisions, coupled with the disclosure rules, provide important tools for Special Entities to enhance their risk management practices to avoid unnecessary and inappropriate risk.

Nevertheless, execution delays, to the extent that they may result from the Special Entity rules, force market participants to either bear certain market risks or be prevented from earning the premiums associated with bearing those risks over the duration of the delay. The design of the Special Entity rules permit reliance on representations on a relationship basis to mitigate these delays.

Any uncertainty over the triggers for advisory status, through an increase in the risk exposure of the swap dealer, may translate into higher fees charged to counterparties as compensation for that increased exposure. Guidance provided by the Commission clarifying the instances and communications that are exempt from this status mitigates this uncertainty.

v. Other Public Interest Considerations

The Special Entity rules promote public trust in swap markets by striving to ensure that Special Entities are adequately represented and treated

[1001] The Commission also believes that § 23.450(b)(1)(vii) may impose similar costs, including compliance costs. *See supra* fn. 984for a discussion of § 23.450(b)(1)(vii)'s benefits. However, the Commission also believes that the cost mitigating features of § 23.450 and the incremental nature of the requirements also limit any burdens or costs imposed by the rule. The costs are incremental because some independent representatives to governmental Special Entities may be SEC-registered investment advisers subject to SEC Advisers Act Rule 206(4)-5 on pay-to-play or registered municipal advisors subject to the MSRB's pay-to-play prohibitions. *See* Section II.C. of this adopting release for a discussion of Special Entity representatives that are also municipal advisors; *see also supra* fn. 880 and accompanying text.

[1002] *See* proposed 17 CFR 240.15Fh–6, SEC's proposed rules, 76 FR at 42457–58.

[1003] *See* Section IV.D.3. of this adopting release for a discussion of the pay-to-play prohibitions under final § 23.451.

[1004] *See* Section IV.C.3.d. of this adopting release for a discussion of the factors used as guidance for the requirements of § 23.450(b).

fairly. When a Special Entity incurs substantial losses due to inadequate advice, biased advice or unfair access such as through pay-to-play schemes, the public loses confidence in the markets. Additionally, the pay-to-play prohibition fosters public confidence in the integrity of the means and manner in which its elected officials handle government finances.

8. Section 4.6—Exclusion for Certain Otherwise Regulated Persons From the Definition of the Term ''Commodity Trading Advisor''

a. Benefits

Final § 4.6(a)(3) is an exclusion from the definition of CTA for swap dealers and, correspondingly, from the application of the CTA registration requirement, any relevant duties under part 4 of the Commission's Regulations and Section 4*o* of the CEA, the anti-fraud provision for CTAs. The Commission believes the exclusion furthers the regulatory approach that underlies the Dodd-Frank Act by facilitating the flow of market-related information between swap dealers and counterparties without undermining the robust protections provided by the business conduct standards provisions. The exclusion benefits both swap dealers and counterparties that claimed that their communications could be chilled, and trading stifled, if swap dealers were deemed to be CTAs and subject to a higher standard of care when providing services that are ''solely incidental'' to their business as a swap dealer. The exclusion clarifies the role of swap dealers and reduces ambiguity in the trading relationship between swap dealers and counterparties.

While not readily amenable to quantification, the benefits of the rule are significant. The rule is designed to avoid the potential costs associated with a swap dealer being deemed a CTA. In addition to CTA registration fees for a swap dealer and its associated persons, CTAs are generally held to a fiduciary standard under case law,[1005] a standard that was rejected by Congress for swap dealers when it adopted Section 4s(h).[1006] Therefore, excluding swap dealers from the definition of CTA when engaging in certain swap dealing activities that overlap with CTA activities is consistent with congressional intent.

Commenters raised concerns that if a swap dealer were deemed to be a CTA then it would increase the potential that they also would be deemed an ERISA fiduciary when dealing with ERISA plans. That would subject the swap dealer to a principal transaction prohibition and to substantial penalties under ERISA. Such risks could dissuade swap dealers from engaging in swaps with pension plans that are subject to ERISA.[1007] Similar risks could potentially adversely affect other counterparties that are regulated under similar state regulatory regimes. These counterparties could face increased costs because swap dealers could charge more to assume the higher duties, fewer swap dealers would be willing to do business with them or swap dealers would offer a narrower range of services.

The rule benefits counterparties by reducing burdens on communications and broadening the range of services available from swap dealers, as well as increasing the number of swap dealers with which a Special Entity may enter into swaps. While not a quantifiable benefit, a greater number of swap dealers should encourage competition and reduce prices for counterparties. Having access to a wider range of services will allow counterparties to more effectively hedge their exposure to market risks and to take advantage of investment opportunities using swaps.

b. Costs

As a result of final § 4.6(a)(3) relieving a burden rather than imposing one, the Commission does not believe that there are any costs associated with the exclusion from the definition of CTA for swap dealers whose advice is solely incidental to its swap dealing activities. This is particularly true because the business conduct standards viewed as a whole provide important protections for counterparties that are not diminished by clarifying the status of swap dealers that make recommendations to counterparties.

c. Section 15(a) of the CEA

In light of the foregoing, the Commission has evaluated the costs and benefits of final § 4.6(a)(3) pursuant to the five considerations identified in Section 15(a) of the CEA as follows:

i. Protection of Market Participants and the Public

The objective of § 4.6(a)(3) is to allow a freer flow of information and ideas between a swap dealer and its counterparties, albeit subject to the disclosure and due diligence requirements of subpart H, among other provisions. Allowing swap dealers to provide limited advice necessary to design bespoke instruments will benefit market participants by offering them a broader range of products to meet their particular hedging requirements and trading objectives. The exclusion will reduce the potential for vexatious litigation by providing certainty regarding the applicable standard of care to be applied to these transactions.

The exclusion is consistent with the goal of protecting market participants and the public when considered together with the business conduct standards in Section 4s(h) and subpart H of part 23. The exclusion does not diminish protections for market participants and the public in those rules, but rather furthers the intent of Congress that swap dealers not be held to a fiduciary standard.[1008] Moreover, the exclusion for swap dealers from the CTA definition does not apply to all advisory activities, but only the swap dealer's advisory activities that are solely incidental to its business as a swap dealer. As such, the Commission has designed these rules to be as targeted as possible to achieve the intended statutory benefits, namely to enable the flow of accurate and timely information between swap dealers and their counterparties, and to continue to allow the marketplace to develop and provide opportunities for swap dealers and counterparties to transact. However, swap dealers will be CTAs if they provide advisory services beyond those that are solely incidental to their swap dealing activities, thereby preserving counterparty protections afforded by the rules that apply to CTAs.

Accordingly, in the Commission's judgment, this rule alleviates a burden, which reduces rather than imposes costs, in such a way that the final rule will achieve the intended benefits of protecting market participants and the public.

ii. Efficiency, Competitiveness and Financial Integrity of Futures Markets

Because swap dealers may not be willing to perform certain functions, like custom tailoring a swap to meet a

[1005] *See, e.g., Savage* v. *CFTC,* 548 F.2d 192 at 197.

[1006] *See* Section IV.B.3.c. at fn. 706 and accompanying text for a discussion of the legislative history of fiduciary duties for swap dealers; *see also* Sections II.D. and IV.B. of this adopting release for a discussion of Regulatory Intersections—Commodity Trading Advisor Status for Swap Dealers and § 23.440—Final Rules for Swap Dealers and Major Swap Participants Dealing with Special Entities—Requirements for Swap Dealers Acting as Advisors to Special Entities, respectively.

[1007] *See* Section II.B. of this adopting release for a discussion of Regulatory Intersections—Department of Labor ERISA Fiduciary Regulations.

[1008] *See* Section II.D. of this adopting release for a discussion of Regulatory Intersections—Commodity Trading Advisor Status for Swap Dealers.

counterparty's needs if such activities would cause the swap dealer to be deemed to be a CTA, excluding them from the CTA definition for certain activities could broaden the range of services that a swap dealer may offer a counterparty. It could also increase the number of swap dealers that are willing to perform such functions. While not a quantifiable benefit, a greater number of swap dealers and available products should enhance efficiency and competition and reduce prices for counterparties. Because the rule alleviates a burden, rather than imposing costs, the Commission concludes that § 4.6(a)(3) will not impede swap market efficiency, competitiveness or financial integrity.

iii. Price Discovery

Relative to not applying this exclusion to swap dealers, the final rule encourages more swap dealers to offer a wider range of products to counterparties, which promotes competition and facilitates price discovery. Accordingly, the exclusion does not adversely affect price discovery and potentially enhances it.

iv. Sound Risk Management Practices

While not creating material incentives for swap dealers to alter how they manage risk, the exclusion from the CTA definition will assist swap dealers in reducing the level of risk associated with their counterparty interactions. The exclusion clarifies the duties owed to counterparties and reduces the potential for litigation. Because the standard of care for swap dealers acting as CTAs is higher than the standard of care when they act as counterparties in principal to principal transactions, disagreements could arise based on misunderstandings concerning the respective roles of the parties. By acting within the scope of the exclusion in compliance with the final rule, swap dealers will reduce the risk of undue reliance by counterparties and any resulting litigation.

v. Other Public Interest Considerations

The Commission has not identified any other public interest considerations.

List of Subjects
17 CFR Part 4

Advertising, Brokers, Commodity futures, Commodity pool operators, Commodity trading advisors, Customer protection, Reporting and recordkeeping requirements, Swaps.

List of Subjects
17 CFR Part 23

Antitrust, Commodity futures, Business conduct standards, Conflict of interests, Counterparties, Information, Major swap participants, Registration, Reporting and recordkeeping, Special Entities, Swap dealers, Swaps.

For the reasons presented above, the Commission hereby amends part 4 and part 23 (as added on January 19, 2012 (77 FR 2613), of Title 17 of the Code of Federal Regulations as follows:

PART 4—COMMODITY POOL OPERATORS AND COMMODITY TRADING ADVISORS

■ 1. The authority citation for part 4 shall be revised to read as follows:

Authority: 7 U.S.C 1a, 2, 4, 6(c), 6b, 6c, 6*l,* 6m, 6n, 6*o,* 12a and 23, as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010).

■ 2. In § 4.6, add new paragraph (a)(3) to read as follows:

§ 4.6 Exclusion for certain otherwise regulated persons from the definition of the term ''commodity trading advisor.''

(a) * * *

(3) A swap dealer registered with the Commission as such pursuant to the Act or excluded or exempt from registration under the Act or the Commission's regulations; *Provided, however,* That the commodity interest and swap advisory activities of the swap dealer are solely incidental to the conduct of its business as a swap dealer.

* * * * *

PART 23—SWAP DEALERS AND MAJOR SWAP PARTICIPANTS

Authority and Issuance

■ 3. The authority citation for part 23 shall be revised to read as follows:

Authority: 7 U.S.C. 1a, 2, 6, 6a, 6b, 6c, 6p, 6s, 9, 9a, 12a, 13b, 13c, 16a, 18, 19, 21 as amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, 124 Stat. 1376 (Jul. 21, 2010).

■ 4. Add subpart H to read as follows:

Subpart H—Business Conduct Standards for Swap Dealers and Major Swap Participants Dealing With Counterparties, Including Special Entities

Sec.
23.400 Scope.
23.401 Definitions.
23.402 General provisions.
23.403–23.409 [Reserved]
23.410 Prohibition on fraud, manipulation and other abusive practices.
23.411–23.429 [Reserved]
23.430 Verification of counterparty eligibility.
23.431 Disclosures of material information.
23.432 Clearing disclosures.
23.433 Communications—fair dealing.
23.434 Recommendations to counterparties—institutional suitability.
23.435–23.439 [Reserved]
23.440 Requirements for swap dealers acting as advisors to Special Entities.
23.441–23.449 [Reserved]
23.450 Requirements for swap dealers and major swap participants acting as counterparties to Special Entities.
23.451 Political contributions by certain swap dealers.
Appendix A—Guidance on the application of §§ 23.434 and 23.440 for swap dealers that make recommendations to counterparties or Special Entities

Subpart H—Business Conduct Standards for Swap Dealers and Major Swap Participants Dealing With Counterparties, Including Special Entities

§ 23.400 Scope.

The sections of this subpart shall apply to swap dealers and, unless otherwise indicated, major swap participants. These rules are not intended to limit or restrict the applicability of other provisions of the Act and rules and regulations thereunder, or other applicable laws, rules and regulations. The provisions of this subpart shall apply in connection with transactions in swaps as well as in connection with swaps that are offered but not entered into.

§ 23.401 Definitions.

(a) *Counterparty.* The term ''counterparty,'' as appropriate in this subpart, includes any person who is a prospective counterparty to a swap.

(b) *Major swap participant.* The term ''major swap participant'' means any person defined in Section 1a(33) of the Act and § 1.3 of this chapter and, as appropriate in this subpart, any person acting for or on behalf of a major swap participant, including an associated person defined in Section 1a(4) of the Act.

(c) *Special Entity.* The term ''Special Entity'' means:

(1) A Federal agency;

(2) A State, State agency, city, county, municipality, other political subdivision of a State, or any instrumentality, department, or a corporation of or established by a State or political subdivision of a State;

(3) Any employee benefit plan subject to Title I of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002);

(4) Any governmental plan, as defined in Section 3 of the Employee Retirement

Income Security Act of 1974 (29 U.S.C. 1002);

(5) Any endowment, including an endowment that is an organization described in Section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c)(3)); or

(6) Any employee benefit plan defined in Section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002), not otherwise defined as a Special Entity, that elects to be a Special Entity by notifying a swap dealer or major swap participant of its election prior to entering into a swap with the particular swap dealer or major swap participant.

(d) *Swap dealer.* The term ''swap dealer'' means any person defined in Section 1a(49) of the Act and § 1.3 of this chapter and, as appropriate in this subpart, any person acting for or on behalf of a swap dealer, including an associated person defined in Section 1a(4) of the Act.

§ 23.402 General provisions.

(a) *Policies and procedures to ensure compliance and prevent evasion.*

(1) Swap dealers and major swap participants shall have written policies and procedures reasonably designed to:

(i) Ensure compliance with the requirements of this subpart; and

(ii) Prevent a swap dealer or major swap participant from evading or participating in or facilitating an evasion of any provision of the Act or any regulation promulgated thereunder.

(2) Swap dealers and major swap participants shall implement and monitor compliance with such policies and procedures as part of their supervision and risk management requirements specified in subpart J of this part.

(b) *Know your counterparty.* Each swap dealer shall implement policies and procedures reasonably designed to obtain and retain a record of the essential facts concerning each counterparty whose identity is known to the swap dealer prior to the execution of the transaction that are necessary for conducting business with such counterparty. For purposes of this section, the essential facts concerning a counterparty are:

(1) Facts required to comply with applicable laws, regulations and rules;

(2) Facts required to implement the swap dealer's credit and operational risk management policies in connection with transactions entered into with such counterparty; and

(3) Information regarding the authority of any person acting for such counterparty.

(c) *True name and owner.* Each swap dealer or major swap participant shall obtain and retain a record which shall show the true name and address of each counterparty whose identity is known to the swap dealer or major swap participant prior to the execution of the transaction, the principal occupation or business of such counterparty as well as the name and address of any other person guaranteeing the performance of such counterparty and any person exercising any control with respect to the positions of such counterparty.

(d) *Reasonable reliance on representations.* A swap dealer or major swap participant may rely on the written representations of a counterparty to satisfy its due diligence requirements under this subpart, unless it has information that would cause a reasonable person to question the accuracy of the representation. If agreed to by the counterparties, such representations may be contained in counterparty relationship documentation and may satisfy the relevant requirements of this subpart for subsequent swaps offered to or entered into with a counterparty, provided however, that such counterparty undertakes to timely update any material changes to the representations.

(e) *Manner of disclosure.* A swap dealer or major swap participant may provide the information required by this subpart by any reliable means agreed to in writing by the counterparty; provided however, for transactions initiated on a designated contract market or swap execution facility, written agreement by the counterparty regarding the reliable means of disclosure is not required.

(f) *Disclosures in a standard format.* If agreed to by a counterparty, the disclosure of material information that is applicable to multiple swaps between a swap dealer or major swap participant and a counterparty may be made in counterparty relationship documentation or other written agreement between the counterparties.

(g) *Record retention.* Swap dealers and major swap participants shall create a record of their compliance with the requirements of this subpart and shall retain records in accordance with subpart F of this part and § 1.31 of this chapter and make them available to applicable prudential regulators upon request.

§§ 23.403–23.409 [Reserved]

§ 23.410 Prohibition on fraud, manipulation, and other abusive practices.

(a) It shall be unlawful for a swap dealer or major swap participant—

(1) To employ any device, scheme, or artifice to defraud any Special Entity or prospective customer who is a Special Entity;

(2) To engage in any transaction, practice, or course of business that operates as a fraud or deceit on any Special Entity or prospective customer who is a Special Entity; or

(3) To engage in any act, practice, or course of business that is fraudulent, deceptive, or manipulative.

(b) *Affirmative defense.* It shall be an affirmative defense to an alleged violation of paragraph (a)(2) or (3) of this section for failure to comply with any requirement in this subpart if a swap dealer or major swap participant establishes that the swap dealer or major swap participant:

(1) Did not act intentionally or recklessly in connection with such alleged violation; and

(2) Complied in good faith with written policies and procedures reasonably designed to meet the particular requirement that is the basis for the alleged violation.

(c) *Confidential treatment of counterparty information.* (1) It shall be unlawful for any swap dealer or major swap participant to:

(i) Disclose to any other person any material confidential information provided by or on behalf of a counterparty to the swap dealer or major swap participant; or

(ii) Use for its own purposes in any way that would tend to be materially adverse to the interests of a counterparty, any material confidential information provided by or on behalf of a counterparty to the swap dealer or major swap participant.

(2) Notwithstanding paragraph (c)(1) of this section, a swap dealer or major swap participant may disclose or use material confidential information provided by or on behalf of a counterparty to the swap dealer or major swap participant if such disclosure or use is authorized in writing by the counterparty, or is necessary:

(i) For the effective execution of any swap for or with the counterparty;

(ii) To hedge or mitigate any exposure created by such swap; or

(iii) To comply with a request of the Commission, Department of Justice, any self-regulatory organization designated by the Commission, or an applicable prudential regulator, or is otherwise required by law.

(3) Each swap dealer or major swap participant shall implement written policies and procedures reasonably designed to protect material confidential information provided by or on behalf of a counterparty from disclosure and use in violation of this section by any person acting for or on behalf of the swap dealer or major swap participant.

§§ 23.411–23.429 [Reserved]

§ 23.430 Verification of counterparty eligibility.

(a) *Eligibility.* A swap dealer or major swap participant shall verify that a counterparty meets the eligibility standards for an eligible contract participant, as defined in Section 1a(18) of the Act and § 1.3 of this chapter, before offering to enter into or entering into a swap with that counterparty.

(b) *Special Entity.* In verifying the eligibility of a counterparty pursuant to paragraph (a) of this section, a swap dealer or major swap participant shall also verify whether the counterparty is a Special Entity.

(c) *Special Entity election.* In verifying the eligibility of a counterparty pursuant to paragraph (a) of this section, a swap dealer or major swap participant shall verify whether a counterparty is eligible to elect to be a Special Entity under § 23.401(c)(6) and, if so, notify such counterparty of its right to make such an election.

(d) *Safe harbor.* A swap dealer or major swap participant may rely on written representations of a counterparty to satisfy the requirements of this section as provided in § 23.402(d). A swap dealer or major swap participant will have a reasonable basis to rely on such written representations for purposes of the requirements in paragraphs (a) and (b) of this section if the counterparty specifies in such representations the provision(s) of Section 1a(18) of the Act or paragraph(s) of § 1.3 of this chapter that describe its status as an eligible contract participant and, in the case of a Special Entity, the paragraph(s) of the Special Entity definition in § 23.401(c) that define its status as a Special Entity.

(e) This section shall not apply with respect to:

(1) A transaction that is initiated on a designated contract market; or

(2) A transaction initiated on a swap execution facility, if the swap dealer or major swap participant does not know the identity of the counterparty to the transaction prior to execution.

§ 23.431 Disclosures of material information.

(a) At a reasonably sufficient time prior to entering into a swap, a swap dealer or major swap participant shall disclose to any counterparty to the swap (other than a swap dealer, major swap participant, security-based swap dealer, or major security-based swap participant) material information concerning the swap in a manner reasonably designed to allow the counterparty to assess:

(1) The material risks of the particular swap, which may include market, credit, liquidity, foreign currency, legal, operational, and any other applicable risks;

(2) The material characteristics of the particular swap, which shall include the material economic terms of the swap, the terms relating to the operation of the swap, and the rights and obligations of the parties during the term of the swap; and

(3) The material incentives and conflicts of interest that the swap dealer or major swap participant may have in connection with a particular swap, which shall include:

(i) With respect to disclosure of the price of the swap, the price of the swap and the mid-market mark of the swap as set forth in paragraph (d)(2) of this section; and

(ii) Any compensation or other incentive from any source other than the counterparty that the swap dealer or major swap participant may receive in connection with the swap.

(b) *Scenario Analysis.* Prior to entering into a swap with a counterparty (other than a swap dealer, major swap participant, security-based swap dealer, or major security-based swap participant) that is not made available for trading, as provided in Section 2(h)(8) of the Act, on a designated contract market or swap execution facility, a swap dealer shall:

(1) Notify the counterparty that it can request and consult on the design of a scenario analysis to allow the counterparty to assess its potential exposure in connection with the swap;

(2) Upon request of the counterparty, provide a scenario analysis, which is designed in consultation with the counterparty and done over a range of assumptions, including severe downside stress scenarios that would result in a significant loss;

(3) Disclose all material assumptions and explain the calculation methodologies used to perform any requested scenario analysis; provided however, that the swap dealer is not required to disclose confidential, proprietary information about any model it may use to prepare the scenario analysis; and

(4) In designing any requested scenario analysis, consider any relevant analyses that the swap dealer undertakes for its own risk management purposes, including analyses performed as part of its ''New Product Policy'' specified in § 23.600(c)(3).

(c) Paragraphs (a) and (b) of this section shall not apply with respect to a transaction that is:

(1) Initiated on a designated contract market or a swap execution facility; and

(2) One in which the swap dealer or major swap participant does not know the identity of the counterparty to the transaction prior to execution.

(d) *Daily mark.* A swap dealer or major swap participant shall:

(1) For cleared swaps, notify a counterparty (other than a swap dealer, major swap participant, security-based swap dealer, or major security-based swap participant) of the counterparty's right to receive, upon request, the daily mark from the appropriate derivatives clearing organization.

(2) For uncleared swaps, provide the counterparty (other than a swap dealer, major swap participant, security-based swap dealer, or major security-based swap participant) with a daily mark, which shall be the mid-market mark of the swap. The mid-market mark of the swap shall not include amounts for profit, credit reserve, hedging, funding, liquidity, or any other costs or adjustments. The daily mark shall be provided to the counterparty during the term of the swap as of the close of business or such other time as the parties agree in writing.

(3) For uncleared swaps, disclose to the counterparty:

(i) The methodology and assumptions used to prepare the daily mark and any material changes during the term of the swap; provided however, that the swap dealer or major swap participant is not required to disclose to the counterparty confidential, proprietary information about any model it may use to prepare the daily mark; and

(ii) Additional information concerning the daily mark to ensure a fair and balanced communication, including, as appropriate, that:

(A) The daily mark may not necessarily be a price at which either the counterparty or the swap dealer or major swap participant would agree to replace or terminate the swap;

(B) Depending upon the agreement of the parties, calls for margin may be based on considerations other than the daily mark provided to the counterparty; and

(C) The daily mark may not necessarily be the value of the swap that is marked on the books of the swap dealer or major swap participant.

§ 23.432 Clearing disclosures.

(a) *For swaps required to be cleared—right to select derivatives clearing organization.* A swap dealer or major swap participant shall notify any counterparty (other than a swap dealer, major swap participant, securities-based swap dealer, or major securities-based

swap participant) with which it entered into a swap that is subject to mandatory clearing under Section 2(h) of the Act, that the counterparty has the sole right to select the derivatives clearing organization at which the swap will be cleared.

(b) *For swaps not required to be cleared—right to clearing.* A swap dealer or major swap participant shall notify any counterparty (other than a swap dealer, major swap participant, securities-based swap dealer, or major securities-based swap participant) with which it entered into a swap that is not subject to the mandatory clearing requirements under Section 2(h) of the Act that the counterparty:

(1) May elect to require clearing of the swap; and

(2) Shall have the sole right to select the derivatives clearing organization at which the swap will be cleared.

§ 23.433 Communications—fair dealing.

With respect to any communication between a swap dealer or major swap participant and any counterparty, the swap dealer or major swap participant shall communicate in a fair and balanced manner based on principles of fair dealing and good faith.

§ 23.434 Recommendations to counterparties—institutional suitability.

(a) A swap dealer that recommends a swap or trading strategy involving a swap to a counterparty, other than a swap dealer, major swap participant, security-based swap dealer, or major security-based swap participant, must:

(1) Undertake reasonable diligence to understand the potential risks and rewards associated with the recommended swap or trading strategy involving a swap; and

(2) Have a reasonable basis to believe that the recommended swap or trading strategy involving a swap is suitable for the counterparty. To establish a reasonable basis for a recommendation, a swap dealer must have or obtain information about the counterparty, including the counterparty's investment profile, trading objectives, and ability to absorb potential losses associated with the recommended swap or trading strategy involving a swap.

(b) *Safe Harbor.* A swap dealer may fulfill its obligations under paragraph (a)(2) of this section with respect to a particular counterparty if:

(1) The swap dealer reasonably determines that the counterparty, or an agent to which the counterparty has delegated decision-making authority, is capable of independently evaluating investment risks with regard to the relevant swap or trading strategy involving a swap;

(2) The counterparty or its agent represents in writing that it is exercising independent judgment in evaluating the recommendations of the swap dealer with regard to the relevant swap or trading strategy involving a swap;

(3) The swap dealer discloses in writing that it is acting in its capacity as a counterparty and is not undertaking to assess the suitability of the swap or trading strategy involving a swap for the counterparty; and

(4) In the case of a counterparty that is a Special Entity, the swap dealer complies with § 23.440 where the recommendation would cause the swap dealer to act as an advisor to a Special Entity within the meaning of § 23.440(a).

(c) A swap dealer will satisfy the requirements of paragraph (b)(1) of this section if it receives written representations, as provided in § 23.402(d), that:

(1) In the case of a counterparty that is not a Special Entity, the counterparty has complied in good faith with written policies and procedures that are reasonably designed to ensure that the persons responsible for evaluating the recommendation and making trading decisions on behalf of the counterparty are capable of doing so; or

(2) In the case of a counterparty that is a Special Entity, satisfy the terms of the safe harbor in § 23.450(d).

§§ 23.435–23.439 [Reserved]

§ 23.440 Requirements for swap dealers acting as advisors to Special Entities.

(a) *Acts as an advisor to a Special Entity.* For purposes of this section, a swap dealer ''acts as an advisor to a Special Entity'' when the swap dealer recommends a swap or trading strategy involving a swap that is tailored to the particular needs or characteristics of the Special Entity.

(b) *Safe harbors.* A swap dealer will not ''act as an advisor to a Special Entity'' within the meaning of paragraph (a) of this section if:

(1) With respect to a Special Entity that is an employee benefit plan as defined in § 23.401(c)(3):

(i) The Special Entity represents in writing that it has a fiduciary as defined in Section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002) that is responsible for representing the Special Entity in connection with the swap transaction;

(ii) The fiduciary represents in writing that it will not rely on recommendations provided by the swap dealer; and

(iii) The Special Entity represents in writing:

(A) That it will comply in good faith with written policies and procedures reasonably designed to ensure that any recommendation the Special Entity receives from the swap dealer materially affecting a swap transaction is evaluated by a fiduciary before the transaction occurs; or

(B) That any recommendation the Special Entity receives from the swap dealer materially affecting a swap transaction will be evaluated by a fiduciary before that transaction occurs; or

(2) With respect to any Special Entity:

(i) The swap dealer does not express an opinion as to whether the Special Entity should enter into a recommended swap or trading strategy involving a swap that is tailored to the particular needs or characteristics of the Special Entity;

(ii) The Special Entity represents in writing that:

(A) The Special Entity will not rely on recommendations provided by the swap dealer; and

(B) The Special Entity will rely on advice from a qualified independent representative within the meaning of § 23.450; and

(iii) The swap dealer discloses to the Special Entity that it is not undertaking to act in the best interests of the Special Entity as otherwise required by this section.

(c) A swap dealer that acts as an advisor to a Special Entity shall comply with the following requirements:

(1) *Duty.* Any swap dealer that acts as an advisor to a Special Entity shall have a duty to make a reasonable determination that any swap or trading strategy involving a swap recommended by the swap dealer is in the best interests of the Special Entity.

(2) *Reasonable efforts.* Any swap dealer that acts as an advisor to a Special Entity shall make reasonable efforts to obtain such information as is necessary to make a reasonable determination that any swap or trading strategy involving a swap recommended by the swap dealer is in the best interests of the Special Entity, including information relating to:

(i) The financial status of the Special Entity, as well as the Special Entity's future funding needs;

(ii) The tax status of the Special Entity;

(iii) The hedging, investment, financing, or other objectives of the Special Entity;

(iv) The experience of the Special Entity with respect to entering into swaps, generally, and swaps of the type and complexity being recommended;

(v) Whether the Special Entity has the financial capability to withstand

changes in market conditions during the term of the swap; and

(vi) Such other information as is relevant to the particular facts and circumstances of the Special Entity, market conditions, and the type of swap or trading strategy involving a swap being recommended.

(d) *Reasonable reliance on representations of the Special Entity.* As provided in § 23.402(d), the swap dealer may rely on written representations of the Special Entity to satisfy its requirement in paragraph (c)(2) of this section to make ''reasonable efforts'' to obtain necessary information.

§§ 23.441–23.449 [Reserved]

§ 23.450 Requirements for swap dealers and major swap participants acting as counterparties to Special Entities.

(a) *Definitions.* For purposes of this section:

(1) The term ''principal relationship'' means where a swap dealer or major swap participant is a principal of the representative of a Special Entity or the representative of a Special Entity is a principal of the swap dealer or major swap participant. The term ''principal'' means any person listed in § 3.1(a)(1) through(3) of this chapter.

(2) The term ''statutory disqualification'' means grounds for refusal to register or to revoke, condition, or restrict the registration of any registrant or applicant for registration as set forth in Sections 8a(2) and 8a(3) of the Act.

(b)(1) Any swap dealer or major swap participant that offers to enter or enters into a swap with a Special Entity, other than a Special Entity defined in § 23.401(c)(3), shall have a reasonable basis to believe that the Special Entity has a representative that:

(i) Has sufficient knowledge to evaluate the transaction and risks;

(ii) Is not subject to a statutory disqualification;

(iii) Is independent of the swap dealer or major swap participant;

(iv) Undertakes a duty to act in the best interests of the Special Entity it represents;

(v) Makes appropriate and timely disclosures to the Special Entity;

(vi) Evaluates, consistent with any guidelines provided by the Special Entity, fair pricing and the appropriateness of the swap; and

(vii) In the case of a Special Entity as defined in § 23.401(c)(2) or (4), is subject to restrictions on certain political contributions imposed by the Commission, the Securities and Exchange Commission, or a self-regulatory organization subject to the jurisdiction of the Commission or the Securities and Exchange Commission; provided however, that this paragraph (b)(1)(vii) of this section shall not apply if the representative is an employee of the Special Entity.

(2) Any swap dealer or major swap participant that offers to enter or enters into a swap with a Special Entity as defined in § 23.401(c)(3) shall have a reasonable basis to believe that the Special Entity has a representative that is a fiduciary as defined in Section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002).

(c) *Independent.* For purposes of paragraph (b)(1)(iii) of this section, a representative of a Special Entity will be deemed to be independent of the swap dealer or major swap participant if:

(1) The representative is not and, within one year of representing the Special Entity in connection with the swap, was not an associated person of the swap dealer or major swap participant within the meaning of Section 1a(4) of the Act;

(2) There is no principal relationship between the representative of the Special Entity and the swap dealer or major swap participant;

(3) The representative:

(i) Provides timely and effective disclosures to the Special Entity of all material conflicts of interest that could reasonably affect the judgment or decision making of the representative with respect to its obligations to the Special Entity; and

(ii) Complies with policies and procedures reasonably designed to manage and mitigate such material conflicts of interest;

(4) The representative is not directly or indirectly, through one or more persons, controlled by, in control of, or under common control with the swap dealer or major swap participant; and

(5) The swap dealer or major swap participant did not refer, recommend, or introduce the representative to the Special Entity within one year of the representative's representation of the Special Entity in connection with the swap.

(d) *Safe Harbor.* (1) A swap dealer or major swap participant shall be deemed to have a reasonable basis to believe that the Special Entity, other than a Special Entity defined in § 23.401(c)(3), has a representative that satisfies the applicable requirements of paragraph (b)(1) of this section, provided that:

(i) The Special Entity represents in writing to the swap dealer or major swap participant that it has complied in good faith with written policies and procedures reasonably designed to ensure that it has selected a representative that satisfies the applicable requirements of paragraph (b) of this section, and that such policies and procedures provide for ongoing monitoring of the performance of such representative consistent with the requirements of paragraph (b) of this section; and

(ii) The representative represents in writing to the Special Entity and swap dealer or major swap participant that the representative:

(A) Has policies and procedures reasonably designed to ensure that it satisfies the applicable requirements of paragraph (b) of this section;

(B) Meets the independence test in paragraph (c) of this section; and

(C) Is legally obligated to comply with the applicable requirements of paragraph (b) of this section by agreement, condition of employment, law, rule, regulation, or other enforceable duty.

(2) A swap dealer or major swap participant shall be deemed to have a reasonable basis to believe that a Special Entity defined in § 23.401(c)(3) has a representative that satisfies the applicable requirements in paragraph (b)(2) of this section, provided that the Special Entity provides in writing to the swap dealer or major swap participant the representative's name and contact information, and represents in writing that the representative is a fiduciary as defined in Section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002).

(e) *Reasonable reliance on representations of the Special Entity.* A swap dealer or major swap participant may rely on written representations of a Special Entity and, as applicable under this section, the Special Entity's representative to satisfy any requirement of this section as provided in § 23.402(d).

(f) *Chief compliance officer review.* If a swap dealer or major swap participant initially determines that it does not have a reasonable basis to believe that the representative of a Special Entity meets the criteria established in this section, the swap dealer or major swap participant shall make a written record of the basis for such determination and submit such determination to its chief compliance officer for review to ensure that the swap dealer or major swap participant has a substantial, unbiased basis for the determination.

(g) Before the initiation of a swap, a swap dealer or major swap participant shall disclose to the Special Entity in writing:

(1) The capacity in which it is acting in connection with the swap; and

(2) If the swap dealer or major swap participant engages in business with the Special Entity in more than one capacity, the swap dealer or major swap participant shall disclose the material differences between such capacities.

(h) This section shall not apply with respect to a transaction that is:

(1) Initiated on a designated contract market or swap execution facility; and

(2) One in which the swap dealer or major swap participant does not know the identity of the counterparty to the transaction prior to execution.

§ 23.451 Political contributions by certain swap dealers.

(a) *Definitions.* For the purposes of this section:

(1) The term ''contribution'' means any gift, subscription, loan, advance, or deposit of money or anything of value made:

(i) For the purpose of influencing any election for federal, state, or local office;

(ii) For payment of debt incurred in connection with any such election; or

(iii) For transition or inaugural expenses incurred by the successful candidate for federal, state, or local office.

(2) The term ''covered associate'' means:

(i) Any general partner, managing member, or executive officer, or other person with a similar status or function;

(ii) Any employee who solicits a governmental Special Entity for the swap dealer and any person who supervises, directly or indirectly, such employee; and

(iii) Any political action committee controlled by the swap dealer or by any person described in paragraphs (a)(2)(i) and (a)(2)(ii) of this section.

(3) The term ''governmental Special Entity'' means any Special Entity defined in § 23.401(c)(2) or (4).

(4) The term ''official'' of a governmental Special Entity means any person (including any election committee for such person) who was, at the time of the contribution, an incumbent, candidate, or successful candidate for elective office of a governmental Special Entity, if the office:

(i) Is directly or indirectly responsible for, or can influence the outcome of, the selection of a swap dealer by a governmental Special Entity; or

(ii) Has authority to appoint any person who is directly or indirectly responsible for, or can influence the outcome of, the selection of a swap dealer by a governmental Special Entity.

(5) The term ''payment'' means any gift, subscription, loan, advance, or deposit of money or anything of value.

(6) The term ''regulated person'' means:

(i) A person that is subject to restrictions on certain political contributions imposed by the Commission, the Securities and Exchange Commission, or a self-regulatory agency subject to the jurisdiction of the Commission or the Securities and Exchange Commission;

(ii) A general partner, managing member, or executive officer of such person, or other individual with a similar status or function; or

(iii) An employee of such person who solicits a governmental Special Entity for the swap dealer and any person who supervises, directly or indirectly, such employee.

(7) The term ''solicit'' means a direct or indirect communication by any person with a governmental Special Entity for the purpose of obtaining or retaining an engagement related to a swap.

(b) *Prohibitions and exceptions.* (1) As a means reasonably designed to prevent fraud, no swap dealer shall offer to enter into or enter into a swap or a trading strategy involving a swap with a governmental Special Entity within two years after any contribution to an official of such governmental Special Entity was made by the swap dealer or by any covered associate of the swap dealer; provided however, that:

(2) This prohibition does not apply:

(i) If the only contributions made by the swap dealer to an official of such governmental Special Entity were made by a covered associate:

(A) To officials for whom the covered associate was entitled to vote at the time of the contributions, provided that the contributions in the aggregate do not exceed $350 to any one official per election; or

(B) To officials for whom the covered associate was not entitled to vote at the time of the contributions, provided that the contributions in the aggregate do not exceed $150 to any one official per election;

(ii) To a swap dealer as a result of a contribution made by a natural person more than six months prior to becoming a covered associate of the swap dealer, provided that this exclusion shall not apply if the natural person, after becoming a covered associate, solicits the governmental Special Entity on behalf of the swap dealer to offer to enter into or to enter into a swap or trading strategy involving a swap; or

(iii) To a swap that is:

(A) Initiated on a designated contract market or swap execution facility; and

(B) One in which the swap dealer does not know the identity of the counterparty to the transaction prior to execution.

(3) No swap dealer or any covered associate of the swap dealer shall:

(i) Provide or agree to provide, directly or indirectly, payment to any person to solicit a governmental Special Entity to offer to enter into, or to enter into, a swap with that swap dealer unless such person is a regulated person; or

(ii) Coordinate, or solicit any person or political action committee to make, any:

(A) Contribution to an official of a governmental Special Entity with which the swap dealer is offering to enter into, or has entered into, a swap; or

(B) Payment to a political party of a state or locality with which the swap dealer is offering to enter into or has entered into a swap or a trading strategy involving a swap.

(c) *Circumvention of rule.* No swap dealer shall, directly or indirectly, through or by any other person or means, do any act that would result in a violation of paragraph (b) of this section.

(d) *Requests for exemption.* The Commission, upon application, may conditionally or unconditionally exempt a swap dealer from the prohibition under paragraph (b) of this section. In determining whether to grant an exemption, the Commission will consider, among other factors:

(1) Whether the exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes of the Act;

(2) Whether the swap dealer:

(i) Before the contribution resulting in the prohibition was made, implemented policies and procedures reasonably designed to prevent violations of this section;

(ii) Prior to or at the time the contribution which resulted in such prohibition was made, had no actual knowledge of the contribution; and

(iii) After learning of the contribution:

(A) Has taken all available steps to cause the contributor involved in making the contribution which resulted in such prohibition to obtain a return of the contribution; and

(B) Has taken such other remedial or preventive measures as may be appropriate under the circumstances;

(3) Whether, at the time of the contribution, the contributor was a covered associate or otherwise an employee of the swap dealer, or was seeking such employment;

(4) The timing and amount of the contribution which resulted in the prohibition;

(5) The nature of the election (*e.g.,* federal, state or local); and

(6) The contributor's apparent intent or motive in making the contribution that resulted in the prohibition, as evidenced by the facts and circumstances surrounding the contribution.

(e) *Prohibitions inapplicable.* (1) The prohibitions under paragraph (b) of this section shall not apply to a contribution made by a covered associate of the swap dealer if:

(i) The swap dealer discovered the contribution within 120 calendar days of the date of such contribution;

(ii) The contribution did not exceed the amounts permitted by paragraphs (b)(2)(i)(A) or (B) of this section; and

(iii) The covered associate obtained a return of the contribution within 60 calendar days of the date of discovery of the contribution by the swap dealer.

(2) A swap dealer may not rely on paragraph (e)(1) of this section more than twice in any 12-month period.

(3) A swap dealer may not rely on paragraph (e)(1) of this section more than once for any covered associate, regardless of the time between contributions.

Appendix A—Guidance on the Application of §§ 23.434 and 23.440 for Swap Dealers That Make Recommendations to Counterparties or Special Entities

The following provides guidance on the application of §§ 23.434 and 23.440 to swap dealers that make recommendations to counterparties or Special Entities.

Section 23.434—Recommendations to Counterparties—Institutional Suitability

A swap dealer that recommends a swap or trading strategy involving a swap to a counterparty, other than a swap dealer, major swap participant, security-based swap dealer or major security-based swap participant, must undertake reasonable diligence to understand the potential risks and rewards associated with the recommended swap or trading strategy involving a swap—general suitability (§ 23.434(a)(1))—and have a reasonable basis to believe that the recommended swap or trading strategy involving a swap is suitable for the counterparty—specific suitability (§ 23.434(a)(2)). To satisfy the general suitability obligation, a swap dealer must undertake reasonable diligence that will vary depending on, among other things, the complexity of and risks associated with the swap or swap trading strategy and the swap dealer's familiarity with the swap or swap trading strategy. At a minimum, a swap dealer's reasonable diligence must provide it with an understanding of the potential risks and rewards associated with the recommended swap or swap trading strategy.

Recommendation. Whether a communication between a swap dealer and a counterparty is a recommendation will turn on the facts and circumstances of the particular situation. There are, however, certain factors the Commission will consider in reaching such a determination. The facts and circumstances determination of whether a communication is a ''recommendation'' requires an analysis of the content, context, and presentation of the particular communication or set of communications. The determination of whether a ''recommendation'' has been made, moreover, is an objective rather than a subjective inquiry. An important factor in this regard is whether, given its content, context, and manner of presentation, a particular communication from a swap dealer to a counterparty reasonably would be viewed as a ''call to action,'' or suggestion that the counterparty enter into a swap. An analysis of the content, context, and manner of presentation of a communication requires examination of the underlying substantive information transmitted to the counterparty and consideration of any other facts and circumstances, such as any accompanying explanatory message from the swap dealer. Additionally, the more individually tailored the communication to a specific counterparty or a targeted group of counterparties about a swap, group of swaps or trading strategy involving the use of a swap, the greater the likelihood that the communication may be viewed as a ''recommendation.''

Safe harbor. A swap dealer may satisfy the safe harbor requirements of § 23.434(b) to fulfill its counterparty-specific suitability duty under § 23.434(a)(2) if: (1) The swap dealer reasonably determines that the counterparty, or an agent to which the counterparty has delegated decision-making authority, is capable of independently evaluating investment risks with regard to the relevant swap or trading strategy involving a swap; (2) the counterparty or its agent represents in writing that it is exercising independent judgment in evaluating the recommendations of the swap dealer; (3) the swap dealer discloses in writing that it is acting in its capacity as a counterparty and is not undertaking to assess the suitability of the recommendation; and (4) in the case of a counterparty that is a Special Entity, the swap dealer complies with § 23.440 where the recommendation would cause the swap dealer to act as an advisor to a Special Entity within the meaning of § 23.440(a).

To reasonably determine that the counterparty, or an agent to which the counterparty has delegated decision-making authority, is capable of independently evaluating investment risks of a recommendation, the swap dealer can rely on the written representations of the counterparty, as provided in § 23.434(c). Section 23.434(c)(1) provides that a swap dealer will satisfy § 23.434(b)(1)'s requirement with respect to a counterparty other than a Special Entity if it receives representations that the counterparty has complied in good faith with the counterparty's policies and procedures that are reasonably designed to ensure that the persons responsible for evaluating the recommendation and making trading decisions on behalf of the counterparty are capable of doing so. Section § 23.434(c)(2) provides that a swap dealer will satisfy § 23.434(b)(1)'s requirement with respect to a Special Entity if it receives representations that satisfy the terms of § 23.450(d) regarding a Special Entity's qualified independent representative.

Prong (4) of the safe harbor clarifies that § 23.434's application is broader than § 23.440—Requirements for Swap Dealers Acting as Advisors to Special Entities. Section 23.434 is triggered when a swap dealer recommends any swap or trading strategy that involves a swap to any counterparty. However, § 23.440 is limited to a swap dealer's recommendations (1) to a Special Entity (2) of swaps that are tailored to the particular needs or characteristics of the Special Entity. Thus, a swap dealer that recommends a swap to a Special Entity that is tailored to the particular needs or characteristics of the Special Entity may comply with its suitability obligation by satisfying the safe harbor in § 23.434(b); however, the swap dealer must also comply with § 23.440 in such circumstances.

Section 23.440—Requirements for Swap Dealers Acting as Advisors to Special Entities

A swap dealer ''acts as an advisor to a Special Entity'' under § 23.440 when the swap dealer recommends a swap or trading strategy involving a swap that is tailored to the particular needs or characteristics of the Special Entity. A swap dealer that ''acts as an advisor to a Special Entity'' has a duty to make a reasonable determination that a recommendation is in the ''best interests'' of the Special Entities and must undertake ''reasonable efforts'' to obtain information necessary to make such a determination.

Whether a swap dealer ''acts as an advisor to a Special Entity'' will depend on: (1) Whether the swap dealer has made a recommendation to a Special Entity; and (2) whether the recommendation concerns a swap or trading strategy involving a swap that is tailored to the particular needs or characteristics of the Special Entity. To determine whether a communication between a swap dealer and counterparty is a recommendation, the Commission will apply the same factors as under § 23.434, the suitability rule. However, unlike the suitability rule, which covers recommendations regarding any type of swap or trading strategy involving a swap, the ''acts as an advisor rule'' and ''best interests'' duty will be triggered only if the recommendation is of a swap or trading strategy involving a swap that is ''tailored to the particular needs or characteristics of the Special Entity.''

Whether a swap is tailored to the particular needs or characteristics of the Special Entity will depend on the facts and circumstances. Swaps with terms that are tailored or customized to a specific Special Entity's needs or objectives, or swaps with terms that are designed for a targeted group of Special Entities that share common characteristics, *e.g.,* school districts, are likely to be viewed as tailored to the particular needs or characteristics of the Special Entity. Generally, however, the Commission would

not view a swap that is ''made available for trading'' on a designated contract market or swap execution facility, as provided in Section 2(h)(8) of the Act, as tailored to the particular needs or characteristics of the Special Entity.

Safe harbor. Under § 23.440(b)(2), when dealing with a Special Entity (including a Special Entity that is an employee benefit plan as defined in § 23.401(c)(3)),[1] a swap dealer will not ''act as an advisor to a Special Entity'' if: (1) The swap dealer does not express an opinion as to whether the Special Entity should enter into a recommended swap or swap trading strategy that is tailored to the particular needs or characteristics of the Special Entity; (2) the Special Entity represents in writing, in accordance with § 23.402(d), that it will not rely on the swap dealer's recommendations and will rely on advice from a qualified independent representative within the meaning of § 23.450; and (3) the swap dealer discloses that it is not undertaking to act in the best interests of the Special Entity.

A swap dealer that elects to communicate within the safe harbor to avoid triggering the ''best interests'' duty must appropriately manage its communications. To clarify the type of communications that they will make under the safe harbor, the Commission expects that swap dealers may specifically represent that they will not express an opinion as to whether the Special Entity should enter into a recommended swap or trading strategy, and that for such advice the Special Entity should consult its own advisor. Nothing in the final rule would preclude such a representation from being included in counterparty relationship documentation. However, such a representation would not act as a safe harbor under the rule where, contrary to the representation, the swap dealer does express an opinion to the Special Entity as to whether it should enter into a recommended swap or trading strategy.

If a swap dealer complies with the terms of the safe harbor, the following types of communications would not be subject to the ''best interests'' duty:[2] (1) Providing information that is general transaction, financial, educational, or market information; (2) offering a swap or trading strategy involving a swap, including swaps that are tailored to the needs or characteristics of a Special Entity; (3) providing a term sheet, including terms for swaps that are tailored to the needs or characteristics of a Special Entity; (4) responding to a request for a quote from a Special Entity; (5) providing trading ideas for swaps or swap trading strategies, including swaps that are tailored to the needs or characteristics of a Special Entity; and (6) providing marketing materials upon request or on an unsolicited basis about swaps or swap trading strategies, including swaps that are tailored to the needs or characteristics of a Special Entity. This list of communications is not exclusive and should not create a negative implication that other types of communications are subject to a ''best interests'' duty.

The safe harbor in § 23.440(b)(2) allows a wide range of communications and interactions between swap dealers and Special Entities without invoking the ''best interests'' duty, including discussions of the advantages or disadvantages of different swaps or trading strategies. The Commission notes, however, that depending on the facts and circumstances, some of the examples on the list could be ''recommendations'' that would trigger a suitability obligation under § 23.434. However, the Commission has determined that such activities would not, by themselves, prompt the ''best interests'' duty in § 23.440, provided that the parties comply with the other requirements of § 23.440(b)(2). All of the swap dealer's communications, however, must be made in a fair and balanced manner based on principles of fair dealing and good faith in compliance with § 23.433.

Swap dealers engage in a wide variety of communications with counterparties in the normal course of business, including but not limited to the six types of communications listed above. Whether any particular communication will be deemed to be a ''recommendation'' within the meaning of §§ 23.434 or 23.440 will depend on the facts and circumstances of the particular communication considered in light of the guidance in this appendix with respect to the meaning of the term ''recommendation.'' Swap dealers that choose to manage their communications to comply with the safe harbors provided in §§ 23.434 and 23.440 will be able to limit the duty they owe to counterparties, including Special Entities, provided that the parties exchange the appropriate representations.

By the Commission, this 11th day of January 2012.

David A. Stawick,

Secretary.

Appendices to the Final Rules for Implementing the Business Conduct Standards for Swap Dealers and Major Swap Participants With Counterparties—Table of Comment Letters, Statement of the Department of Labor, Commission Voting Summary, and Statements of Commissioners

Note: The following appendices will not appear in the Code of Federal Regulations.

BILLING CODE 6351–01–P

[1] The guidance in this appendix regarding the safe harbor to § 23.440 is limited to the safe harbor for any Special Entity under § 23.440(b)(2). A swap dealer may separately comply with the safe harbor under § 23.440(b)(1) for its communications to a Special Entity that is an employee benefit plan as defined in § 23.401(c)(3).

[2] Communications on the list that are not within the meaning of the term ''acts as an advisor to a Special Entity'' are outside the requirements of § 23.440. By including such communications on the list, the Commission does not intend to suggest that they are ''recommendations.'' Thus, a swap dealer that does not ''act as an advisor to a Special Entity'' within the meaning of § 23.440(a) is not required to comply with the safe harbor to avoid the ''best interests'' duty with respect to its communications.

Appendix 1–Table of Comment Letters

ABA/ABASA June 3 Letter	American Bankers Association and the ABA Securities Association letter dated June 3, 2011
ABA/ABC Feb. 22 Letter	Davis & Harman LLP, on behalf of the American Bankers Association, American Benefits Council, the Committee on the Investment of Employee Benefit Assets, The ERISA Industry Committee, Financial Executives International's Committee on Corporate Treasury, Financial Services Roundtable, Insured Retirement Institute, National Association of Insurance and Financial Advisors, National Association of Manufacturers and Securities Industry and Financial Markets Association letter dated Feb. 22, 2011
ABC/CIEBA Feb. 22 Letter	American Benefits Council and the Committee on the Investment of Employee Benefit Assets letter dated Feb. 22, 2011
ABC/CIEBA June 3 Letter	American Benefits Council and the Committee on the Investment of Employee Benefit Assets letter dated June 3, 2011
ABC Aug. 29 Letter	American Benefits Council letter dated Aug. 29, 2011
ACM June 15 Submission	ACM Capital Management submission dated June 15, 2011
AFSCME Feb. 22 Letter	American Federation of State, County and Municipal Employees letter dated Feb. 22, 2011
AGA June 3 Letter	American Gas Association letter dated June 3, 2011
AMG-SIFMA Jan. 18 Letter	The Asset Management Group of the Securities Industry and Financial Markets Association letter dated Jan. 18, 2011
AMG-SIFMA Feb. 22 Letter	The Asset Management Group of the Securities Industry and Financial Markets Association letter dated Feb. 22, 2011
APGA Feb. 22 Letter	American Public Gas Association letter dated Feb. 22, 2011
APPA/LPPC Feb. 22 Letter	American Public Power Association and the Large Public Power Council letter dated Feb. 22, 2011
ASF Feb. 22 Letter	American Securitization Forum letter dated Feb. 22, 2011
ATA Feb. 22 Letter	Air Transport Association of America, Inc. letter dated Feb. 22, 2011
Bank of America Merrill Lynch Apr. 5 Letter	Cleary Gottlieb Steen & Hamilton LLP, for Bank of America Merrill Lynch, Barclays Capital, BNP Paribas, Citi, Crédit Agricole Corporate and Investment Bank, Credit Suisse Securities (USA), Deutsche Bank AG, HSBC, Morgan Stanley, Nomura Securities International Inc., Societe Generale, UBS Securities LLC and Wells Fargo & Company letter dated Apr. 5, 2011
Bank of Tokyo May 6 Letter	The Bank of Tokyo-Mitsubishi UFJ, Ltd., Mizuho Corporate Bank, Ltd. And Sumitomo Mitsui Banking Corporation letter dated May 6, 2011
Barclays Jan. 11 Letter	Barclays Bank PLC, BNP Paribas S.A., Deutsche Bank AG, Royal Bank of Canada, Royal Bank of Scotland Group PLC, Societe Generale and UBS AG letter dated Jan. 11, 2011
Barclays Feb. 17 Letter	Barclays Bank PLC, BNP Paribas S.A., Credit Suisse AG, Deutsche Bank AG, HSBC, Nomura Securities International Inc., Rabobank Nederland, Royal Bank of Canada, The Royal Bank of Scotland Group PLC, Societe Generale, The Toronto-Dominion Bank, and UBS AG letter dated Feb. 17, 2011
Barnard May 23 Letter	Chris Barnard letter dated May 23, 2011

BDA Feb. 22 letter	Bond Dealers of America letter dated Feb. 22, 2011
Better Markets Feb. 22 Letter	Better Markets Inc. letter dated Feb. 22, 2011
Better Markets June 3 Letter	Better Markets Inc. letter dated June 3, 2011
Better Markets Aug. 29 Letter	Better Markets Inc. letter dated Aug. 29, 2011
BlackRock Feb. 22 Letter	BlackRock Inc. letter dated Feb. 22, 2011
BlackRock Apr. 12 Letter	BlackRock Inc. letter dated Apr. 12, 2011
BlackRock June 3 Medero and Prager Letter	BlackRock Inc. letter dated June 3, 2011, executed by Joanne Medero and Richard Prager
BlackRock June 3 Medero, Prager and VedBrat Letter	BlackRock Inc. letter dated June 3, 2011, executed by Joanne Medero, Richard Prager, and Supurna VedBrat
BlackRock Aug. 29 Letter	BlackRock Inc. letter dated Aug. 29, 2011
Bloomberg June 3 Letter	Bloomberg LP letter dated June 3, 2011
Calhoun Feb. 22 Letter	Calhoun, Baker Inc., Program Administrator for the Delaware Valley Regional Finance Authority letter dated Feb. 22, 2011
CalPERS Feb. 18 Letter	California Public Employees' Retirement System ("CalPERS"), Missouri State Employees' Retirement System ("MOSERS"), Public School & Education Employees' Retirement System of Missouri, Pennsylvania Public School Employees' Retirement System, Virginia Retirement System ("VRS"), New Jersey Division of Investments, Utah Retirement Systems, South Carolina Retirement System Investment Commission, State of Wisconsin Investment Board ("SWIB"), Colorado Public Employees' Retirement Association ("Colorado PERA"), and Teacher Retirement System of Texas ("TRS") letter dated Feb. 18, 2011
CalPERS Aug. 29 Letter	CalPERS, Colorado PERA, MOSERS, SWIB, VRS and TRS letter dated August 29, 2011
CalPERS Oct. 4 Letter	CalPERS, Colorado PERA, MOSERS, SWIB and TRS letter dated October 4, 2011
CalSTRS Feb. 28 Letter	California State Teachers' Retirement System letter dated Feb. 28, 2011
CEF Feb. 22 Letter	Hunton & Williams LLP on behalf of the Working Group of Commercial Energy Firms letter dated Feb. 22, 2011
CEF June 3 Letter	Hunton & Williams LLP on behalf of the Working Group of Commercial Energy Firms letter dated June 3, 2011
CFA/AFR Feb. 22 Letter	Consumer Federation of America and Americans for Financial Reform letter dated Feb. 22, 2011
CFA/AFR Aug. 29 Letter	Consumer Federation of America and Americans for Financial Reform letter dated Aug. 29, 2011
CFA/AFR Nov. 3 Letter	Consumer Federation of America and Americans for Financial Reform letter dated Nov. 3, 2011
Church Alliance Feb. 22 Letter	Church Alliance letter dated Feb. 22, 2011
Church Alliance Aug. 29 Letter	Church Alliance letter dated Aug. 29, 2011
Church Alliance Oct. 4 Letter	Church Alliance letter dated Oct. 4, 2011
CII Feb. 10 Letter	Council of Institutional Investors letter dated Feb. 10, 2011
Citadel June 3 Letter	Citadel LLC letter dated June 3

Cityview Feb. 22 Submission	Cityview Capital Solutions, LLC electronic submission dated Feb. 22, 2011
CME Feb. 22 Letter	CME Group Inc. letter dated Feb. 22, 2011
CME June 3 Letter	CME Group Inc. letter dated June 3, 2011
Comm. Cap. Mkts. May 3 Letter	Committee on Capital Markets Regulation letter dated May 3, 2011
Comm. Cap. Mkts. June 10 Letter	Committee on Capital Markets Regulation letter dated June 10, 2011
Comm. Cap. Mkts. June 24 Letter	Committee on Capital Markets Regulation letter dated June 24, 2011
Comm. Cap. Mkts. Aug. 26 Letter	Committee on Capital Markets Regulation letter dated Aug. 26, 2011
COPE Feb. 22 Letter	Coalition of Physical Energy Companies letter dated Feb. 22, 2011
COPE June 3 Letter	Coalition of Physical Energy Companies letter dated June 3, 2011
Copping Jan. 12 Submission	Jason Copping Submission dated Jan. 12, 2011
CPPIB Feb. 22 Letter	Canada Pension Plan Investment Board letter dated Feb. 22, 2011
Davis & Harman Mar. 25 Letter	Davis & Harman LLP letter dated Mar. 25, 2011
Davis & Harman May 3 Email	Davis & Harman LLP email dated May 3, 2011
Davis & Harman May 19 Email	Davis & Harman LLP email dated May 19, 2011
Davis & Harman June 6 Email	Davis & Harman LLP email dated June 6, 2011
Davis & Harman Sept. 15 Email	Davis & Harman LLP email dated Sept. 15, 2011
DC Energy June 3 Letter	DC Energy LLC letter dated June 3, 2011
DOL Apr. 28 Letter	U.S. Department of Labor letter dated Apr. 28, 2011
DOL Statement	U.S. Department of Labor Statement on the final Business Conduct Standards rules dated Jan. 17, 2012
EEI June 3 Letter	Edison Electric Institute letter dated June 3, 2011
Encana Feb. 22 Letter	Encana Marketing (USA) Inc. letter dated Feb. 22, 2011
ERIC Feb. 22 Letter	The ERISA Industry Committee letter dated Feb. 22, 2011
Eris June 3 Letter	Eris Exchange LLC letter dated June 3, 2011
ETA May 4 Letter	Electric Trade Associations, on behalf of the National Rural Electric Cooperative Association, American Public Power Association, Large Public Power Council, Edison Electric Institute, and Electric Power Supply Association letter dated May 4, 2011 on the May 3 CFTC-SEC Staff Roundtable Discussion on Dodd-Frank Implementation
ETA June 3 Letter	Electric Trade Associations, on behalf of the National Rural Electric Cooperative Association, American Public Power Association, Large Public Power Council, Edison Electric Institute, and Electric Power Supply Association letter dated June 3, 2011
Exelon Feb. 22 Letter	Exelon Corporation letter dated Feb. 22, 2011
FHLBanks Feb. 22 Letter	Sutherland Asbill & Brennan LLP, on behalf of The Federal Home Loan Banks letter dated Feb. 22, 2011
FHLBanks June 3 Letter	Sutherland Asbill & Brennan LLP, on behalf of The Federal Home Loan Banks dated June 3, 2011

FIA/ISDA/SIFMA Aug. 26 Letter	Futures Industry Association, International Swaps and Derivatives Association and Securities Industry and Financial Markets Association letter dated Aug. 26, 2011
FIA/ISDA/SIFMA Sept. 14 Letter	Futures Industry Association, International Swaps and Derivatives Association, and Securities Industry and Financial Markets Association letter dated Sept. 14, 2011
Financial Serv. Roundtable Apr. 6 Letter	Financial Services Roundtable letter dated Apr. 6, 2011
Financial Assns. May 4 Letter	Futures Industry Association, Financial Services Forum, International Swaps and Derivatives Association, and Securities Industry and Financial Markets Association letter dated May 4, 2011
Financial Assns. May 26 Letter	Futures Industry Association, Financial Services Roundtable, Institute of International Bankers , Insured Retirement Institute, International Swaps and Derivatives Association, Securities Industry and Financial Markets Association, and the U.S. Chamber of Commerce letter dated May 26, 2011
Financial Assns. June 10 Letter	Futures Industry Association, Institute of International Bankers, International Swaps and Derivatives Association, Investment Company Institute, and Securities Industry and Financial Markets Association letter dated June 10, 2011
Fleming Feb. 21 Submission	Richard H. Fleming submission dated Feb. 21, 2011
GFOA Feb. 22 Letter	Government Finance Officers Association letter dated Feb. 22, 2011
GreenX June 3 Letter	Green Exchange LLC letter dated June 3, 2011
HETCO Feb. 22 Letter	Hess Energy Trading Company LLC letter dated Feb. 22, 2011
HOOPP Feb. 22 Letter	Healthcare of Ontario Pension Plan letter dated Feb. 22, 2011
ISDA June 2 Letter	International Swaps and Derivatives Association letter dated June 2, 2011
Markit Feb. 22 Letter	Markit letter dated Feb. 22, 2011
Markit June 3 Letter	Markit letter dated June 3, 2011
MarkitSERV June 3 Letter	MarkitSERV letter dated June 3, 2011 (subject line referencing Reopening and Extension of Comment Periods, Core Principles for Swap Execution Facilities, etc.)
MarkitSERV June 3 Letter	MarkitSERV letter dated June 3, 2011 (subject line referencing Reopening and Extension of Comment Periods, Swap Data Repositories, Swap Data Recordkeeping, etc.)
MetLife Feb. 22 Letter	MetLife letter dated Feb. 22, 2011
MFA Feb. 22 Letter	Managed Funds Association letter dated Feb. 22, 2011
MFA Mar. 24 Letter	Managed Funds Association letter dated Mar. 24, 2011
MGEX June 3 Letter	Minneapolis Grain Exchange Inc. letter dated June 3, 2011
MHFA Feb. 22 Letter	Minnesota Housing Finance Agency letter dated Feb. 22, 2011
NACUBO Feb. 22 Letter	National Association of College and University Business Officers letter dated Feb. 22, 2011
NERA Dec. 20 Letter	National Economic Research Associates on behalf of the Working Group of Commercial Energy Firms letter dated Dec. 20, 2011
NextEra Mar. 11 Letter	NextEra Energy Inc. letter dated Mar. 11, 2011
NFA Aug. 25, 2010 Letter	National Futures Association letter dated Aug. 25, 2010
NFA Aug. 31 Letter	National Futures Association letter dated Aug. 31, 2011

NFP Energy End Users, Ex Parte Communication, Jan. 19, 2011	Ex Parte Communication with the Not-For-Profit Energy End Users, including the National Rural Electric Cooperative Association, American Public Power Association, American Public Gas Association, Large Public Power Council and ACES Power Marketing, on Jan. 19, 2011, citing Not-For-Profit Energy End Users letter dated Sept. 9, 2010 on the Commission's Advanced Notice of Proposed Rulemaking on Definitions contained in Title VII of Dodd-Frank, 75 FR 51429, Aug. 20, 2010
Noble July 7 Letter	Noble Energy Inc. letter dated July 7, 2011
NY City Bar Feb. 22 Letter	New York City Bar Association – Committee on Futures and Derivatives Regulation letter dated Feb. 22, 2011
NY City Bar June 13 Letter	New York City Bar Association – Committee on Futures and Derivatives Regulation letter dated June 13, 2011
Ohio STRS Feb. 18 Letter	State Teachers Retirement System of Ohio letter dated Feb. 18, 2011
OneChicago June 3 Letter	OneChicago LLC letter dated June 3, 2011
OTPP Feb. 22 Letter	Ontario Teachers' Pension Plan Board letter dated Feb. 22, 2011
Rep. Bachus Mar. 15 Letter	Chairman Spencer Bachus, House Committee on Financial Services; Chairman John Kline, House Committee on Education and the Workforce; and Chairman Frank D. Lucas, House Committee on Agriculture letter dated March 15, 2011
Rep. Smith July 25 Letter	Members of Congress, including Rep. Adam Smith, Rep. Kurt Schrader, Rep. Dan Boren, Rep. Terri Sewell, Rep. Rick Larsen, Rep. Laura Richardson, and Rep. Jim Himes letter dated July 25, 2011
Riverside Feb. 22 Letter	Riverside Risk Advisors LLC letter dated Feb. 22, 2011
Ropes & Gray Feb. 22 Letter	Ropes & Gray LLP letter dated Feb. 22, 2011
Russell Feb. 18 Letter	Russell Investments letter dated Feb. 18, 2011
Sen. Harkin May 3 Letter	Members of Congress, including Chairman Tom Harkin, Senate Committee on Health, Education, Labor & Pensions; Chairman Max Baucus, Senate Committee on Finance; Chairman Tim Johnson, Senate Committee on Banking, Housing & Urban Affairs; Chairman Debbie Stabenow, Senate Committee on Agriculture, Nutrition & Forestry; Senator Jeff Bingaman; Senator Bob Casey, Jr.; Senator Claire McCaskill; Senator Jon Tester; and Senator Kirsten Gillibrand letter dated May 3, 2011
Sen. Johnson Oct. 4 Letter	Senator Johnson and Rep. Barney Frank letter dated Oct. 4, 2011
Sen. Kerry May 18 Letter	Senator John F. Kerry and Senator Jeanne Shaheen letter dated May 18, 2011
Sen. Levin Aug. 29 Letter	Senator Carl Levin letter dated Aug. 29, 2011
SFG Feb. 22 Letter	Swap Financial Group, LLC letter dated Feb. 22, 2011
Shell June 3 Letter	Shell Energy North America letter dated June 3, 2011
SIFMA/ISDA Oct. 22, 2010 Letter	Securities Industry and Financial Markets Association and International Swaps and Derivatives Association letter dated Oct. 22, 2010
SIFMA/ISDA Feb. 17 Letter	Securities Industry and Financial Markets Association and International Swaps and Derivatives Association letter dated Feb. 17, 2011
Societe Generale Feb. 18 Letter	Societe Generale letter dated Feb. 18, 2011 (citing enclosed Societe Generale Nov. 23, 2010 Letter).

State Street Feb. 22 Letter	State Street Corporation letter dated Feb. 22, 2011
SWIB Feb. 22 Letter	State of Wisconsin Investment Board letter dated Feb. 22, 2011
Texas VLB Feb. 22 Letter	Texas General Land Office – The Veterans' Land Board of the State of Texas letter dated Feb. 22, 2011
Tradeweb June 3 Letter	Tradeweb Markets LLC letter dated June 3, 2011
U. Tex. System Feb. 22 Letter	The University of Texas System letter dated Feb. 22, 2011
VRS Feb. 22 Letter	Virginia Retirement System letter dated Feb. 22, 2011
Wells Fargo May 11 Letter	Sullivan & Cromwell LLP, for Wells Fargo Bank N.A., Branch Banking and Trust Company, East West Bank, Fifth Third Bank, The PrivateBank and Trust Company, Regions Bank, SunTrust Bank, and U.S. Bank National Association letter dated May 11, 2011
WMBAA June 3 Letter	Wholesale Markets Brokers' Association Americas letter dated June 3, 2011
Wright Feb. 16 Submission	Sam Wright submission dated Feb. 16, 2011

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Appendix 2—Statement of the Department of Labor

U.S. Department of Labor

Assistant Secretary for Employee Benefits Security Administration, Washington, DC 20210

JAN 17 2012

Honorable Gary Gensler
The Honorable Jill Sommers
The Honorable Bart Chilton
The Honorable Scott D. O'Malia
The Honorable Mark Wetjen
U.S. Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Re: Final Business Conduct Standards Rules Adopted January 11, 2012

Dear Chairman Gensler and Commissioners Sommers, Chilton, O'Malia and Wetjen:

The Department of Labor has reviewed the final draft of the Commodity Futures Trading Commission's (''CFTC's'') rules to implement Section 4s(h) of the Commodity Exchange Act pursuant to Section 731 of Title VII of the Dodd-Frank Wall Street Reform and The Consumer Protection Act of 2010. These rules prescribe external business conduct standards for swap dealers and major swap participants and will have a direct impact on ERISA-covered plans and plan fiduciaries. I very much appreciate the care that the CFTC has taken to coordinate its work on this project with the Department of Labor in light of the Department's regulatory and enforcement responsibilities with respect to ERISA fiduciaries. As we have worked with your staff, we have paid particular attention to the interaction between the original business conduct proposal and the Department's own fiduciary regulations and proposals.

The Department of Labor has reviewed these final business conduct standards and concluded that they do not require swap dealers or major swap participants to engage in activities that would make them fiduciaries under the Department of Labor's current five-part test defining fiduciary advice 29 CFR § 2510.3–21(c). In the Department's view, the CFTC's final business conduct standards neither conflict with the Department's existing regulations, nor compel swap dealers or major swap participants to engage in fiduciary conduct. Moreover, the Department states that it is fully committed to ensuring that any changes to the current ERISA fiduciary advice regulation are carefully harmonized with the final business conduct standards, as adopted by the CFTC and the SEC, so that there are no unintended consequences for swap dealers and major swap participants who comply with these business conduct standards.

We look forward to continuing to work with you on these important projects and are grateful for your staff's thoughtful efforts to harmonize our work.

Sincerely,

Phyllis C. Borzi
Assistant Secretary, Employee Benefits Security Administration

Appendix 3—Commission Voting Summary

On this matter, Chairman Gensler and Commissioners Chilton, O'Malia and Wetjen voted in the affirmative; Commissioner Sommers voted in the negative.

Appendix 4—Statement of Chairman Gensler

I support the final rules to establish business conduct standards for swap dealers and major swap participants in their dealings with counterparties, or external business conduct. Today's final rules implement important new authorities in the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) for the Commodity Futures Trading Commission to establish and enforce robust sales practices in the swaps markets. Dealers will have to tell their counterparties the mid-market mark of their outstanding bilateral swaps every day, bringing transparency to the markets and helping to level the playing field for market participants.

The rules prohibit fraud and certain other abusive practices. They also implement requirements for swap dealers and major swap participants to deal fairly with customers, provide balanced communications, and disclose material risks, conflicts of interest and material incentives before entering into a swap.

The rules include restrictions on certain political contributions from swap dealers to municipal officials, known as ''pay to play'' prohibitions.

The rules also implement the Dodd-Frank heightened duties on swap dealers and major swap participants when they deal with certain entities, such as pension plans, governmental entities and endowments.

The rules were carefully tailored to include safe harbors to ensure that special entities, such as pension plans subject to the Employee Retirement Income Security Act, will continue to be able to access these markets and hedge their risks.

The final rules benefitted substantially from the input of members of the public who met with staff and Commissioners and those who submitted thoughtful, detailed letters. The Securities and Exchange Commission, prudential regulators and the Department of Labor also provided helpful feedback.

[FR Doc. 2012–1244 Filed 2–16–12; 8:45 am]

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H.R. 588/P.L. 112–94
To redesignate the Noxubee National Wildlife Refuge as the Sam D. Hamilton Noxubee National Wildlife Refuge. (Feb. 14, 2012; 126 Stat. 10)

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